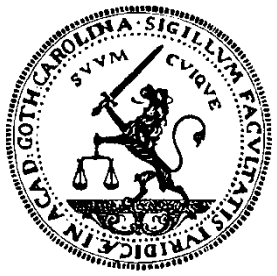

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The Autonomy and Specific Characteristics of EU law – An obstacle to the EU's accession to the ECHR?

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Summary

Since the Lisbon Treaty's entering into force in 2009 it is stated in Article 6(2) TEU that the EU shall accede to the European Convention for the Protection of Fundamental Rights (ECHR). In the second sentence of the same article it is provided that "such accession shall not affect the Union's competences as defined in the Treaties". Attached to the Lisbon Treaty is also Protocol No 8 in which it is held that the accession of the EU to the ECHR must preserve the specific characteristics of the Union and of Union law and that the competences of the EU and its institutions cannot be affected through the accession

The autonomy and specific characteristics of EU law is something that the ECJ has always been very safeguarding of in its judgments, and its approach towards international law has not always been the most positive one. With an accession to the ECHR these features of EU law are likely to be affected and the EU will also have to set up a functioning cooperation with the Council of Europe. The research question of this thesis consequently is whether the autonomy and specific characteristics of EU law is something that might cause problems for the EU's accession to the ECHR and what the future looks like regarding the accession process.

By autonomy of EU law it is according to the ECJ meant that the EU courts are the only ones that can have jurisdiction to interpret EU law, that international treaties cannot amend the Treaties and that the primacy of EU law cannot be jeopardized. Included in the concept of autonomy is the fact that EU law cannot be dependent on the rules of another international legal order.

The relationship between EU law and international one has always been a tricky one and the ECJ's judgments in this area of law has been quite contradictive. One thing that is clear is that the ECJ is of the opinion that EU law will most often prevail when norms of international law conflicts with provisions of EU law. The ECJ has further elected itself to be the final arbiter in deciding which provisions of international law is in compliance with EU law and which are not.

In 2013 a Draft Accession Agreement on the accession of the EU to the ECHR was presented and in 2014 the ECJ delivered Opinion 2/13 in which it held that the DAA was not compatible with the EU Treaties since it was liable to adversely affect the autonomy and specific characteristics of EU law. Thus the accession process cannot go on until the ECJ's concerns in Opinion 2/13 are addressed. The reactions to Opinion 2/13 has been many. Some has called it a clear and present danger to human rights protection and others claim that those who value

human rights no longer have any reason to pursue the EU accession to the ECHR, while some has been more understanding towards the approach taken by the ECJ towards the accession since the autonomy and specific characteristics is at the heart of the EU and important features for the functioning of the Union.

It is concluded in the thesis that the ECJ's strong desire to preserve the autonomy and the specific characteristics of EU law at any prize at present blocks the accession to the ECHR and consequently amounts to a threat to fundamental rights protection within Europe. It is also concluded that to be able to continue with the accession process either the DAA will have to be amended, the Treaties will have to be amended or the EU will have to make reservations to the ECHR in connection with the accession. The most likely option is that the DAA will be amended and thus that the negotiations between the EU and the Council of Europe on the accession of the EU to the ECHR will have to be started again.

Sammanfattning

Sedan Lissabonfördragets ikraftträdande år 2009 anges i artikel 6(2) i EU-fördraget att EU ska ansluta sig till Europakonventionen (EKMR). I samma artikels andra mening föreskrivs att "denna anslutning ska inte ändra unionens befogenheter såsom de definieras i fördragen". Bifogat till Lissabonfördraget är också Protokoll nr 8, i vilket det anges att EU:s anslutning till EKMR ska bevara unionens och unionsrättens särdrag och att EU:s och dess institutioners befogenheter inte ska påverkas genom anslutningen.

Unionsrättens särdrag och autonomi är något som EU-domstolen alltid varit mycket benägen att beskydda och bevara i sina domslut, och dess inställning till internationell rätt har inte alltid varit den mest positiva. I och med en anslutning till EKMR kan dessa funktioner komma att påverkas, dock till priset av ett utökat samarbete mellan EU och Europarådet, vilket i sin tur kommer att förstärka skyddet för mänskliga rättigheter för Europas medborgare. Frågeställningen i denna uppsats är följaktligen huruvida unionsrättens särdrag och autonomi är något som riskerar att hindra EU:s anslutning till Europakonventionen och hur framtiden ser ut när det gäller anslutningsprocessen.

Med unionsrättens särdrag och autonomi menas enligt EU-domstolen att EU-domstolarna är de enda som är behöriga att tolka EU-rätten, att internationella avtal inte kan ändra EU-fördragen och att systemet för förhandsavgöranden inte får äventyras. Begreppen innebär också att EU-lagstiftningen inte får vara beroende av andra internationella rättsregler.

Förhållandet mellan EU-rätten och internationell rätt en har länge varit en komplicerad fråga inom EU och EU-domstolens domar inom detta rättsområde är motsägelsefulla. Något som dock kan uttolkas från EU-domstolens domar på detta område är att EU-rätten enligt domstolen i de allra flesta fall äger företräde när en konflikt uppstår mellan EU-rätt och internationell rätt. EU-domstolen har dessutom utsett sig själv till att fatta det slutgiltiga avgörandet i varje fall om huruvida EU-rätten äger företräde framför internationell rätt eller inte.

År 2013 lades ett utkast till avtal om EU:s anslutning till EKMR fram och i december 2014 kom EU-domstolen med sitt Yttrande 2/13, i vilket domstolen ansåg att utkastet till avtalet inte är förenligt med EU-fördragen eftersom att det riskerar att påverka unionsrättens särdrag och autonomi. Anslutningsprocessen kan således inte fortgå förrän EU-domstolens synpunkter i Yttrande 2/13 har tagits i beaktande. Reaktionerna på Yttrande 2/13 har varit många. Vissa har kallat det ett äventyrande av skyddet för de mänskliga rättigheterna i Europa

och andra hävdar att de som värdesätter skyddet för mänskliga rättigheter inte längre har någon anledning att sträva efter en anslutning till EKMR, medan en del har varit mer förståelse gentemot EU-domstolens inställning till anslutningen eftersom att unionsrättens särdrag och autonomi står i centrum för EU:s fungerande.

Det konstateras i uppsatsen att EU-domstolen starka önskan att bevara unionsrättens särdrag och autonomi för närvarande blockerar anslutningen till EKMR och därmed utgör ett hot mot skyddet för mänskliga rättigheter i Europa. Slutsatsen dras också att för att kunna fortsätta med anslutningsprocessen krävs det att antingen utkastet till anslutningsavtalet ändras, att EU-fördragen ändras eller att EU gör sina egna reservationer till EKMR. Det mest sannolika alternativet är att utkastet till anslutningsavtalet kommer att ändras. I så fall måste förhandlingarna mellan EU och Europarådet om EU:s anslutning till EKMR återupptas.

Abbreviations

AG	Advocate General
CFSP	Common Foreign and Security Policy of the EU
The Charter	Charter of Fundamental Rights of the European Union
DAA, the agreement	Draft Agreement for EU accession to the ECHR
EC	European Community
ECHR, the Convention	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	The European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
GC	General Court of the EU
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	The United Nations
UNSC	United Nations Security Council

Contents

1. Introduction

1.1 Background

The EU started as an economic community with its main focus on the creation of a common market without internal borders between the Member States.[1] Already from the very beginning the EU established itself as a special source of international law different from all other international organizations[2] and assigned itself as a new legal order of international law.[3] Over the years, fundamental rights protection has become more and more important within the Union and this is an area of law that today constitutes an important part of the EU with the Charter of Fundamental Rights of the European Union (The Charter) as the main legal document.[4]

To take the fundamental rights protection within the Union one step further, it is since the Lisbon Treaty's entering into force in 2009 stated in Article 6(2) of the Treaty on European Union (TEU) that the EU shall accede to the European Convention on Human Rights (ECHR). How and when this should be done is not provided for in the article, and this is aspects of the accession that has proven to be difficult ones since the accession has not yet been realized. However, the fact that the EU shall accede to the ECHR is not the only thing mentioned in Article 6(2) TEU. The second sentence of the same article states that an accession cannot affect the competences of the Union as defined in the Treaties. Attached to the Lisbon Treaty is also Protocol No 8 which states that the specific characteristics of the EU and of EU law cannot be affected by the accession. In 2013 a Draft Accession Agreement (the DAA)[5] on the accession of the EU to the ECHR was presented after negotiations between the EU and the Council of Europe and in 2014 the European Court of Justice (ECJ or the Court) delivered Opinion 2/13[6] in which it held that the DAA is not compatible with the EU Treaties since it is liable to adversely affect the autonomy and specific characteristics of EU law.

[1] P. Graig, G. De Búrca, *EU law – texts cases and material*, Oxford University Press 2011, Fifth Edition, p. 364.
[2] Judgment of the Court of 15 July 1964 in Case C-6/64, *Flaminio Costa v E.N.E.L*, EU:C:1964:66.
[3] Judgment of the Court of 5 February 1963 in Case C-26/62, *Van Gen den Loos v Administratie der Belastingen*, EU:C:1963:1.
[4] P. Graig, G. De Búrca p. 394-395.
[5] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 10 June 2013.
[6] Opinion 2/13 of the Court (Full Court) of 18 December 2014, EU:C:2014:2454.

The autonomy and specific characteristics of EU law is something that the EU courts has been striving to protect and preserve in their case law over the years. The ECJ for instance has in a large number of cases placed the autonomy and the specific characteristics of EU law above everything else regardless of what that might be.[7] The ECJ has also indicated a sometimes doubtful approach towards sources of international law by placing itself at the top of the hierarchy among the different sources of international law and elected itself as the final arbiter in the majority of cases where acts of EU law is involved and is accused of violating other sources of international law, regardless of which other source of international law is at stake.[8] This approach adopted by the ECJ, in connection with its sometimes doubtful approach towards other sources of international law has caused concerns about whether an accession to the ECHR can be realized without significant hurdles on the way. After the accession acts of EU law can be directly challenged by individuals before the European Court of Human Rights (ECtHR)[9] and thus the ECJ will no longer be the final arbiter regarding all acts of EU law's compatibility with other sources of international law. This means that the autonomy and specific characteristics of EU law will be affected after the accession, but at the prize of a strengthened fundamental rights protection within Europe. It has now been seven years since the Lisbon Treaty entered into force and voices has been raised regarding whether the EU is really taking fundamental rights seriously and with Opinion 2/13 now blocking the accession further doubts are raised regarding whether it is still possible for an accession to go through.

1.2 Purpose and research question

The ECJ has always been very safeguarding of the autonomy and the specific characteristics of EU law in its case law, and its approach towards sources if international law has not always been the most welcoming. With an accession of the EU to the ECHR the autonomy and the specific characteristics of EU law might need to be to some extent affected for the fulfillment of the purpose of the accession; namely a further developed protection for fundamental rights within Europe. This is something that might lead to difficulties with the accession, which can already be seen from the ECJ's concerns in Opinion 2/13 which at present blocks the accession.

[7] See Chapter 2.
[8] See Chapter 3.
[9] P. Craig, G. De Búrca, p. 400.

The research question for this thesis consequently is whether the ECJ's desire to preserve and safeguard the autonomy and specific characteristics of EU law is something that will cause problems for the EU's accession to the ECHR, and consequently poses a threat to fundamental rights protection within Europe. If that is the case, how and why does the autonomy of EU law prevent or obstruct an accession? Furthermore, is it reasonable from the side of the ECJ to prevent an accession, or is it taking the protection of the EU's autonomy a step too far? Another question that will be discussed is what the future looks like regarding the accession. Is it still possible for the EU to accede to the ECHR and if that is the case, which is the next step in the accession process?

1.3 Method and Material

In order to answer the research questions the legal dogmatic method has been used. An interpretation and analysis of the relevant legal sources has been carried out in order to establish what the law is. An assessment of what the law should be has also been made since the focus in this thesis is an area of law that is navigated by an ongoing process where major developments will have to be made in the future. Thus it has been assessed how this area of law will evolve in the future and it has consequently been discussed what the law should be in the future.

To be able to answer the research questions the first chapters of this thesis are allocated to explain and analyze the autonomy and specific characteristics of EU law, the ECJ's approach towards sources of international law and the development of fundamental rights protection within the EU. To be able to carry out these assessments case law from the ECJ has been used as the main source of material. In the latter parts of the thesis Opinion 2/13 from the ECJ is being discussed and analyzed and therefore Opinion 2/13 and also the view of Advocate General (AG) Kokott in Opinion 2/13 are the main sources that the latter part of the thesis is based on. A significant focus is also placed on the reactions to Opinion 2/13 and therefore opinions from legal scholars has been an important source. Articles from well-reputed law reviews is being used and also some comments from blogposts from different law blogs is raised. Regarding law review articles one might understand the discussion in this thesis about Opinion 2/13 as a bit one-sided. This is because it has been hard to find opinions in favor of Opinion 2/13 among legal scholars, since most scholars apparently has arguments against the opinion. I have tried my best to find opinions both against and in favor of Opinion 2/13 to

make the discussion as neutral as possible. What further needs to be emphasized is that blogs is not used as a source of facts in this thesis but are only referred to for the possibility to assess the reactions to Opinion 2/13 among legal scholars and to see the different opinions on Opinion 2/13 and on the accession process. The blogposts that is referred to in this thesis are written by well-known legal authors and professors that are well-informed of EU law and of the accession process.

The accession of the EU to the ECHR is an evolving area of EU law where significant developments has occurred very recently and therefore it has been difficult to find literature that is up to date regarding this issue. Therefore it has been hard to use literature as part of the material for this thesis. Only some standard pieces on EU and human rights law has been used to describe some basic facts of the EU and of EU law.

Because of the fact that this thesis focuses on a constantly changing process and since it is partly based on reactions to Opinion 2/13 judicial articles and online sources has been the most appropriate material for this thesis since reactions and debates regarding this matter constantly appears and develops online.

1.4 Delimitations

This thesis focuses on the EU accession to the ECHR from an EU perspective. The view on Opinion 2/13 from the ECtHR's side is only briefly mentioned but other than that the approach of the Council of Europe towards the accession is not assessed. Nor is the view on the accession from the side of the Member States assessed.

When discussing the EU's accession to the ECHR Opinion 2/13 is of great importance and it is this opinion the discussion and analysis of this thesis emanates from. However not the entire opinion is assessed. Instead this thesis focuses mainly on the parts of the opinion that deals with the autonomy and specific characteristics of EU law.

The DAA is also discussed in the thesis but I will not go into any deep analysis of the specific provision of the agreement. Nor is it discussed in detail which features will be introduced and available for the citizens of the EU after an accession to the ECHR since the focus of the thesis is not what will be the result of an accession but instead what hinders an accession.

1.5 Disposition

After the introduction chapter, Chapter 2 defines and discusses the autonomy and specific characteristics of EU law. In Chapter 3 the relationship between EU law and international law is assessed based on case law from the ECJ. Chapter 4 discusses the development of fundamental rights protection within the EU and reveals where the EU stands today regarding this prior to the accession to the ECHR. Chapter 5 focuses on the accession process and discusses the Draft Accession Agreement and the ECJ's and AG Kokott's reactions to the DAA in Opinion 2/13. The two views are compared to each other in the end of the chapter. In Chapter 6 reactions to Opinion 2/13 among legal scholars and professors are being presented and assessed. In Chapter 7 my own analysis of Opinion 2/13 is carried out in connection with the assessments made in Chapters 2 and 3. In Chapter 8 an analysis of the future of the accession process is carried out and finally some concluding remarks is raised in Chapter 9.

2. The autonomy of the EU legal order

2.1 A new legal order of international law

Autonomy means self-rule. An autonomous entity can choose its own path without the influence of others and without being dependent on other entities.[10] The autonomy of the EU and of EU law is an important feature for the functioning of the EU legal system. It is a concept that is often mentioned in the case law of the EU courts and something that the courts frequently highlights and places a significant focus on. The autonomy of EU and of EU law is what, according to the ECJ, distinguishes the EU from other international organizations. To be able to assess the EU's accession to the ECHR in light of the autonomy of EU law it will in this chapter be cleared out what the concept entails and how it should be defined, and what the effects of the concept are within the EU legal system.

Already back in 1963 the ECJ held in its landmark case *Van Gend en Loos*[11] that the European Community (EC) created a new legal order of international law, and that the states by becoming members to the EC had limited their sovereign rights in favor of this new legal order. Shortly after this it was held in the case *Costa v ENEL*[12] that the Treaty establishing the European Economic Community (EEC Treaty) created its own legal system, which according to the ECJ differed the Community legal system from other international treaties and gave it its specific characteristics. In this important case the autonomy of the EU legal order was emphasized by the ECJ and used as an argument for the promotion of the primacy of EU law over national law. The new legal order that the European Community formed simply had to be primary to all national sources of law to be able to function the way it was intended to. Furthermore the ECJ meant that the binding force and primacy of EC law was not subordinated to the national laws of the Member States, instead EC law derived from the EC Treaties and not from the laws of the Member States.[13] Already in the early years of what has today become the European Union the ECJ strongly emphasized the importance of the autonomy and primacy of the EU legal order as something that should characterize the Union and give it its specific characteristics.

[10] J. Odermatt, *When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law*, EUI Working Papers, MWP 2016/17, p. 1.
[11] Case C-26/62, *Van Gen en Loos.*
[12] Case C-6/64, *Costa v E.N.E.L.*
[13] T. Locke, *Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order*, 48 Common Market Law Review, July/August 2011, p. 5.

Since then, the ECJ has in its judgments often placed a particularly large focus on the autonomy of the EU legal order. It has been held by the ECJ that the autonomy of the EU legal order must be preserved[14] and in the Court's early case law it distinguished EU law from other international law. This distinction was, according to the ECJ, a result of the specific characteristics of EU law, namely the principles of primacy and direct effect.[15]

2.2 What is meant by autonomy?

It is clear that the autonomy of the EU legal order is an important feature for the functioning of the Union, but what does autonomy mean and how has the concept been used and interpreted within the EU legal order? What does the concept of autonomy mean in practice and how does it affect the Union and its internal and external relations? This will be examined in the following part through an assessment of the EU courts' judgments and opinions.

How the concept of the autonomy of the EU legal order shall be defined has been on the agenda on several occasions by the ECJ. In Opinion 1/00[16] regarding the establishment of a European Common Aviation Area (ECAA) the ECJ held that to be able to preserve the autonomy of the EU legal order it is required that "the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered".[17] The ECJ further held that the preservation of the autonomy of the EU legal order requires that "the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement".[18] This means that an international court other than the EU courts cannot interpret the EU Treaties in a way that makes such interpretations binding for the EU. The EU courts are the only courts that has the authority to interpret the provisions of the EU legal order and it is those interpretations that are binding for the EU and for the Member States.

[14] Opinion 1/00 of the Court of 18 April 2002, para. 11.
[15] B. Van Vooren, R. A. Wessel, *EU External Relations Law – Text, Cases and Materials,* Cambridge University Press 2014, p. 210.

[16] Opinion 1/00 of the Court of 18 April 2002, EU:C:2002:231.
[17] Ibid, para. 12.
[18] Opinion 1/00, para. 13.

In 1991 the ECJ was requested to examine the compatibility of the Draft Agreement on the European Economic Area (EEA) with the EU Treaties. The ECJ issued regarding this matter Opinion 1/91[19] in which it declared the Draft Agreement to be incompatible with the EU Treaties since it risked to jeopardize the autonomy of the EU legal order. The ECJ found three main reasons for this. According to the agreement, the EEA Court was supposed to have jurisdiction to rule on matters between parties to the Treaty. However, the term "party to the treaty" had not been clearly defined in the Treaty. Therefore the EEA Court would have to decide in every individual case who is a party to the agreement; the EU, its Member States or the EU and the Member States together. This decision would have been based on how the responsibilities between EU and its Member States had been allocated under EU law, and therefore the EEA Court would have been forced to interpret EU law, which according to the ECJ would have risked to affect the distribution of responsibilities as defined in the Treaties, and hence the autonomy of EU law.[20]

The second problem with the EEA agreement related to the fact that many of the provisions in the agreement had the same or similar wordings as the provisions in the EEC Treaty and it had been drafted in accordance with this Treaty. Even though these provisions would not necessarily have to be interpreted in the same way as the provisions of the EEC Treaty, since these two legal sources had different objectives, the intentions of the drafters had still been that the provisions should be interpreted uniformly.[21] Therefore, the interpretation by the EEA Court of the provisions of that agreement would prejudice the interpretation of the corresponding provisions in the EEC Treaty. Since the EEA court was only obliged to follow the judgments of the ECJ decided until the day for the signing of the EEA agreement and thus not later developments in the ECJ's case law, the ECJ considered that there were no guarantees that the autonomy of the EU legal order would be preserved, since the judgments of the ECJ risked to be overruled by the EEA court.[22]

The third issue was related to the preliminary reference procedure. The EEA agreement included a possibility for national courts in the European Free Trade Association (EFTA) Member States to request a preliminary reference from the ECJ regarding the interpretation of the EEA agreement. The ECJ held that it was indeed a possibility that an agreement to which the EU was party could give new functions to the EU institutions. However, such new

[19] Opinion 1/91 of the Court of 14 December 1991, EU:C:1991:490.
[20] Ibid, paras. 33-35.
[21] Ibid, paras. 14-16.
[22] Ibid, paras. 41-46.

functions could not lead to Treaty amendments, since that would jeopardize the autonomy of EU law. The problem in this case was that the answers the ECJ gave to EFTA states asking for a preliminary ruling would not have been binding for the courts in these states. This was something that according to the ECJ would have changed the nature of the preliminary reference system, since under EU law the answers given to such a request from a national court is binding for the referring court. Such a change in the EU legal system could only be imposed by a Treaty amendment. Therefore, such a change of the system for preliminary rulings flowing from the EEA agreement was incompatible with the autonomy of the EU legal order.[23]

From this it can be concluded that the autonomy of the EU legal order according to the ECJ is threatened if another court than the EU courts is allocated with the task of interpreting EU law, if another international agreement is interpreted in uniformity with the provisions of the EU Treaties and therefore risks to prejudice the interpretations of the provisions of EU law, or if the system for preliminary references within the EU is being changed or jeopardized. In other words, the autonomy of the EU legal order is preserved when the EU courts are the only courts with the authority to interpret EU law and when the system for preliminary references is maintained as specified in the Treaties.

In 2011 the concept of autonomy of EU law was once again discussed by the ECJ in Opinion 1/09[24] on the Draft Agreement on the European and Community Patent Court. Also this Draft Agreement was declared to be incompatible with the EU Treaties since the Patents Court would have been given jurisdiction to interpret not only the provisions of an international agreement but also to interpret EU law.[25] This was, as the ECJ had held before, not in conformity with the autonomy of EU law. The ECJ meant that even though the Patents Court was supposed to be given the right to refer matters for a preliminary reference to the ECJ, there were not enough guarantees for the ECJ's involvement. When a supreme domestic court is faced with a problem of interpretation of EU law, it is obliged to ask the ECJ for a preliminary ruling on the matter. If it does not do so, the Commission or a Member State can instigate infringement proceedings or an individual can bring a state liability case against the Member State.[26] The Patent Court was supposed to work as an agent for the national courts in some specific areas of law and would therefore deprive those national courts of the power to

[23] Ibid, paras. 55-61.
[24] Opinion 1/09 of the Court (Full Court) of 8 March 2011, EU:C:2011:123.
[25] Ibid, paras. 77-78.
[26] Ibid, paras. 86-87.

request preliminary references from the ECJ regarding those legal matters. The Patent Court would thus have been the sole court with the possibility to communicate with the ECJ by means of references for preliminary rulings concerning the interpretation of EU law and would thus have the duty to interpret and apply EU law. The Draft Agreement therefore gave the Patent Court the power to refer questions for a preliminary ruling while taking that power away from the national courts.[27] This imposed a threat to the autonomy of EU law according to the ECJ. In this opinion it is obvious that the autonomy does not only apply to the EU institutions but also to institutions in the Member States which implements EU law. It is thus not only the EU institutions that should be protected from being affected by international agreements but also the Member States.[28]

It can be summarized that to be able to preserve the autonomy of the EU legal order it is not allowed for an international court to interpret the EU Treaties in a binding manner. Neither can an international agreement introduce amendments of the EU Treaties nor can it jeopardize the primacy of EU law. Included in the concept of autonomy is the fact that EU law cannot be dependent on the rules of another international legal order. Treaty amendments can only be imposed when EU law provides for them and the EU rules are not dependent on the interpretations by another court but only on the interpretations by the ECJ.

2.3 The exclusive jurisdiction of the ECJ

As has been held above, for the autonomy of the EU legal order to be preserved the EU courts needs to have exclusive jurisdiction in interpreting the EU Treaties. The exclusive jurisdiction of the ECJ is furthermore established in Article 344 of the Treaty on the Functioning of the European Union (TFEU) which states 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 provision was the focus in the case *MOX Plant*[29] in which Ireland brought proceedings against the UK before the International Arbitral Tribunal set up by the United Nations Convention on the Law of the Sea (UNCLOS) since it considered that the UK had failed to protect the environment by setting up the MOX Plant in the Irish Sea. The Commission consequently instigated proceedings against Ireland for its

[27] Ibid, paras. 79-81.
[28] T. Locke, p. 9.
[29] Judgment of the Court (Grand Chamber) of 30 May 2006 in Case C-459/03, *Commission v Ireland*, EU:C:2006:345.

failure to regard Article 344 TFEU. The ECJ held in the case that an international agreement cannot affect the allocation of responsibilities as laid down in the EU Treaties, and hence not the autonomy of the Community legal system.[30] It held that since the system for resolution of disputes between Member States provided for in UNCLOS resulted in binding decisions for the Member States, the system for resolution of disputes in the EC Treaty had to prevail over that dispute settlement system, since the relevant provisions of UNCLOS in this case was already to a large extent regulated by Community law and therefore fell within the competence of the Community.[31] Therefore the ECJ held that the dispute in this case related to the interpretation of the EC Treaty, which is something that falls within the exclusive jurisdiction of the ECJ. The ECJ ruled that Ireland had failed to comply with its obligation to respect the exclusive jurisdiction of the ECJ, which risked to affect the autonomy of the EU legal system.

Another recent case that reveals the ECJ's desire to preserve the autonomy of EU law and that also concerns the protection of fundamental rights is the *Melloni*[32] case from 2013. It has already been held by the ECJ that EU law shall be primary to all national law including the Member States' constitutions.[33] The *Melloni* case concerned the interpretation of Article 53 of the Charter which states that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized (…) by Union law and international law (…) and by the Member States' constitutions". The ECJ held in *Melloni* that Article 53 of the Charter shall not be interpreted as giving the Member States the freedom to impose higher standards for the protection of fundamental rights than that provided for in the Charter, even if such a higher level of protection of fundamental rights is provided for in the national constitution.[34] Such an interpretation of Article 53 of the Charter would compromise the principle of primacy of EU law and it would also give the Member States the authority to set aside EU law as provided for in the Charter when it is incompatible with provisions in the Member State's constitution. The ECJ pointed to the fact that provisions of national law, even if they are included in the constitution, cannot have the effect of undermining the effectiveness of EU law. Where an act of EU law requires national

[30] Ibid, para. 123.
[31] Ibid, paras. 125-126.
[32] Judgment of the Court (Grand Chamber) of 26 February 2013 in Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107.
[33] Judgment of the Court of 17 December 1970 in Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.
[34] Case C-399/11 *Melloni*, para. 56.

implementing measures the national authorities are allowed to apply national standards for protection of fundamental rights, as long as these national standards does not compromise the level of protection provided for in the Charter or the primacy, unity and effectiveness of EU law.[35] It is clear from the ECJ's reasoning in this case that the Member States are free to apply national standards for protection of fundamental rights as long as these does not compromise the level of protection provided for in the Charter. Thus the Member States are not allowed to apply higher standards for the protection of fundamental rights than what is provided for in the Charter, and thus they cannot impose stricter standards in the national legal order. This is because, according to the ECJ, this would undermine the primacy, unity and effectiveness of EU law. Also in this case the ECJ places the specific characteristics of EU law on top of everything else no matter what. The autonomy of the EU legal order is more important than an increased protection for fundamental rights in the Member States. What the ECJ states in this case is that the autonomy of the EU legal order must be preserved at any price. All national measures, even if they would lead to an increased protection of fundamental rights, that risks to undermine the autonomy of EU law must be restricted.

From all the above it is obvious that the ECJ is very safeguarding of the autonomy of the EU legal order. It is determined to protect the autonomy no matter what, and often points to the specific characteristics of EU law as a reason for why other international treaties or legal actions in the Member States are not compatible with the EU Treaties. Even when it comes to the protection of fundamental rights the ECJ made clear in *Melloni* that the autonomy and specific characteristics of EU law is more important than a possibility for the Member States to choose if they want a level of protection for fundamental rights that is higher than that in the Charter. This is something that seem to be a problem in the presence of the EU's accession to the ECHR. An accession to the ECHR will likely introduce some changes in the EU legal system which will have an effect on the specific characteristics and the autonomy of the EU legal order. It has been discussed among legal scholars whether the autonomy can lead to difficulties and even pose a threat to the EU's accession to the ECHR and thus pose a threat to the protection of fundamental rights within Europe.[36] This is something that will be discussed further, but first an assessment of the EU's relationship to other international organizations and agreements will be carried out in the following chapter.

[35] Ibid, paras. 58-60.
[36] See Chapter 4 below.

3. The relationship between EU law and international law

The relationship between EU law and international law is a complex area of law and it is a relationship that has been assessed by the ECJ on several occasions over the years, with the *Kadi* case as one of the leading examples. In this chapter, this relationship will as throughout as possible be cleared out and discussed to try to establish where the EU and in particular the ECJ stands today regarding its view of this complex relationship. What are the effects of provisions of international law within the EU legal order and how does such sources interact with provisions of EU law within the EU?

3.1 The relationship between EU law and international law in the Treaties

As already established, the ECJ held in the case *Van Gen en Loos* from 196 that the EEC created a *new* legal order of international law. Thus the ECJ already at this early stage in the EU's development pointed to the fact that the founding of the EEC was the creation of something new and something that differed from other sources of international law.

Since then the EU has developed several Treaty articles that declares at least partly the relationship between EU law and other international law. Article 3(5) TEU declares that the EU shall contribute to "the strict observance and the development of international law". In Article 216(1) TFEU it is stated that the Union may conclude agreements with third countries and international organizations when such an agreement is provided for in the Treaties or when such a conclusion is necessary in order to achieve one of the objectives laid down in the Treaties or another binding legal act of the Union. It is further held in Article 216(2) TFEU that agreements concluded by the Union are binding on the institutions of the Union and on the Member States.

Regarding Article 216 TFEU it was held by the ECJ in the case *Haegeman*[37] that once an agreement concluded by the Union enters into force, its provisions form an integral part of Union law.[38] This means that the EU institutions has competence to conclude agreements with third countries or organizations and that this is a way for the EU institutions to create new EU law which becomes binding for the Member States, which has to adapt to those rules in the same manner as with other acts of EU law. It has further been held by the ECJ that also

[37] Judgment of the Court of 30 April 1974 in Case C-181/73, *R. & V. Haegeman v Belgian State*, EU:C:1974:41.
[38] Ibid, para. 5.

customary international law must be respected by the EU. In the case *Racke*[39] the ECJ held that the Union must respect international law in the exercise of its powers, which also includes rules of customary international law. Such rules of customary international law are binding on the Union and forms part of the EU legal order.[40]

Concerning international agreements to which the EU is not a party but to which all or some of the Member States are parties, Article 351 TFEU provides that such agreements, if they are concluded before 1 January 1958 between one or more Member States on the one hand and one or more third countries on the other, the rights and obligations flowing from that agreement shall not be affected by the provisions of the TEU and the TFEU. Thus, agreements that the Member States has concluded before entering the EU shall still be valid and shall not be affected by rules of the EU legal order. However, it has been held by the ECJ that to the extent that such agreements are incompatible with the EU Treaties, the Member States has to take all appropriate steps to eliminate such incompatibilities. Such an agreement was at stake in the case *Commission v Portugal*[41] in which it was held by the ECJ that the fact that a Member State faced difficulties in bringing its obligations to a third state in line with its obligations under EU law did not release that state from its obligation to adjust and eliminate such incompatibilities. The case concerned infringement proceedings brought by the Commission against Portugal after the latter, after their accession to the Union, had failed to adjust their prior agreement with the Federal Republic of Yugoslavia to be in compliance with the relevant provisions of EU law. The ECJ held that in so far as denunciation of such an agreement was possible under international law, the Member State in question had to denounce it.[42] The ECJ further held that even if the Member State concerned was free to choose the appropriate steps to be taken to eliminate such incompatibilities, it was still under an obligation to do so. The ECJ came to the conclusion that Portugal had failed to fulfil its obligations under EU law by failing to either denounce or adjust the contested agreement.[43]

[39] Judgment of the Court of 16 June 1998 in Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, EU:C:1998:293.
[40] Ibid, paras. 45-46.
[41] Judgment of the Court of 4 July 2000 in Case C-84/98, *Commission v Portugal*, EU:C:2000:359.
[42] Ibid, para. 40.
[43] Ibid, paras. 58-61.

3.2 EU law assessed in the light of international law

Another example of how EU law and international law interact was provided in the case *ATA*.[44] In this case it was argued by the Air Transport Association of America (ATA) and others that an EU directive was unlawful according to certain provisions of international law, namely provisions of the Chicago Convention, the Kyoto Protocol and the Open Skies Agreement and also according to international customary law. A question was referred for a preliminary ruling, and the ECJ was asked whether the provisions and principles of international law in question could be relied upon when assessing the validity of an EU directive. Thus the ECJ was asked to examine whether the validity of an EU directive could be assessed in the light of provisions of international law, including principles of customary international law.[45] The ECJ pointed out that international agreements concluded by the Union are binding upon the EU. Thus an act of EU law might be invalid for reasons that it is incompatible with provisions of international law. The ECJ further held that for an act of EU law to be able to be assessed in light of international law, there are certain conditions that needs to be fulfilled. First of all, the EU must be bound by those rules. Second, such an assessment is possible only where the nature and the broad logic of the provisions of international law in question does not preclude this. Third, the provisions of international law relied upon must be unconditional and sufficiently precise. This third condition is considered to be fulfilled when the provisions relied upon contains clear and precise obligations which are not subject to any subsequent measures.[46] The ECJ concluded in the case that the directive could not be assessed in light of the Chicago Convention since the EU was not a party to that convention.[47] Neither the Kyoto Protocol could be relied on in assessing the validity of the specific EU directive. The EU was however bound by the Kyoto Protocol but the relevant provisions of the agreement could not be considered to be unconditional and sufficiently precise and could thus not confer rights upon individuals to rely on.[48] The Open Skies Agreement on the other hand could according to the ECJ be relied on in the assessment since the Union was bound by it and since it conferred rights and freedoms on individuals which could be relied upon against the parties to that agreement, and since the nature and the broad

[44] Judgment of the Court (Grand Chamber) of 21 December 2011 in Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, EU:C:2011:864.
[45] Ibid, para. 46.
[46] Ibid, paras. 50-55.
[47] Ibid, para. 72.
[48] Ibid, para. 77.

logic of the agreement did not preclude this.[49] Regarding customary international law the ECJ held that even if such principles should be binding upon the Union, their lack of precision only makes it possible to review the question whether the EU institutions made manifest errors of assessment concerning the conditions for applying those principles when adopting the legal act in question.[50]

What can be drawn from this case is that the EU is indeed bound by international law. However, the ECJ can examine the validity of an EU legal act in light of provisions of international law only where the nature and broad logic of the latter do not preclude this and in such a situation, only if the provisions of that agreement which are relied upon to examine the validity of the EU legal act in question appears to be unconditional and sufficiently precise. This case reveals that an act of international law cannot only be an integral part of the EU legal order but can also set aside acts of Union legislation.

3.3 The hierarchy among sources of international law

There are no provisions in the EU Treaties clarifying the hierarchy between the sources of EU law and sources of international law. However, this is something that has been discussed intensively among legal scholars and something that has been partly cleared out and partly even more problematized by the ECJ in its case law over the years.

As already mentioned, international agreements concluded by the EU become binding upon the Union and forms an integral part of EU law once it enters into force. However, the ECJ has made clear that provisions of international law which are binding on the Union still has to conform to primary EU law to be valid.[51] Furthermore it is the ECJ that decides whether norms of international law can be granted direct effect, which could be seen in the *ATA* case discussed above. This means that, as AG Maduro held in the *Kadi* case, "the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law".[52] Besides this, it has been argued that international norms that has been incorporated into the EU legal order undergoes a process of

[49] Ibid para. 84.
[50] Ibid, para. 110.
[51] Judgment of the Court (Grand Chamber) of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council*, EU:C:2008:461, para. 285.
[52] Opinion of Advocate General Poiares Maduro delivered on 23 January 2008, Case 415/05 P, *Al Barakaat International Foundation v Council and Commission*, EU:C:2008:30, para. 23.

"unionization". This means that these norms will be treated in the same way as norms of EU law once they become part of the EU legal order. This is something that affects such norms of international law at a Member State level. Since agreements concluded by the Union are binding on the Member States as a matter of EU law, the provisions of such an agreement are to be treated in the same way as norms of EU law at a national level. Consequently, when a national court faces difficulties regarding the interpretation of the provisions of an international agreement, it is requested or obliged, depending on which court is ruling on the matter, to refer this question to the ECJ for a preliminary ruling and the ECJ will in turn rule on how the specific provision shall be interpreted. The result of this is that the ECJ decides how that specific provision of the international agreement shall be interpreted. Consequently, the ECJ regards itself not only as the final arbiter of the interpretation of acts of EU law but also as the final arbiter regarding provisions of international law.[53]

3.4 The *Kadi* case

One case that further reveals something about the ECJ's view of the relationship between EU law and international law, but which also has resulted in confusion regarding this matter, is the *Kadi*[54] case. The case concerned an EU regulation that had been adopted to give effect to a United Nations Security Council (UNSC) Resolution. The resolution included a list over suspected terrorists which as a result of their placing on the list suffered severe sanctions. Mr. Kadi was one of the persons placed on the list suspected for having connections with Al-Qaida. Mr. Kadi and others that had been placed on the same list argued that they had wrongfully been listed and therefore they brought proceedings before the General Court (GC) of the EU challenging the EU regulation giving effect to the UNSC resolution. Mr. Kadi and others asked the GC to annul the EU regulation since it breached a number of their fundamental rights and since they had not been given a chance to encounter the terrorism

[53] J. W. Van Rossem, Chapter 2: *The Autonomy of EU Law: More is Less?* p. 21 in R. A . Wessel, S. Blockmans, *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organizations*, Springer Science and Business Media, 2012.

[54] The *Kadi* case is in fact made up of a number of cases. In this thesis the following parts of the *Kadi* judgment is referred to: Judgment of the Court of First Instance of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*, EU:T:2005:331, Judgment of the Court of First Instance of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission*, EU:T:2005:332 and Judgment of the Court (Grand Chamber) of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council*, EU:C:2008:461.

accusations.[55] The GC held that it only had the power to determine whether the UNSC had respected the principle of *jus cogens* when issuing the resolution and not the power to review the validity of the legal act in its entirety. The GC concluded that the UNSC had respected *jus cogens* when adopting the resolution.

The case was appealed to the ECJ which held that all EU legal acts must be consistent with fundamental rights to be lawful, and thus it decided to review the legality of the EU regulation giving effect to the UNSC resolution in light of the relevant provisions of fundamental rights. The ECJ held that since Mr. Kadi and the other appellants had not been informed about the reasons for their listing they had not been given a fair opportunity to challenge it. Therefore the appellants' rights to be heard, their right to effective judicial review and their right to protection of property had not been respected by the UNSC. The ECJ therefore decided to annul the EU regulation in question and consequently the ECJ decided not to implement the UNSC resolution into the EU legal order.

Kadi is a case that has raised many questions about the relationship between EU law and international law. As has been discussed above, it has been held by the ECJ in its previous case law that the EU institutions are bound by international agreements and that such agreements shall form an integral part of the Union legal order. However, the ECJ held in *Kadi* that the binding nature of international agreements is in fact limited, since sources of primary EU law is, according to the ECJ, considered to have a higher value than international agreements in the international legal order.[56] The ECJ further held in the case that the obligations imposed by an international agreement, even if it is the Charter of the United Nations (UN Charter), "cannot have the effect of prejudicing the constitutional principles of the EC Treaty".[57] Further, an international agreement cannot, according to the ECJ, influence the allocation of powers as laid down in the Treaties, and consequently, "the autonomy of the Community legal system".[58] These arguments from the ECJ resulted in the outcome that the ECJ decided to annul the EU regulation giving effect to the UNSC resolution, and therefore it instructed the EU Member States not to adopt the UNSC resolution in question but instead to ignore it.

[55] Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* and Case T-315/01 *Kadi v Council and Commission*.
[56] Joined Cases C-402/05 P and C-415/05 P, para. 308.
[57] Ibid, para. 285.
[58] Ibid, para. 282.

The *Kadi* case has received much criticism. This criticism particularly focuses on the lack of attention for the United Nations (UN) dimension of the dispute measure. The ECJ indeed emphasized the great importance and responsibility of the UN for the international legal order in the case, but at the same time it carried out its assessment without taking into account the UN Charter.[59] What is particularly noteworthy in the case is that the ECJ seem to circumvent the question whether UN law is binding upon the EU. The hypothetical way in which the ECJ answered this question is that it is not. This is particularly remarkable because what the ECJ suggests is that the EU is wholly autonomous and exempted from one of the world's leading organizations for the protection of fundamental rights.[60] Thus the ECJ places EU on top of the hierarchy among the different sources of international law and according to the *Kadi* case EU law is placed on top of the hierarchy of international legal sources and shall be primary to all other sources of law, both national and international. In this case, the ECJ decided to go against its previous decisions regarding this matter. The ECJ simply asked the Member States to set aside their obligations under UN on behalf of EU secondary law, which according to the ECJ's previous case law should be set aside on behalf of international agreements.

Instead of taking the previously established relationship between EU law and other international law, in this case UN law, into consideration the ECJ decided to look at this relationship in a different way. Even if the ECJ cannot decide on the validity of a UNSC resolution, it can still assess the validity of the EU legal act implementing this resolution, and by annulling the EU legal act the ECJ is indirectly invalidating the UNSC resolution in the EU legal order. This is so because Member States are prevented from implementing the UN resolution since that would mean that they would be in breach of EU law. What is interesting about this case is that it concerns the protection of fundamental rights, and yet the ECJ places the EU above the UN, the world's leading organization for the protection of fundamental rights, in a matter that concerns the protection of fundamental rights. This tells us some interesting things about the ECJ's view of the relationship between EU law and international law.

When it comes to the relationship between EU law and international law there are many questions remaining that needs to be answered. However one thing that is clear is that the relationship is a very complex one and there is no clear answer to how the different sources of law shall interact. Another thing that can be drawn from the ECJ's case law is that EU law

[59] J. W. Van Rossem, p. 32.
[60] Ibid, p. 33.

always prevails when, according to the ECJ, norms of international law are incompatible with EU law. Today there are several provisions in the EU Treaties that expresses the intention that the Union shall respect and take into account international law, and that the Union shall cooperate with international organizations. However, as is also laid down in the TFEU and also shown in the ECJ's case law, the Member States shall preferably adapt all their obligations flowing from all international agreements they are parties to be in compliance with EU law. In other words, every obligation a Member State has under an international agreement shall be set aside if such an obligation is not in compliance with EU law. Furthermore it is the EU courts that are the final arbiters in deciding which provisions and principles of international law is compatible with EU law and which are not. Also, the ECJ is apparently the final judge in deciding how norms of international law which becomes an integral part of the Union legal order shall be interpreted. This leads to what has been called a "unionization" of norms of international law. This means that the ECJ is free to decide that such norms shall be interpreted in a way that correspond to the aims and purposes of the Union. In *Kadi*, which is one of the leading cases regarding the relationship between EU law and international law, the ECJ considered, indirectly, that acts of the EU legal order shall be primary to acts of the UN, and that a UNSC resolution that is contrary to the principles for protection of fundamental rights in the Union legal order shall not be implemented in the Member States. This tells us something about the attitude of the ECJ toward other sources of international law. What can be drawn from all of this is that the judgments from the ECJ are many and contradictory to each other, and that the ECJ like to be the final judge in deciding which norms of international law shall be accepted within the Union, with the Union law as the ideal source and which constitutes the vision that every other norm of international law shall be adapted to. This is also something that might be problematic for a future accession of the EU to the ECHR, since an accession will mean that the EU will be bound by the provisions of the ECHR. Whether this seem to be the case or not will be discussed further, but first a brief introduction to fundamental rights protection within the EU will follow.

4. EU and the protection of fundamental rights

4.1 Developments within the Union

Even though the EU started as an economic community the question regarding the role of human rights within EU was on the agenda from the very beginning. Already in 1953, in the Draft Treaty establishing the European Community, the European Coal and Steel Community (ECSC) argued for the inclusion of provisions of the ECHR in the EEC Treaty. This was however without success, sine the EEC and the ECSC were considered to be mainly economic treaties with no place left for other values, such as human rights.[61] Indeed for many years after the founding of the EEC the focus of the Community was mainly on the creation of a common market.[62] New attention for human rights protection arose in the 1960s when it became evident that the EU was growing in scope and importance and a need for protection of human rights became more and more striking. The ECJ eventually started to develop a new jurisprudence in human rights concerns, starting with the case *Stauder*[63] in 1969. In the following decade the ECJ held in several cases that the human rights within the Union were to be found in the general principles of EU law, in international conventions and in the constitutional traditions common to the Member States, which are also part of EU law.[64]

In the 1990s the most important developments regarding human rights protection at that point took place by the implementation of the Maastricht and Amsterdam Treaties.[65] The situation for fundamental rights protection then took a dramatic turn in 2000 when the EU Charter was drafted. The drafting of the Charter started after an initiative taken by the European Council and it was politically approved by the Member States in December 2000. However, it was not until the Lisbon Treaty entered into force that the Charter became binding and it is today on the basis of Article 6(1) TEU granted the same legal value as the Treaties. The main purpose with the drafting of the Charter was not to create anything new but rather to emphasize the EU's already existing obligation to respect fundamental rights.[66]

[61] J. Nergelius, *The accession of the EU to the European Convention on Human Rights – A critical analysis of the Opinion of the European Court of Justice*, Swedish Institute For European Policy Studies, 2015:3, p. 11.
[62] P. Craig, G. De Burca, p. 364.
[63] Judgment of the Court of 12 November 1969 in Case C-29/69, *Erich Stauder v City of Ulm – Sozialamt*, EU:C:1969:57.
[64] J. Nergelius p. 11.
[65] P. Graig, G. De Búrca, p. 364.
[66] P. Graig, G. De Búrca p. 394-395.

Today the EU places a major focus on fundamental rights protection, as is evident both from the Treaties and from the case law of the ECJ. In the Treaties it is declared that the EU is founded on respect for human rights[67] and that in the Union's external relations it shall contribute to the protection of human rights.[68] As mentioned above, the Charter is binding on the basis of Article 6(1) TEU and in Article 6(3) it is submitted that "fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

4.2 The special significance of the ECHR

Before the Charter was drafted, the ECHR was given substantial attention by the ECJ as a "special source of inspiration" for the general principles of law protecting fundamental rights. Even if the ECHR is not yet binding on the EU, it has been established since the adoption of the Maastricht Treaty in 1992 that the ECHR is of great importance for the fundamental rights protection within the Union.[69] The EU courts has in a number of cases emphasized the "special significance" of the ECHR and the judgments of the ECtHR for the development and interpretations of the general principles of EU law protecting fundamental rights.[70] Since the ECJ is not yet bound by the ECHR it has had the possibility to assert the autonomy and primacy of EU law in its case law. Further, by using the ECHR as a source of inspiration rather than as a binding instrument the ECJ has had the opportunity to set aside the Convention whenever it wishes to, in particular when its provisions has not been compatible with EU law.[71] The use of the ECHR as a source of inspiration rather than a binding document is codified in Article 52(3) of the Charter which states that the rights within the Charter that corresponds to provisions in the ECHR shall be interpreted in line with them, but that such provision should not hinder the EU from providing more extensive protection than that provided for in the ECHR.

[67] Article 2 TEU.
[68] Article 3(5) TEU.
[69] P. Graig, G. De Búrca, p. 366.
[70] Judgment of the Court of 18 June 1991 in Case C-260/89, *ERT v DEP*, EU:C:1991:254, para. 41 and Judgment of the Court (Fifth Chamber) of 29 May 1997 in Case C-299/95, *Friedrich Kremzow v Republik Österreich*, EU:C:1997:254, para. 14.
[71] P. Graig, G. De Búrca, p. 367.

Another big step for the development of fundamental rights protection within the EU came with the *Bosphorus*[72] case decided by the ECtHR in 2005. The case concerned the impounding of an aircraft by the Irish authorities. The aircraft had been leased by the applicant, a Turkish company, from the national airline of the former Yugoslavia. The Irish authorities had decided to impound the aircraft because of an EU regulation which implemented the UN sanctions regime against the former Yugoslavia during the civil war in the 1990s. The impoundment of the aircraft constituted according to the applicant a violation of its right to protection of property provided for in Article 1 of Protocol No 1 of the ECHR, but the ECtHR took the view that the violation had occurred because of Ireland's compliance with the EU regulation. The question was whether this was a justified breach of the ECHR. The ECtHR held that it is not prohibited for Contracting Parties to the Convention to transfer its sovereign rights to another international organization in order to improve the cooperation in certain fields. At the same time, a Contracting Party is responsible for all acts and omissions of its organs regardless of whether these acts and omissions are the result of domestic law or of its international legal obligations. However, such action taken in compliance with that state's international legal obligations is justified as long as that international organization is considered to provide at least equivalent protection of fundamental rights to the level of protection provided for in the ECHR. If such equivalent protection can be guaranteed, it will be presumed that the state in question has not departed from its obligations under the ECHR when it has done nothing more than implementing its legal obligations imposed by that international organization.[73] In this case, the ECtHR held that the protection of fundamental rights provided by the European Community could be considered equivalent to that of the ECHR. Therefore Ireland did not violate its legal obligations flowing from the ECHR when it acted in accordance with its legal obligations flowing from European Community law.[74]

This important case is based on the presumption from the view of the ECtHR that the protection for fundamental rights provided by the EU is equivalent to that provided by the ECHR. This means that the ECtHR considers EU to provide a rather high level of fundamental rights protection. The case serve as a guarantee for that a Contracting Party to the ECHR which implements its obligations under EU law is presumed to act in accordance

[72] Judgment of the European Court of Human Rights of 30 June 2005 in Case *Bosphorus Hava Yollari Turízm Ve Tícaret Anoním Şírketí v. Ireland*, App No 45036/98.
[73] Ibid, paras. 152-156.
[74] Ibid, para. 165.

with the ECHR. This means that the EU is presumed to provide a rather high level of fundamental rights protection since it can be considered equivalent to that of the ECHR.

Even though the EU's focus is mainly economic the ECJ has in recent years heard a large number of cases in which violations of fundamental rights has been pleaded as a ground for challenges to EU legislation. Despite this it is still relatively unusual that the ECJ sets aside acts of EU law in such human rights claims.[75] This is something an accession by the EU to the ECHR might change. It is to the discussion of this accession I will now turn.

4.3 The accession to the ECHR

The accession of the EU to the ECHR has been on the agenda for a long time. Already in 1979 the negotiations within the Union regarding an accession started when the Commission introduced the idea of the Union acceding to the ECHR. Since then the discussion about the accession has been pending and in 1996 the ECJ delivered Opinion 2/94[76] in which it held that an accession to the ECHR would not be possible since it would lead to changes of EU law of constitutional significance, which would make an accession incompatible with the EU Treaties. The only way an accession would be possible would be if the Treaties were amended. More than a decade later, in 2009, the required Treaty amendment took place with the Lisbon Treaty's implementation. Since then it is stated in Article 6(2) TEU that the EU *shall* accede to the ECHR. In the second sentence of the same article it is provided that "such accession shall not affect the Union's competences as defined in the Treaties". Attached to the Lisbon Treaty is also Protocol No 8 in which it is held that the accession of the EU to the ECHR must preserve the specific characteristics of the Union and of Union law and that the competences of the Union and its institutions cannot be affected through the accession and that the accession cannot affect Article 344 TFEU. In 2010 Article 59(2) ECHR came into force which provides for an EU accession to the ECHR on behalf of the Council of Europe. It is thus now decided that the ECHR shall not only be a source of "special significance" for the development of general principles of law within the EU but shall also, after the accession, bind the ECJ to the provisions of the Convention. However, the question has been raised whether an accession of the EU to the ECHR is still necessary and desirable. The EU has today its own Bill of Rights for the protection of fundamental rights, the Charter, which to a

[75] P. Craig, G. De Burca, p. 372.
[76] Opinion 2/94 of the Court of 28 March 1996.

large extent is based on the ECHR. Still there are a number of reasons for why the accession is still desirable.

First of all, the EU has received much criticism for its work with human rights, and doubts has been expressed as to whether the EU is taking the fundamental rights protection within the Union seriously. Some has been expressing concerns regarding whether the EU is simply just trying to extend its competences in areas in which the competence remain with the Member States. Therefore an accession could serve as a proof of that the EU is willing to fully commit itself to fundamental rights protection and that the EU is taking fundamental rights seriously.[77]

Another reason for why an accession seems necessary is because some has argued that the ECJ is not a human rights court, and should not model itself as one either. Instead there already exists an expert court for fundamental rights protection within Europe, namely the ECtHR, which should be left with the task of being the human rights expert. The ECtHR has an expert human rights jurisdiction and has developed a large body of case law which has given it its expertise, an expertise that the ECJ does not yet share.[78]

Others has cautioned that conflicts between the ECJ and ECtHR is likely to arise since the ECJ is placing an increased focus on human rights. An accession by the EU to the ECHR might help to avoid such conflicts and to guarantee a uniform interpretation and application of human rights provisions within Europe.[79] It has also been emphasized that it is desirable to make it possible to challenge acts of EU law directly before the ECtHR. Today this can be done indirectly, as could be seen from *Bosphorus*, but with an accession the ECJ would not be the final arbiter on EU laws' compatibility with human rights. With an accession it would be possible to challenge EU law acts that are considered to violate human rights before the ECtHR which would have the task of deciding in such cases. This would also lead to a more extensive protection for individuals against human rights violations, since legal acts of the EU will be subject to the same control as legal acts of Member States in their compliance with fundamental rights. It would lead to a more extensive external control of EU acts, which the

[77] P Graig, G. De Burca, p. 399.
[78] Ibid. p. 399.
[79] Ibid. p. 399-400.

EU should be open for since it would increase fundamental rights protection for individuals within Europe.[80]

According to the Commission, an accession will promote a development of a common culture of fundamental rights protection within Europe, encourage the EU's credibility in its human rights protection, prove that the EU is supporting and trusting the ECHR system and make sure that there is a harmonious development of the case law of the ECJ and the ECtHR.[81]

According to the Council of Europe, an accession of the EU to the ECHR will strengthen the protection of human rights within Europe since individuals will be given the possibility to challenge EU legal acts before the ECtHR. It will also help achieving a coherent development of fundamental rights protection within Europe and it will make sure that all the European systems for the protection of fundamental rights are subject to the same controls. Further, an accession will according to the Council of Europe reassure the European citizens that the EU is not "above the law" but is also subject to external controls regarding the Union's protection of fundamental rights. An accession will also be a means of ensuring a harmonious development of the case law of the ECJ and the ECtHR. Finally, an accession will give the EU an opportunity to be a part to proceedings before the ECtHR when proceedings is brought against an EU Member State that has violated provisions of the ECHR by implementing EU law. Such a possibility will give the EU a chance to defend the EU legal act before the ECtHR.[82]

As can be seen from the above stated the ECJ has today developed its own body of case law regarding fundamental rights protection and the EU even has its own Bill of Rights for the protection of fundamental rights, namely the Charter. According to many an accession to the ECHR is still desirable since it would increase the protection of fundamental rights for individuals and would be a better guarantee for a harmonious development of case law between the ECJ and the ECtHR. As can be seen from the previous chapters the ECJ is always striving for the protection and preservation of the autonomy and specific characteristics of EU law and wants to "protect" the EU legal system from other sources of international law that are contrary to provisions of EU law. Therefore the ECJ places itself on

[80] A. Lazowski, R. A. Wessel, *When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, German Law Journal No. 1, 2015, p. 20.
[81] P. Craig, G. De Burca p. 400.
[82] *Accession by the European Union to the European Convention on Human Rights – Answers to frequently asked questions*, European Court of Human Rights, 1 June 2010, available at: http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf, p. 2-3.

top of the hierarchy among the different sources of international law and consider itself to be the final arbiter in deciding whether EU law is compatible with or shall prevail over international law. With an accession to the ECHR, the ECJ would in some cases be required to give up this role to the ECtHR and to expose itself to the external control of another judicial body which would have the power to decide whether EU law is compatible with the ECHR. As could be seen from the *Kadi* case the ECJ cannot even let organs of the UN decide in matters that relates to fundamental rights protection, but instead places itself above the UN by annulling an EU regulation that implemented a UNSC resolution. The ECJ has held that for the autonomy and specific characteristics of EU law to be preserved the essential character of the powers of the EU and its institutions as it is laid down in the Treaties must be preserved. Another court is thus not allowed to interpret EU law in a binding manner. When the EU accedes to the ECHR the ECtHR will be given the authority to interpret EU law and its compatibility with the ECHR. Judging from what according to the ECJ is required to preserve the autonomy of EU law this cannot happen. As also can be seen from the ECJ's case law the Court does not always have a very positive approach towards international law and it often decides to let EU law prevail over international law when these two sources of law are not in conformity. These matters raises the question whether the ECJ's desire to preserve and safeguard the autonomy of EU law is something that will cause problems for the EU's accession to the ECHR, and consequently poses a threat to fundamental rights protection within Europe. If that is the case, how and why does the autonomy of EU law prevent or obstruct an accession? Furthermore, is it reasonable from the side of the ECJ to prevent an accession, or is it taking the protection of the EU's autonomy a step too far? The following chapter will focus on this discussion and will assess the ECJ's approach to the accession.

5. The accession of the EU to the ECHR

5.1 The Draft Accession Agreement and Opinion 2/13

After the adoption of the Lisbon Treaty with Article 6(2) TEU stating that the EU *shall* accede to the ECHR and after Article 59(2) ECHR came into force allowing the accession, the negotiations between the EU and the Council of Europe about the accession consequently started in 2010 and the Draft Accession Agreement was presented in April 2013.[83] On the basis of Article 218(11) TFEU[84] the ECJ in December 2014 delivered Opinion 2/13 regarding the compatibility of the DAA with the EU Treaties. In its opinion, the ECJ named one part "The specific characteristics and the autonomy of EU law", where the ECJ, even though an accession now is provided for in the Treaties, came to the final conclusion that the DAA is not compatible with the Treaties since it is liable to adversely affect the specific characteristics and the autonomy of EU law.[85] The reasons for this conclusion will be presented and discussed in the following part.

5.1.1 ECtHR judgments binding the ECJ and the two Articles 53

First of all the ECJ made clear in the opinion that by the accession to the ECHR the Convention would, according to Article 216(2) TFEU, form an integral part of EU law and therefore become binding for the EU and its institutions. Because of this, the EU would be subject to the control by the ECtHR to ensure that the EU fulfills its obligations under the Convention. The EU institutions would then be bound by the decisions and judgments provided by the ECtHR. The ECJ emphasized that the fact that another court is responsible for the interpretation of an international agreement and which provides decisions that are binding on the EU institutions is not incompatible with EU law *per se*, and particularly not when such an agreement is provided for in the Treaties. However, such an international agreement can affect the powers of the ECJ only if it does not adversely affect the autonomy of the EU legal order.[86] In other words, such a court is according to the ECJ allowed only when the autonomy and the specific characteristics of the EU legal order is not jeopardized.

[83] L. Halleskov Storgaard, *EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR*, Human Rights Law Review, 2015, 15, pp. 485-521, p. 487-488.
[84] Article 218(11) TFEU states that the Member States, the European Parliament, the Council or the Commission can obtain an opinion from the ECJ on the compatibility of an international agreement with the Treaties.
[85] Opinion 2/13, para. 200.
[86] Ibid, paras. 180-183.

The EU will, like any other state that is a member of the Council of Europe, be a Contracting Party to the ECHR after the accession. This means that the decisions and judgments provided by the ECtHR will be binding on the EU and its institutions, including the ECJ. On the contrary, the judgments delivered by the ECJ interpreting provisions of the ECHR, which after the accession will form an integral part of EU law and therefore be subject to the interpretations by the ECJ, will not be binding on the ECtHR. However, the same would not apply to the interpretations by the ECJ of EU law, including the Charter. Regarding this, the ECJ pointed to the fact that Article 53 of the Charter states that nothing in the Charter is to be interpreted as restricting or affecting fundamental rights as provided by EU law and international law. This means according to the ECJ that the level of protection of fundamental rights provided in the Member States cannot compromise the level of protection provided for in the Charter. The ECJ continued by comparing Article 53 of the Charter to Article 53 of the ECHR which allows the Contracting Parties to provide higher standards for the protection of fundamental rights than the level laid down in the ECHR and stressed that the two provisions must be coordinated so that the authority granted to the Contracting Parties by Article 53 ECHR is limited in a way that prohibits the Member States to impose higher standards for the protection of fundamental rights than what is provided for in the Charter and in the ECHR. In that way the primacy, unity and effectiveness of EU law would be maintained. However, since there is no provision in the DAA guaranteeing such a coordination of the two provisions the agreement is according to the ECJ incompatible with EU law.[87]

5.1.2 The principle of mutual trust and Protocol No 16 to the ECHR

Secondly the ECJ focused on the principle of mutual trust, which is of great importance within the EU legal system. The principle requires Member States to presume that the other Member States are complying with EU law and provides a level of protection of fundamental rights that corresponds to the level of protection guaranteed by the Charter. Also, a Member State cannot demand another Member State to provide a higher level of protection of fundamental rights than that laid down in the Charter and it may not check whether another Member State has observed fundamental rights in a specific case. The ECJ is of the opinion that the DAA fails to take this particular characteristic of the EU into account and that the DAA also fails to take into consideration the fact that by becoming a member to the EU the

[87] Ibid. paras. 185-190.

Member States gives up their competences in some areas and that those areas are governed entirely by EU law. The ECJ means that where the ECHR requires the Contracting Parties which are also Member States of the EU, to check that another Member State has observed fundamental rights, this risks to "upset the underlying balance of the EU and undermine the autonomy of EU law". Since the DAA does not contain any provision preventing such a development the agreement cannot be considered to be compatible with EU law.[88]

The third reason the ECJ points to regards the system for preliminary rulings. Protocol No 16 to the ECHR states that the highest courts and tribunals of the Contracting Parties can request the ECtHR for an advisory opinion regarding the interpretation of the provisions inherent in the ECHR. The EU on the other hand requires those same courts to ask the ECJ for a preliminary ruling under Article 267 TFEU when they are facing difficulties in interpreting EU law. When the EU accedes to the ECHR the provisions therein becomes an integral part of EU law and therefore it is, according to the ECJ, that court's task to decide how to interpret those provisions. Even though the agreement does not provide for the accession of the EU to Protocol No 16 and even though the protocol was signed after the agreement was concluded, the ECHR would still after an accession form an integral part of EU law and the mechanism established by Protocol No 16 could still affect the autonomy and the effectiveness of the preliminary ruling mechanism. For a guarantee that the preliminary ruling procedure would not be undermined a provision establishing the relationship between the preliminary ruling procedure and Protocol No 16 would have to be included in the agreement. There is no such provision in the agreement and therefore the ECJ considered that the DAA is liable to affect the autonomy and effectiveness of the preliminary ruling procedure and thus to be incompatible with the EU Treaties.[89]

Another interesting aspect of the opinion occurs at the end of the opinion where the ECJ examines the specific characteristics of EU law as regards judicial review in Common Foreign and Security Policy (CFSP) matters. The ECJ stresses that it only has limited jurisdiction regarding the review of matters falling within the scope of CFSP, which is laid down in the Treaties and can therefore only be explained by reference to EU law.[90] However, as a result of the accession, the ECtHR would be given jurisdiction to review the compatibility with certain acts, actions or omissions compatibility with ECHR in all areas of EU law, and thus also

[88] Ibid. paras. 191-195.
[89] Ibid. paras. 196-199.
[90] Ibid. paras. 249-253.

within the area of CFSP. This is something that the ECJ does not have jurisdiction to do and thus the jurisdiction of the ECtHR would be more extensive than that of the ECJ. This would mean that a non EU-body would have jurisdiction to review acts, actions and omissions that is part of EU law regarding such acts' compatibility with the ECHR. To confer such exclusive jurisdiction on an international court which is outside the judicial framework of the EU cannot be approved. Therefore the ECJ concludes that the DAA by giving another international court than the EU courts the exclusive jurisdictions to carry out reviews of acts, actions and omissions within the context of CFSP and to rule on their compatibility with the ECHR fails to take into account the specific characteristics of EU and of EU law. Therefore the agreement is not compatible with Article 6(2) TEU or with Protocol No 8.[91]

5.1.3 The desire the preserve the autonomy and specific characteristics of EU law

The message emanating from Opinion 2/13 is that the EU is the superior institution for the protection of fundamental rights within Europe and that the ECJ shall be the final arbiter regarding the protection for fundamental rights in Europe. The ECJ emphasizes the specific characteristics and the autonomy of the EU legal order and stresses that this is what prevent the EU from acceding to the ECHR. Even though the treaty amendment the ECJ requested in Opinion 2/94 has now been adopted the ECJ still cannot allow for an accession of the EU to the ECHR. What is apparent in the opinion is that the ECJ seem to evaluate the autonomy and the specific characteristics of EU and EU law higher than the increased protection for fundamental rights for individuals. As could be seen in a previous chapter there are several reasons for why the EU should accede to the ECHR. It would promote a harmonious development of the case law of the ECJ and the ECtHR and it would give individuals within Europe the possibility to challenge acts of the EU which breaches their rights under the ECHR which would lead to a stronger protection for fundamental rights for individuals. Because of the desire to preserve the autonomy and specific characteristics of EU law the ECJ hinders the accession of the EU to the ECHR and therefore prevents a cooperation between the ECJ and the ECtHR which would lead to a more comprehensive protection for fundamental rights within Europe. This corresponds to the ECJ's approach in its previous case law as discussed in previous chapters where the autonomy of the EU legal order often has been the most important thing to preserve at any prize.

[91] Ibid. paras. 254-258.

The ECJ is also a strong opponent to letting the Member States have higher protection for fundamental rights than that provided at an EU level. This is something that indeed is intelligible since the EU is an organization with a much broader focus than just fundamental rights. The EU started as an economic community and the development of an area of free movement without internal borders has been one of the Union's main focuses. In fact the free movement within EU is something that has been conflicting with the protection for fundamental rights before as can be seen from the ECJ's case law where a balance has had to be made between a specific free movement provision inherent in the Treaties and between a specific fundamental right.[92] If the Member States were free to impose higher levels of protection for fundamental rights than those provided for in e.g. the Charter this would risk to hinder the free movement within EU and that would undermine one of the man aims of the Union. On the other hand, this is an even stronger reason for the EU to accede to the ECHR and in that way "assign" some of the work with the protection for fundamental rights to an expert international organization while the EU could put more focus on coordinating fundamental rights protection with the EU internal market.

What is also interesting about the opinion is the ECJ's approach towards the ECtHR's jurisdiction over CFSP matters, which the ECJ only has limited jurisdiction over. The approach the ECJ is taking here is "if we can't have jurisdiction over these matters, no one else can either". Instead of seeing the possibilities for an increased protection for fundamental rights within this area, the ECJ promptly holds on tight to the fact that no other international institution can have jurisdiction over matters the ECJ can't. This is again at the cost of increased fundamental rights protection within Europe.

From the reading of Opinion 2/13 it is clear that the autonomy of the EU legal order seem to be more important than the protection for fundamental rights for the ECJ. By this opinion the ECJ blocks the accession of the EU to the ECHR and makes the accession very problematic. Opinion 2/13 can be compared to the *Kadi* case discussed in a previous chapter in which the ECJ claimed the autonomy and the specific characteristics of EU and EU law to block an act of the UNSC to be implemented into the EU legal order. However the difference between Opinion 2/13 and *Kadi* is that in the latter the ECJ used the preservation of the autonomy of

[92] See e.g. Judgment of the Court of 12 June 2003 in Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, EU:C:2003:333, Judgment of the Court (First Chamber) of 14 October 2004 in Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, EU:C:2004:614 and Judgment of the Court (Grand Chamber) of 18 December 2007 in Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

EU law as a means for the protection of fundamental rights, while in the former the ECJ is using the same arguments as a hinder to increased protection for fundamental rights. Thus the problem with the ECJ's approach towards an accession to the ECHR is apparently not that it is against fundamental rights protection but instead that the consequences of the strong desire to protect the autonomy and specific characteristics of EU law is that obstacles to increased fundamental rights protection arises as a result of the ECJ's approach.

The ECJ's approach in Opinion 2/13 will be analyzed further but first the view of AG Kokott prior to the opinion will be presented and compared to the view of the ECJ.

5.2 AG Kokott in Opinion 2/13

The Advocate General, AG Kokott, takes another approach towards the DAA's compatibility with the EU Treaties than the ECJ.[93] This is an interesting approach and the opinion of the AG will therefore be partly presented and discussed below.

5.2.1 Effects on the competences of the EU

As could be seen from previous chapters, for the autonomy of EU law to be preserved it is required that the competences of the EU are not affected. Among other issues, the AG discusses exactly this, namely whether the competences of the EU will be affected as a result of the accession. According to Article 6(2) TEU, the accession of the EU to the ECHR cannot affect the EU's competences as defined in the Treaties.[94] To make sure that this article is preserved it is according to AG Kokott necessary to ensure that the competences of the EU are not affected as a result of the accession to the ECHR. Other than in Article 6(2) TEU it is also laid down in Article 2 of Protocol No 8 to the Lisbon Treaty that the accession of the EU to the ECHR shall not affect the competences of the EU. AG Kokott considers that there is nothing in the DAA that indicates that the competences of the EU should be curtailed because of the accession for several reasons.[95]

As a first argument for this conclusion the AG points to the fact that being bound by the ECHR will certainly impose restrictions on the EU in the exercise of its competences. Since

[93] View of Advocate General Kokott delivered on 13 June 2014, Opinion procedure 2/13, EU:C:2014:2475.
[94] Ibid, para. 33.
[95] Ibid. paras. 38-39.

the ECHR will be an international agreement concluded by the EU it will become binding on the EU and its institutions after the accession in accordance with Article 216(2) TFEU. Such restrictions will however be a natural consequence of the ambition to strengthen the protection of fundamental rights and are necessary in order to protect individuals in that aspect. Without such restrictions on the EU's competences the mission set out in Article 6(2) TEU, namely to accede to the ECHR, would be meaningless since that is something that will have to restrict the competences of the EU in some senses. Further, the EU is already applying the same standards for protection of fundamental rights as provided for in the ECHR so therefore the restriction of the competences of the EU that flows from the accession to the ECHR in fact already applies in that manner, as can be seen from the reading of in particular Article 6(3) TEU stating that fundamental rights as guaranteed by the ECHR shall constitute general principles of EU law, and from the first sentence of Article 52(3) of the EU Charter, stating that rights in the Charter that corresponds to rights in the ECHR shall be interpreted in line with them. Therefore, according to the AG, there is no need to worry about any curtailment of the competences of the EU as a result of the accession, which means that the accession is in compliance with the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8.[96]

The AG then turns to the assessment of whether the competences of the EU risks to be extended as a result of the accession to the ECHR, which is also something that is prohibited according to the second sentence of Article 6(2) TEU. The AG points to the principle of conferral which states that the EU can only act within the competences that has been conferred to it by the Member States. There have been anxieties from the Member States that the accession will result in extended competence for the EU, but these worries are unfounded. In fact there are according to the AG provisions in the DAA guaranteeing that such extensions of the competences of the EU shall not be a result of the accession. As an example the AG states that these concerns regarding a possible extension of the EU's competences concerns the EU's participation in the control bodies of the ECHR. She further points to the fact that the EU's involvement in these control bodies does not mean that the EU will have to act beyond the competences conferred upon it in the Treaties. Instead EU primary law allows for the EU to participate in the control mechanisms of the ECHR which means that such participation from the EU is in line with the Treaties. Instead such participation from the EU's

[96] Ibid. paras. 40-43.

side serve as a means to fulfill the obligation set up in Article 6(2) TEU, namely to accede to the ECHR and to increase the protection for fundamental rights within Europe.[97]

Another concern regarding EU's accession to the ECHR has been whether the EU will gain extended competences to conclude other international agreements for the protection of fundamental rights as a result of the accession, including existing or future protocols to the ECHR, which then will become binding on the Member States. Also these concerns are unfounded since the accession only will give the EU the possibility to adopt the first and sixth protocol to the ECHR since it is already required to adopt those. For the EU to accede to other existing or future protocols special instruments for accession is required. The risk that EU would be given a larger amount of competence to conclude other international agreements is also absent according to the second sentence of Article 6(2) TEU according to which the accession cannot affect the EU's competences as defined in the Treaties. The AG concludes by stating that against this background, there is nothing within the proposed accession agreement that will affect the EU's competences as defined in the Treaties.[98]

5.2.2 The autonomy and specific characteristics of EU law

AG Kokott then turns to an assessment of whether the specific characteristics of EU and of EU law will be preserved after an accession. She starts in her general considerations regarding this to point to the fact that when the EU accedes to the ECHR, it have to recognize the jurisdiction of the ECtHR just like any other Contracting Party. This will constitute an element of external judicial control for the EU's compliance with basic standards of fundamental rights. This is, according to the AG, what will constitute the most significant difference for the sake of the EU and is referred to as the real "added value" for the EU with the accession. However the fact that the EU recognizes the jurisdiction of the ECtHR shall instead of being seen as a mere submission from the EU's side be regarded as an opportunity to improve the ongoing dialogue on issues of fundamental rights between the ECJ and the ECtHR. Such cooperation between the two courts will strengthen the protection of fundamental rights in Europe. The AG further stresses the fact that the drafters of the Lisbon Treaty assumed that the EU would recognize the jurisdiction of the ECtHR as long as the specific characteristics of EU and of EU law are preserved even after the accession of the EU

[97] Ibid. paras. 44-51.
[98] Ibid. paras. 53-55.

to the ECHR. According to AG Kokott this would not amount to any practical difficulties in the majority of cases.[99]

The AG proceeds by presenting three problems with the DAA regarding the accession's compliance with and preservation of the autonomy of the EU and EU law. The first problem she identifies is the division of responsibilities between the EU and the Member States when they are joint parties in proceedings before the ECtHR and the ECtHR rules that there has been a breach of the ECHR. In such a situation the ECtHR would be allocated with the task to decide how the responsibilities for the violation of the ECHR should be divided between the EU and the Member States and thus the ECtHR would have to interpret EU law, since the division of powers between the EU and the Member States is laid down in the Treaties. As held in a previous chapter, for the autonomy of EU law to be preserved the ECJ must be the only institution that has the authority to interpret EU law in a binding manner. Therefore this is something that could amount to a threat to the autonomy of the EU and EU law.[100]

The second problem the AG identifies relates to the assessment of the need for the ECJ to initiate a prior involvement procedure in a particular case. In the DAA it is provided that the ECJ shall be given the possibility to decide whether a provision of the ECHR is in compliance with EU law, if such an assessment has not been carried out before. This means that whether the ECJ can initiate a prior involvement procedure or not will be dependent on whether it has expressed its view on the ECHR's compatibility with EU law or not before. In cases where it is unclear whether the ECJ has expressed its view on such a question it has to be guaranteed that it is the ECJ and not the ECtHR who decides whether this is the case or not, in accordance with the DAA. This is since a requirement for the preservation of the autonomy of EU law is that the ECJ is the only one who can decide on such a question.[101]

The third issue the AG identifies regarding the preservation of the autonomy of EU law refers to the protection of fundamental rights and the review of EU measures in the framework of CFSP.[102] The jurisdiction of the ECtHR will allow it to have the authority to examine applications from individuals and states within all areas of EU law, including the area for CFSP. This is an area of law where the ECJ only has limited jurisdiction and thus the jurisdiction of the ECtHR extends further than that of the ECJ. AG Kokott consequently raises

[99] Ibid. paras. 163-165.
[100] Ibid. paras- 176-179.
[101] Ibid. paras. 182-184.
[102] Ibid. para. 185.

the question whether this is something that risks to amount to a threat to the autonomy of EU law. She argues that the fact that there are no sufficient arrangements within the EU for the protection of the autonomy of EU law cannot as such be used as an argument for not allowing another judicial body a certain jurisdiction. Further she stresses the fact that by giving the ECtHR such jurisdiction as in this case would strengthen rather than weaken the legal protection for individuals within this area. What is also important to emphasize is that the drafters of the Lisbon Treaty inserted Article 6(2) in that treaty without first setting up any arrangements regarding the ECJ's jurisdiction over CFSP matters. This means that the drafters of the Lisbon Treaty apparently did not see any contradictions between the ECJ's limited jurisdiction over CFSP matters and the jurisdiction given to the ECtHR with an accession.[103]

After assessing this, the AG comes to the conclusion that as long as modifications and clarifications regarding these three matters are included in the DAA the accession of the EU to the ECHR will be compatible with the Treaties and will consequently not be liable to adversely affect the autonomy and specific characteristics of EU law.[104]

5.3 Differences between the view taken by the ECJ and the view taken by the AG

By comparing the opinion of the ECJ with the opinion of AG Kokott it is clear that the two has taken different approaches to the accession and also comes to different conclusions regarding the DAA's compatibility with the EU Treaties. One overall difference between the two opinions is that when the ECJ puts its focus on the preservation of the specific characteristics and the autonomy of EU law and claims that this is something that needs to be preserved regardless of a strengthened protection for fundamental rights, the AG instead puts her focus on the increased protection for fundamental rights the accession will result in, even if this means that the EU needs to take a step back regarding the preservation of the specific characteristics and the autonomy of EU law. She focuses on the strengthened protection for individuals the accession will lead to and the important role of fundamental rights. She sees the accession as a possibility to strengthen the cooperation between the ECJ and the ECtHR which will lead to a more comprehensive fundamental rights protection within Europe. Instead of seeing these two courts as competitors she points to the possibilities that will be the result of an increased cooperation between the two.

[103] Ibid. paras. 193-194.
[104] Ibid. para. 196.

Also, instead of simply claiming that the DAA is not compatible with the specific characteristics and autonomy of EU law AG Kokott proposes solutions on how the agreement can be amended to be compatible with the Treaties in places where she sees doubts regarding these matters. She states what is required for the autonomy of EU law to be preserved and presents solutions on which modifications and clarifications that needs to be included in the DAA instead of just rejecting the agreement as being incompatible with the Treaties. She puts her focus on the possibility for the EU to go through with the accession instead of seeing it as an impossibility. One thing that is interesting is also that the AG talks about the intentions of the drafters of the Lisbon Treaty. She believes that the drafters has already taken into account the difficulties and question marks with the accession and she trusts them to already have been thinking about the conflicts that could come from an accession.

Also regarding CFSP matters the AG takes another approach towards the accession than the ECJ. While the ECJ takes the view that "if we can't have jurisdiction over a specific matter no one else can either" the AG sees no problem with the ECtHR having a broader jurisdiction than the ECJ in CFSP matters since this will only increase individuals protection regarding fundamental rights in this area of law, which the AG sees as an entirely positive aspect.

By comparing the two views the conclusion can be drawn that there seem to be nothing wrong with the DAA *per se*, instead it is the approach towards it that decides whether it is compatible with the EU Treaties or not. It is clear that the ECJ puts its main focus on the preservation of the specific characteristics and autonomy of EU law and on the aspects of the DAA which makes it incompatible with the EU Treaties while the AG puts her main focus on the clarifications and modifications that needs to be done with the DAA for it to be compatible with the EU Treaties. She focuses on the increased fundamental rights protection the accession will lead to instead of the obstacles it will cause for EU law.

The commentators to Opinion 2/13 has been many and the reasons for the ECJ's approach towards the DAA has been frequently discussed among legal scholars. Some of the different views of the ECJ's approach in Opinion 2/13 will be discussed and analyzed in the next chapter and the questions in focus will be what the reasons are for the ECJ's approach in Opinion 2/13 and whether the approach is reasonable or whether the ECJ is taking a step too far.

6. Reactions to Opinion 2/13

6.1 Is the ECJ taking fundamental rights seriously?

It did not take long before lawyers and legal scholars raised their voices with critics about Opinion 2/13. Some called it "a clear and present danger to human rights protection"[105] while others claimed that the ECJ is not taking fundamental rights seriously and that "those who value human rights no longer have any reason to pursue EU accession to the ECHR"[106].

One discussion that has been pending since the delivery of Opinion 2/13 is what the reasons are for the ECJ's approach to the accession to the ECHR. One explanation for the ECJ's approach towards the DAA in Opinion 2/13 might be that the ECJ wants to "protect" the Charter, which is the Union's own legal document for the protection of fundamental rights, without letting other provisions of international law for the protection of fundamental rights bind the ECJ. The Charter is at the heart of the Unions constitutional structure and it has been composed and implemented through the EU legislative procedure. Therefore one explanation is that the ECJ wants to preserve its own Bill of Rights, to which the ECJ is the sole guardian. Another reason for the ECJ's approach towards the accession could be related to the changed status of the ECHR within the EU, which was implemented by the Lisbon Treaty. Before the Lisbon Treaty entered into force fundamental rights was within the Union protected through general principles of EU law interpreted by the ECJ. This meant that the ECJ always had the final say on how great the impact of the provisions of the ECHR and the judgments of the ECtHR should be within the Union. Therefore the autonomy of the EU legal system was not threatened by the ECHR. In fact the ECJ was including provisions of the ECHR in its judgments to a much larger extent before the Lisbon Treaty entered into force, and the reason for this is probably because the ECJ could decide exactly how and to what extent these provisions should be included in its judgments. This will however be changed when the EU accedes to the ECHR, since the ECJ is no longer going to have the final say in matters

[105] S. Peers, *The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*, EU Law Analysis, 18 December 2014, available at http://eulawanalysis.blogspot.se/2014/12/the-cjeu-and-eus-accession-to-echr.html.
[106] S. Douglas-Scott, *Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*, U.K. Const. L. Blog (24th December 2014), available at https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/.

covered by the ECHR, which will remove competence and control from the ECJ and thus affect the autonomy of the EU legal order.[107]

Other commentators of Opinion 2/13 points to the fact that a clear pattern from the ECJ has emerged over the years, namely that when something poses a threat to the autonomy of the EU and to the exclusive jurisdiction of the ECJ, the judges of the ECJ will not hesitate in taking overconfident decisions that might sometimes go against the will of the Member States.[108] Indeed, also in Opinion 2/13, the judges of the ECJ focuses heavily on matters regarding the autonomy of the EU legal order, which is something that according to the opinion lays close to the Court's heart.[109] It has been submitted that by placing such large focus on the autonomy of the EU legal order the ECJ is leaving other important aspects of the accession behind. The task of the ECJ was in the opinion to decide whether the DAA is compatible with the EU Treaties. It is true that one of the desires of the drafters of the Lisbon Treaty was to have a transparent division of competences between the EU and the Member States. This is something that becomes clear from the reading of Article 6(2) TEU and Article 2 of Protocol No 8 to the Lisbon Treaty. Both of these articles provides that the accession by the EU to the ECHR cannot in any way affect the competences of the EU as laid down in the Treaties. An accession can thus in no way serve as a tool for increasing the competences of the EU. As AG Kokott states in her opinion, the DAA does not affect the competences transferred to the EU by its Member States. However, the ECJ still decides not to put its focus on this fact.[110] Even though this is a main feature of the DAA that in fact makes it compatible with the EU Treaties and even though the AG pushes on this point the ECJ simply decides not to put any focus on it, but instead to place its main focus on the threat the DAA poses on the autonomy of the EU legal order. This tells us a lot about the ECJ's initial approach to the DAA.

Further, the ECJ held in Opinion 2/13 that an international agreement that provides for the existence of another court is acceptable only if it can be guaranteed that the specific characteristics and the autonomy of EU law is not affected by the judgments of that court. To meet such demands is almost impossible, especially since the ECJ strongly points to the fact that the judgments of the ECtHR cannot bind the ECJ to a particular interpretation of EU law. Currently, the judgments of the ECtHR interpreting the provisions of the ECHR binds the

[107] L. Halleskov Storgaard, p. 519.
[108] A. Lazowski, R. A. Wessel, p. 1.
[109] Ibid, p. 4.
[110] Ibid, p. 5.

ECJ but this is not the case vice versa. This result in judicial competition between the two courts, especially regarding the interpretation of the EU Charter. The ECJ holds in its opinion that the accession is possible only if it can be guaranteed that the ECJ will have exclusive competence to determine when EU law applies, and in particular the EU Charter, and when the provisions of the ECHR applies. It is true that the Charter to a large extent is based on the ECHR and the provisions of the Charter corresponding to a provision of the ECHR shall be interpreted in conformity with that provision taking also into account the case law of the ECtHR, according to Article 52(3) of the Charter. At the same time, the ECJ wants to be the final arbiter in interpreting the Charter. Therefore there might be a possibility that the ECJ wishes to delay the accession of the EU to the ECHR so that the ECJ has a chance to develop a larger body of case law regarding the interpretation of the Charter and in that way avoid to be dependent on the case law of the ECtHR when interpreting those provisions of the Charter that corresponds to provisions in the ECHR. The less developed the Charter is, the more the ECtHR judgments will have an impact on the ECJ's interpretations of the Charter.[111]

One question one might ask is whether the ECJ really takes the protection of fundamental rights seriously? The result of Opinion 2/13 is that the ECJ managed to block the accession to the ECHR and it is to some commentators not a surprise that the ECJ once again is doing whatever it takes to protect its exclusive jurisdiction. It has become a persistent feature that the ECJ tries to eliminate the competition before another court threatens its exclusive jurisdiction. Since the accession is currently blocked by Opinion 2/13 the ECJ will be given more time to develop its case law on the interpretation of the Charter. This will strengthen the status of the Charter while the ECJ at the same time can prove that it is taking fundamental rights seriously.[112]

Other commentators are eager to point to the fact that the ECJ in Opinion 2/13 is simply following their reasoning in the *Melloni* case discussed in a previous chapter, which is an approach that causes problems with a future accession. It is according to some clear that the ECJ in Opinion 2/13 requires an interpretation of Article 53 ECHR that is in line with the interpretation in the *Melloni* case, namely that the article must be coordinated with Article 53 of the Charter so as to restrict Member States from imposing higher standards for the level of protection for fundamental rights at a national level than what is provided for in the Charter to be able to preserve the specific characteristics of the EU. Hence the ECJ is asking the Member

[111] Ibid, p. 7.
[112] Ibid, p. 15-16.

States to set aside Article 53 of the ECHR also after an accession. This is very far-reaching, and begs the question whether the ECJ is asking for too much. It is clear that the ECJ does not show a great interest in cooperating with the Council of Europe in this matter.[113]

6.2 The importance of preserving the specific characteristics of EU law

There are however commentators that are of the opinion that the approach taken by the ECJ in Opinion 2/13 is reasonable. Regarding the concerns from the ECJ that the system for preliminary rulings is threatened by Protocol No 16 to the ECHR giving the Contracting Parties the opportunity to ask the ECtHR for an advisory opinion, it has been submitted that it has to be kept in mind that the preliminary ruling procedure is one of the most important features for the functioning of the EU legal system and also that the procedure is very fragile. Article 267 TFEU in which the preliminary ruling procedure is prescribed for allows for a dialogue between the judges in the Member States and the ECJ about the interpretation of EU law and is one of the most important functions for the preservation of the effectiveness and supranational nature of EU law. For the Member States to comply with Article 267 TFEU it is required that the national judges are willing to refer national matters to the ECJ. Thus it requires a desire from national judges to cooperate with the ECJ. For many of the Member States it was not obvious from the beginning to enter into this cooperation with the ECJ, instead it is a trust that has been built up gradually over time. This reveals something about how fragile this cooperation is, since the slightest side-step from the ECJ might jeopardize the trust in the ECJ from the national judges. The ECJ expresses its concerns in Opinion 2/13 that the Member States will turn to the ECtHR for an advisory opinion and set aside the preliminary ruling system. If for example the conformity of an EU regulation with the ECHR is at stake, the national court might engage in forum shopping, turning to the ECtHR regarding the conformity between the two legal documents instead of turning to the ECJ. Also, where a first instance court has asked the ECJ for a preliminary ruling, there is nothing that hinders the Supreme Court of that Member State to turn to the ECtHR for a "new" opinion in the same matter, which would result in different interpretation of the same provision. Therefore, it is important that there is a clear chronological order between the system for preliminary rulings and the system for advisory opinions. The fact that there is no provision in the agreement envisaging this, it is certainly understandable why the ECJ is

[113] J. Nergelius, p. 35.

having concerns about this, since it is highly important for the judicial system of the EU that the preliminary reference system is functioning.[114]

The *Melloni* case has already been discussed above, but while some authors has pointed to the difficulties that follows from the approach the ECJ takes in following their judgment in that case, it has also been submitted that this is an approach from the ECJ's side that is understandable. In *Melloni* the ECJ held that "rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State". By the accession to the ECHR the ECJ has concerns that the Member States will be given ammunition to challenge the judgment in *Melloni*. This is because of Article 53 ECHR which provides that "nothing in this Convention shall be construed as limiting domestic fundamental rights", which means that the Contracting Parties are free to impose a higher level of protection for fundamental rights than that provided for in the ECHR. Here the difference between EU law and the ECHR is very important to point out. The Council of Europe is an organization for the mere protection of fundamental rights within Europe. There are no other areas of law that needs to be taken into account within the organization and therefore the provisions of the ECHR does not have to be balanced against other interests. The provisions of the ECHR can therefore function as a minimum level of protection for the Contracting Parties, which are free to impose higher standards if they prefer. Within the EU on the other hand harmonization among the Member States is an important feature for the uniform application of EU law. Thus, also the protection of fundamental rights is an area of law that needs to be harmonized and therefore it is important that all the Member States provides the same level of protection for fundamental rights within their national legal systems. It is therefore important to ensure that the Member States does not use Article 53 ECHR to impose a higher level of protection.[115]

This is indeed a problematic issue and an area where it is understandable that the ECJ has concerns. One needs to see the differences between the Council of Europe and the EU. While the Council of Europe works solely for the protection of fundamental rights the EU is a union that covers different areas of law and where the EU internal market with the free movement of persons, goods, services and capital is one of the main areas. If a Contracting Party to the ECHR imposes higher levels of protection no other interests within the Council of Europe

[114] C. Krenn, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13*, German Law Journal, Vol. 16 No. 01 pp. 147-168, at p. 154-156.
[115] Ibid, p. 156-158.

would risk to be compromised. Therefore the ECHR can allow the Contracting Parties to impose higher standards for protection than those provided for therein. In the EU on the other hand it is not unusual that provisions for the protection of fundamental rights and the provisions for free movement clashes and a conflict between the two arises areas of law arises. In such a situation it is for the ECJ to do a balance between the two interests to see which one shall prevail in that particular situation. If the Member States were free to provide higher levels of protection for fundamental rights than that laid down by EU law other interests within EU would risk to be restricted and that would risk to undermine important features of the Union. Therefore it is understandable that the ECJ expresses concerns about Article 53 of the Charter and Article 53 of the ECHR and requires a coordination between the two.

It has further been submitted regarding the ECJ's jurisdiction in the field of CFSP that it might not only be a result of constitutional pride that the ECJ takes the approach that if the ECJ can't have jurisdiction in the field, no one else can either. To extend the ECJ's jurisdiction within this dynamic and sensitive area of law is an important desire of constitutional character. Letting another court than the EU courts have jurisdiction within this field would pose a threat to EU law. If the ECtHR could provide final guidance to national courts within this field it would jeopardize one of the most important features of EU law, namely uniformity. This would risk to undermine the specific characteristics of EU law.[116]

Lastly it should be mentioned that judge Malenovský of the ECJ has recently presented an alternative approach towards the EU's accession to the ECHR. He considers that the fundamental interests of the Union needs to be regarded, and a disparity needs to be made between the EU and the other Contracting Parties, since the system and goals of the EU differs from that of the other Contracting Parties. The EU is not, unlike the other Contracting Parties to the ECHR, a state and this is something that needs to be regarded. Therefore it is highly important that the specific characteristics of EU law is taken into account. The DAA consequently should take into account the autonomy of EU law. To be able to do that he considers that the *Bosphorus* doctrine deserves particular attention.[117]

[116] Ibid, p. 161.
[117] J. Malenovský, *Comment Tirer Parti de l'Avis 2/13 de La Cour de L'Union Européenne sur l'Adhésion á la Convention Européénne des Droits de l'Homme*, RGDIP 2015-4, 705. The article is discussed and summarized in X. Groussot, J. Hettne and G.T. Petursson, *General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union*, Lund University Legal Research Paper Series, Paper No 01/2016, April 2016, p. 24.

6.3 Are the specific characteristics of EU law really that specific?

It is submitted in Protocol No 8 to the Lisbon Treaty that the specific characteristics of EU law needs to be preserved with the accession to the ECHR and as judge Malenovský stresses the EU differs from the other Contracting Parties to the ECHR and therefore the EU needs to be differentiated from them with the accession. It is indeed understandable that the ECJ has concerns about these threats to the specific characteristics of EU law, as can be drawn from the above discussions. But what if these specific characteristics are not that specific after all? It has been submitted that the specific characteristics of EU law are in fact not EU specific at all. Instead all Contracting Parties to the ECHR naturally cares to preserve the autonomy of their legal systems, as well as the effectiveness and uniformity of the national law and the prerogatives of their national courts. It is indeed not only the EU that cares to preserve these features. Because of this there are guarantees for the preservation of the national legal systems laid down in the ECHR, e.g. the possibility to make reservations laid down in Article 57 ECHR and the requirement for the exhaustion of domestic remedies laid down in Article 35 ECHR. Every national constitutional court naturally have a great interest in preserving the specific characteristics of the judicial system in that particular state such as the autonomy and the constitutional principles of that state's legal system. Thus it is not a concern only within the EU but a concern common to all Contracting Parties.[118] Exactly because autonomy, effectiveness and similar constitutional principles are common concerns among the Contracting Parties, the ECHR includes provisions to protect and safeguard them. Also there exists a common understanding among the Contracting Parties on which provisions of the ECHR needs to be accepted or taken care of in that state, namely those provisions for which no common rules exists.[119]

This is an interesting aspect of the approach taken by the ECJ in Opinion 2/13. It is true that all Contracting Parties to the ECHR has certain characteristics and prerogatives of their legal systems that are specific for that particular system. It is only natural that all Contracting Parties to the ECHR have a willingness to preserve such specific characteristics of their legal systems, even when they become members of international organizations. Therefore, if it did not exist guarantees in the ECHR for the preservation of the specific characteristics of the Contracting Parties legal systems, no state would probably be willing to sign the convention. So if all other 47 Contracting Parties to the ECHR can be parties to the convention while still

[118] C. Krenn, p. 162.
[119] Ibid, p. 163.

preserving the specific characteristics of their legal systems, why can't the EU do the same? It does not make sense that the EU shall be given special treatment in such a situation, like if the specific characteristics of the EU legal systems were a little bit more specific than those of other legal systems. One needs to ask whether the EU membership of the ECHR would compromise the autonomy of the EU legal system more than what the autonomy of the other Contracting Parties is compromised at present? This is, according to some commentators, unlikely. Therefore the EU should be a member to the ECHR on the same terms as all the other Contracting Parties, without any special treatment given to the EU. Opinion 2/13 is simply a claim of sovereignty from the ECJ's side and there is a risk that the opinion might encourage other Contracting Parties to the ECtHR to assert the autonomy of their legal systems more aggressively against the ECtHR.[120]

The ECJ might be exaggerating their concerns in Opinion 2/13 but many of the concerns are justified. However this is, as the ECJ presents it, because the preservation of autonomy and effectiveness are not concerns specific to the EU judicial system, but because these are concerns common to all the Contracting Parties to the ECHR.[121]

In fact the ECJ has itself presented an alternative way to interpret the concept of specific characteristics of EU law in a Discussion Document on the accession to the ECHR from 2010.[122] In this document the ECJ submits that the specific characteristics of EU law includes the feature that "action by the Union takes effect against individuals only through the intermediary of national measures of implementation or application". By this the ECJ means that individuals needs to approach the national courts and authorities to secure the protection of their fundamental rights. It is not before the individual in question has exhausted all domestic remedies that he or she can turn to the ECtHR with the matter. In this way individuals have the opportunity to indirectly challenge acts of the EU by challenging the national act implementing or applying the particular Union act.[123] The ECJ further submits that the specific characteristics of the Union must be seen in light of the principles governing the functioning of the control mechanisms of the ECHR, namely the principle of subsidiarity. In the context of the ECHR the principle of subsidiarity means that it is for the Contracting

[120] S. Douglas-Scott, *Autonomy and Fundamental rights: The ECJ's Opinion 2/13 on the Accession of the EU to the ECHR*, Europarättslig Tidsskrift (Swedish European Law Journal) March 20, 2015, p. 38.
[121] C. Krenn p. 167.
[122] *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*, 5 May 2010, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf.
[123] Ibid, para. 5.

Parties to guarantee that the rights enshrined therein are protected at a national level, and that it is for the ECtHR to control that this has been done. It is therefore mainly the national authorities that have to make sure that the ECHR is complied with and to penalize breaches of the Convention. Therefore it is for the Union to make sure that review of the ECHR after the accession must be carried out by the courts of the Member States and/or of the Union.[124]

It is interesting that the ECJ itself has presented an alternative way to interpret the concept of autonomy and the specific characteristics of EU law in a discussion document prior to Opinion 2/13. Yet the ECJ does not make use of this interpretation at all in Opinion 2/13 and instead takes the approach that these concepts are threatened by an accession to the ECHR. In that sense the signals from the ECJ are somewhat contradictory. In fact also the presidents of the ECJ and the ECtHR has in a joint communication from 2011 expressed their common view on the accession of the EU to the ECHR.[125] The presidents indicated a supportive approach towards the negotiations between the EU and the Council of Europe regarding an accession by the EU to the ECHR. It is interesting that the ECJ prior to its Opinion 2/13 has expressed a willingness to promote an accession, but when it really counts all this willingness is gone with the wind and instead the ECJ blocks the accession.

[124] Ibid, paras. 6-7.
[125] *Joint Communication from Presidents Costa and Skouris*, 24 January 2011, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

7. Comments on Opinion 2/13

What can be said about Opinion 2/13 is that almost every commentator to it seem to agree on the fact that it poses a threat to fundamental rights protection. However there are different views of whether the opinion is a result of an overreacting court or whether the court's approach is rational and justified. Some commentators think that the ECJ needs to take a step back regarding the preservation of the autonomy and specific characteristics of EU law, while some seem to understand the concerns from the ECJ's side and sees the difficulties and problems an accession would lead to for the EU. Personally I am not surprised over the ECJ's approach in Opinion 2/13. Considering the court's previous case law where the preservation of the autonomy of EU law at any prize has been the focus, and where the ECJ's often reluctant approach towards other sources of international law has been revealed, it would have been surprising if the ECJ had been taking a different approach in Opinion 2/13. It has been revealed over the years that the ECJ is very safeguarding of the autonomy and specific characteristics of EU law. What is clear from the ECJ's previous case law and from Opinion 2/13 is that the relationship between EU law and other international agreements is a problematic one, since the ECJ will only show solicitude for international human rights agreement when these agreements and their institutional arrangements does not risk to undermine the constitutional architecture of the EU.[126] This is somewhat contrary to Article 3(5) TEU which declares that the EU shall contribute to "the strict observance and the development of international law". It seem like the ECJ is only willing to do this when the autonomy and specific characteristics of EU law does not risk to be undermined.

7.1 Is the ECJ overreacting?

The question remains whether Opinion 2/13 is the result of the ECJ overreacting the need to safeguard the specific characteristics and autonomy of EU law? This depends on which perspective one sees the accession from; an EU perspective or a fundamental rights perspective. It is no secret that some characteristics of the EU legal system will be modified and will have to be adapted to the ECHR judicial system after an accession. Without these changes in the EU legal system an accession will be impossible and unnecessary. If one decides to see the accession from a fundamental rights perspective, the ECJ needs to take a

[126] D. Hallberstam, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, 16 German Law Journal, 105 2015, p. 113-114.

step back regarding the approach in Opinion 2/13 and instead see to the increased protection for fundamental rights an accession will result in. It might be worth amending some of the EU characteristics for a better cooperation between the ECJ and the ECtHR on behalf of the individuals within Europe that will be given a stronger fundamental rights protection. It is consequently true that Opinion 2/13 poses a threat to fundamental rights protection within Europe. If one decides to consider the accession from an EU perspective one needs to think about the fact that for the functioning of the Union the autonomy and specific characteristics of EU law plays an important role. These features are among those that constitutes the cornerstones of the EU legal system. Consequently the aims of the Union would risk to be undermined if these features risked to be compromised. The ECJ is simply following their previous judgments in Opinion 2/13, pointing out the important characteristics of the Union that needs to be preserved for the functioning of the Union. What is sad is that these two different perspectives are just that; that it is two different perspectives. The ultimate solution would of course be to find a way to make these two perspectives interact with each other so that the specific characteristics of the EU would be preserved at the same time as the protection for fundamental rights would be increased and developed within Europe. That is however something that, based on the reading of Opinion 2/13 and the comments thereto, seems to be far away at present.

One thing that the ECJ points to in Opinion 2/13 is the importance to preserve the principle of mutual trust, which is inherent in the concept of autonomy and is a specific characteristic of EU law. It is held that the Member States are not allowed to check that another Member State respects fundamental rights when implementing EU law, instead the Member States shall presume that the other Member States respects fundamental rights as laid down by EU law. This is also something that demonstrates the ECJ's absent will to regard the increased protection for fundamental rights an accession will lead to. A case that is of interest here is the case *M.S.S. v Belgium and Greece*[127], a case from the ECtHR which shows that the Member States cannot trust each other regarding the protection of fundamental rights regarding the asylum seeking system. If the Member States would be allowed, as provided for under the ECHR system, to check each other to make sure that the other Member States respects fundamental rights, it would help increase the protection for fundamental rights since it would be observed when another Member State is breaching their fundamental rights obligation and

[127] Judgment of the European Court of Human Rights (Grand Chamber) of 21 January 2011 in Case *M.S.S. v Belgium and Greece*, Application no. 30696/09.

thus that Member State could be remedied. This is something that would benefit the individuals' fundamental rights protection, since breaches of fundamental rights would be discovered and remedied to a larger extent. Again this is something that the ECJ should take into account and regard, instead of claiming that the principle of mutual trust is a specific characteristic of the EU legal system and therefore must be preserved at any prize.

7.2 An absolute obligation to accede to the ECHR?

Something that is apparent is that if the EU were to accede to the ECHR today with the amendments that would have to be done to the DAA to be compatible with the EU Treaties would undermine the whole idea of the accession. If the ECJ could make exceptions and reservations to all the features of the ECHR system it claims not to be compatible with the EU Treaties in Opinion 2/13, this would not fulfill the goals of an increased fundamental rights protection that is the aim of an accession. However Article 6(2) TEU includes a requirement for the EU to accede to the ECHR through the important word "shall". This means that the EU Treaties sets up an absolute obligation for the EU to accede to the ECHR. However, as has been held by one of the commentators to Opinion 2/13 "however, when viewed through the lens of Protocol No 8 and the second sentence of Article 6(2) TEU, the Treaty provides not an absolute obligation to accede but a *conditional* one".[128] Protocol No 8 to the Lisbon Treaty and the second sentence of Article 6(2) TEU indeed provides that an accession by the EU to the ECHR shall be realized *only* if the specific characteristics of the EU and of EU law are not affected. This makes the accession conditional and gives the ECJ a chance to postpone the accession, which is in fact not incompatible with the Treaties at all but in fact the other way around. So the accession shall still go through, but the Treaties does not reveal anything about when and how, only that the specific characteristics of EU law needs to be preserved. Thinking about it that way, the ECJ's approach in Opinion 2/13 is highly justified.

Another thing that might be of interest here is a judgment delivered by the ECJ the same day as the delivery of Opinion 2/13, namely the *Abdida* case.[129] The case concerned a third country national's right to be granted leave in Belgium based on an illness he was suffering from and which remedies were available for him in respect of that decision. In the case the

[128] C. Barnard, *Opinion 2/13 on EU accession to the ECHR: looking for the silver lining*, EU Law Analysis 16 February 2015, http://eulawanalysis.blogspot.se/2015/02/opinion-213-on-eu-accession-to-echr.html.
[129] Judgment of the Court (Grand Chamber) of 18 December 2014 in Case C-562/13, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, EU:C:2014:2453.

ECJ made references both to the Charter and to the ECHR and thus revealed a willingness to refer to the provision of the ECHR. The message emanating from this case might have been that the ECJ wanted to show that it had the will and possibility to take fundamental rights seriously and to prove its willingness to refer to provisions of the ECHR without being bound by the Convention. Maybe it was a desire from the ECJ to show that it can take fundamental rights seriously without the need of being bound by the ECHR. However, one should remember that the ECtHR is the expert fundamental rights court within Europe, while the ECJ is the supreme court of the EU. For a better protection of fundamental rights for individuals within Europe, the task of being the final arbiter in protecting fundamental rights shall be allocated to the ECtHR, which the ECJ must learn to accept. One risk with the ECJ's approach of protecting its specific characteristics no matter what is that it might send a twisted signal to the EU Member States who's national courts would be triggered to do the same, namely to protect their own judicial systems at any price instead of giving competences to the EU. For the functioning of the EU it is required that the Member States are willing to give up competences on behalf of the EU, but if the EU cannot set a good example and give away competences to the expert human rights court within Europe this might affect the Member States willingness to give up competences to the EU. This is also something that would risk to undermine the whole idea of the Union.

What is also important to mention is that the Council of Europe has already thought about the autonomy and specific characteristics of EU law and held that the principle of autonomy of EU law will be no obstacle to the accession and that after the accession the ECtHR will always have regard to the specific characteristics of EU law in judgments where the EU is involved. The Council of Europe also reminds of the fact that the ECtHR is already taking the specific characteristics of EU law into account as can be seen in the *Bosphorus* case where the ECtHR generously held that when a Contracting Party to the ECHR is implementing their obligations under EU law there is no violation of the ECHR since the EU is considered to provide equivalent fundamental rights protection as provided in the ECHR.[130] That is a proof of the ECtHR's willingness to approve the EU as equivalent to the ECHR regarding fundamental rights protection.

It has been held that "the more the EU seeks to present itself as an actor in its own right at an international level, to participate in the development of international law, the more the Court

[130] Accession by the European Union to the European Convention on Human Rights - Frequently asked questions, p. 6.

seeks to stress the autonomy of the EU legal order".[131] This is indeed an interesting statement. It is a somewhat contradictory approach to have a willingness to participate as a Contracting Party to the ECHR, while at the same time strive to protect the autonomy of the EU legal system. It does not cling well. As mentioned in the beginning of this thesis, the concept of autonomy means that an autonomous entity cannot be dependent on another entity. The concept of autonomy within the EU legal order has proven, through the case law of the ECJ, to mean exactly that. The autonomy of the EU legal system would be undermined if the ECJ were dependent on another international court. When the EU accedes to the ECHR it will be to some extent dependent on the ECtHR and the ECJ will be bound by the judgments by the ECtHR. This means that the autonomy of EU law will be undermined, as quite right was held by the ECJ in Opinion 2/13. To be able to set up a functioning cooperation between the EU and the ECHR after the accession this is a requirement. One of the main ideas with the EU's accession to the ECHR is to improve fundamental rights protection within Europe by giving individuals the possibility to challenge acts of EU law before the ECtHR, whose judgments on these issues would bound the ECJ. Therefore, if the ECJ wants to preserve the autonomy of EU law, why even accede to the ECHR? As already mentioned, the ECJ needs to regard the increased fundamental rights protection an accession would lead to and to scale down its defensive position towards the ECHR and the ECtHR. Otherwise an accession will be impossible.

[131] J. Odermatt, p. 18.

8. The future of the accession

Since the ECJ considers the DAA to be incompatible with the Treaties the accession of the EU to the ECHR cannot proceed at present. The ECtHR has referred to Opinion 2/13 as a "great disappointment"[132] and has further held that "let us not forget, however, that the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member state".[133] Opinion 2/13 indeed amounts to challenges for the accession process and as held by the ECtHR it is the citizens of Europe which are deprived of the right to challenge acts of EU law before the ECtHR. Therefore it is important that the concerns in Opinion 2/13 is addressed for the continuation of the accession process. Further Article 6(2) TEU will not suddenly cease to exist and consequently the EU shall still accede to the ECHR. It is important that the accession becomes reality for several reasons, mainly for a more consistent fundamental rights protection within Europe and also so that acts of EU law can be challenged before the ECtHR, which is something that will strengthen the fundamental rights protection within Europe. However to accede to the ECHR with all the requirements laid down by the ECJ in Opinion 2/13 will not entirely fulfill these goals, since the ECJ refuses to cooperate with the ECtHR in important areas which would result in gaps in the European fundamental rights protection. The question is what will happen now. The EU still shall accede to the ECHR, so the question is what the next step in the accession process will be and what needs to be done for the accession to go through. A first step is to address the ECJ's concerns in Opinion 2/13, and then it needs to be decided how the accession process shall go on. As I see it there are three possible options for how the ECJ's concerns in Opinion 2/13 can be addressed and lead to the proceeding in the accession process; either the DAA needs to be amended, the Treaties will have to be amended, or the EU will have to make its own reservations to the ECHR in connection with the accession. I will consider these three options in turn.

[132] Annual Report 2014, European Court of Human Rights, Council of Europe, available at: http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf p. 6.
[133] Ibid, p. 6.

8.1 Amending the DAA

One option for addressing the ECJ's concerns in Opinion 2/13 and thus to make it possible to continue with the accession process would be to amend the DAA. This would mean that the EU and the Council of Europe would have to return to the negotiation table and start new negotiations about the DAA. What is problematic with this is that the ECJ's concerns regarding the DAA are not of minor significance. As can be seen from the reading of the opinion the ECJ's expressed concerns would require major changes of the DAA in important areas. As can also be seen from the ECJ's approach to international law and its strong desire to preserve the autonomy and specific characteristics of EU law there is a risk that the EU would not be very compliant to just small changes of the DAA. Instead the ECJ would probably continue to push for a strong protection of the autonomy and specific characteristics of EU law, which will make it problematic to find a way to agree on every single provision of the DAA and which will likely also compromise the level of protection of fundamental rights the Council of Europe strives to preserve and strengthen. Also if the ECJ is asked again after a new DAA has been agreed on to deliver an opinion on the new agreement's compatibility with the EU Treaties the ECJ would probably still find new provisions in the DAA that is not compatible with the Treaties. To enter into new negotiations is also a very time consuming option and so the accession will not be reality within the near future.

8.2 Amending the Treaties

A second option for addressing the concerns in Opinion 2/13 to be able to continue with the accession process is to amend the Treaties on the basis of Article 218(11) TFEU which provides that Treaty changes is a possible option if the ECJ delivers an opinion stating that an international agreement is not compatible with the Treaties. Protocol No 8 discussed above clearly states that the accession cannot affect the specific characteristics of EU law. As established in previous chapters, the specific characteristics of EU law will be affected as a result of an accession. Such effects on the specific characteristics of EU law is a necessity for the strengthened protection of fundamental rights the accession will result in. Therefore one option is to amend or remove Protocol No 8, which would mean that the DAA would no longer be incompatible with the Treaties on the parts where it jeopardizes the autonomy and specific characteristics of EU law. Another suggestion of how the Treaties could be amended for the accession process to go through is that a notwithstanding protocol could be added to

the Treaties. The protocol should read: "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".[134] In this way the Treaties would have been fully amended in line with the requirements of the ECJ and in accordance with Article 218(11) TFEU. Such a protocol would automatically cover all of the concerns raised by the ECJ in Opinion 2/13.[135] This is of course an option, but it would probably be hard to get all the Member States to agree on such a protocol, and it does not counter the concerns of the ECJ, some of which is probably justified and worthy of assessment before the accession. Another problem with amendments of the Treaties would be that the ECJ even after such amendments could find new ways in which the Treaties are incompatible with the DAA. Thus amending the Treaties is not a guarantee for that the EJC will find them to be compatible with the DAA.

8.3 Reservations to the ECHR

A third option would be for the EU to make reservations to the ECHR, which is provided for in Article 57 ECHR. In this way the EU could deviate from the aspects of the DAA that have such major effects on EU law so that the autonomy and specific characteristics of EU law is threatened. However to make a reservation as a Contracting Party to the ECHR is not done without prerequisites. For a reservation to be valid there are four requirements that needs to be fulfilled. First, the reservation must have been made when the ECHR was signed or ratified. Second, the reservation must relate to specific laws in force at the time of ratification. Third, the reservation cannot be of a general character and lastly, it must contain a brief statement of the law concerned.[136] These requirements amounts to problems for a potential reservation made by the EU. Many of the aspects that according to the ECJ makes the Treaties incompatible with the DAA are of a general character instead of pointing at specific laws or provisions. The concept of autonomy of EU law for instance is not expressly mentioned in the Treaties and so it is not mentioned in a specific law. Also some of the specific characteristics of EU law such as supremacy and direct effect are not mentioned in the Treaties or in any

[134] Leonard F.M. Besselink: *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*, VerfBlog, 2014/12/23, http://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/..
[135] Ibid.
[136] P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press 2011, Third Edition, p. 462.

other law and therefore it is hard to fulfill the requirements that the reservations must refer to a specific law and cannot be of a general character. Therefore I think that to address the concerns in Opinion 2/13 by making reservations to the ECHR is not an option that is likely to happen. Another thing that would be problematic with this option is that it would risk to strongly undermine the purpose of the accession, namely to strengthen the protection for fundamental rights within Europe. This is because reservations would circumvent many of the provisions in the DAA and lead to gaps in the European fundamental rights protection instead of fulfilling the goal of creating a more consistent fundamental rights protection within Europe.

Out of these three options I think amendments of the DAA is the most likely one. Thus the EU and the Council of Europe will have to restart the negotiations to try to find a solution that fits them both. As I see it the EU, mainly the ECJ, will have to take a step back in their eager to protect and preserve the autonomy and specific characteristics of EU law and to see to the stronger fundamental rights protection the accession will lead to. Otherwise I think that an accession is unnecessary, since it will not fulfill its purposes anyway. The ECJ needs to show a stronger will to cooperate with the Council of Europe, and in return the latter will probably show a willingness to respect and take into account the specific characteristics of EU law when the EU is involved in proceedings before the ECtHR, something that the ECtHR in fact already has held that they are willing to do.[137] After all, the aim of the accession is to develop the fundamental rights protection within Europe, not to work with the preservation of the specific characteristics of EU law. If the negotiations are started again the accession process will of course be rather long-drawn and it will probably take years before the accession can go through. On the other hand, it is either that or to put the accession process on hold, since as it is today the accession is blocked by Opinion 2/13. Article 6(2) TEU sets no time frames, it only states that the EU shall accede to the ECHR.

What will be the next step in the accession process will hopefully be seen in an early future. The president of the Commission, Jean-Claude Juncker, held at a speech at the Council of Europe's parliamentary assembly session in April this year that the EU's accession to the ECHR is a political priority for the Commission. He further held that the Commission is currently working on a solution for the accession process continue and emphasized that "we

[137] See footnote 129.

will not rest until we have found a solution to the EU's accession to the ECHR"[138]. Thus it seem like the accession process is not dead and as long as Article 6(2) TEU is not repealed or amended there is an obligation for the EU to accede to the ECHR which will not cease to exist. How and when this shall be done are still questions that only can be speculated about. Personally I think that it is still possible for the EU to accede to the ECHR as long as the concerns expressed by the ECJ in Opinion 2/13 are addressed in a proper manner.

[138] Jean-Claude Juncker at the Council of Europe Parliamentary Assembly Session, Strasbourg, 19 April 2016, a video of the speech is available at: http://www.coe.int/en/web/portal/-/jean-claude-juncker-le-conseil-de-l-europe-est-un-partenaire-majeur-de-l-union-europeenne-.

9. Concluding remarks

As can be seen from the ECJ's judgments over the years the court is very eager to preserve the autonomy, jurisdiction, powers and characteristics of EU and of EU law no matter what, and Opinion 2/13 is no exception from this approach. According to many commentators of the accession process and of Opinion 2/13 the opinion constitutes a threat to fundamental rights protection within Europe and many of these commentators are eager to point out that the ECJ is taking a step too far regarding its strong desire to preserve the autonomy and specific characteristics of EU law. Noteworthy is also that AG Kokott in Opinion 2/13 claims that the DAA, with a few proposed amendments, is compatible with the EU Treaties. Other commentators finds the ECJ's approach understandable since the ECJ needs to fight for the preservation of the specific characteristics of EU law for the functioning of the Union as it has been developed over the years.

If those specific characteristics of EU law really is that specific and whether the ECJ is taking a step too far in protecting these interests is something that can be discussed, but something that is certain is that the strong desire from the ECJ to protect and preserve the autonomy and specific characteristics of EU law poses a threat to the accession of the EU to the ECHR since it postpones the accession and makes it highly problematic, and it also risks to undermine the aim of the accession, namely to increase fundamental rights protection within Europe. Therefore Opinion 2/13 constitutes a threat to fundamental rights protection within Europe. Still it can't be denied that Article 6(2) TEU continues to exist with the obligation for the EU to accede to the ECHR. What will be the next step in the accession process will hopefully be seen in an early future. The ECJ's concerns in Opinion 2/13 will have to be addressed and the Commission has expressed a willingness to continue with the accession process which is promising. I think that an accession is still possible and still desirable and can be realized through either amendments of the DAA, Treaty changes or reservations to the ECHR made by the EU in connection with the accession. The most likely option is according to my opinion that the DAA will have to be amended and thus the negotiations on the accession between the EU and the Council of Europe will have to be restarted.

To conclude, it will probably be a somewhat difficult task to satisfy all the demands from the ECJ regarding the amendments of the DAA while not undermining the objectives of the accession. The ECJ should instead of being opponents to the accession regard the possibilities the accession will bring for fundamental rights protection within Europe. If the ECJ really is

taking fundamental rights seriously, this is a good way to show it. After all the ECtHR is the expert human rights court within Europe, something that the ECJ needs to be willing to accept and respect.

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