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Published in:
European Public Law

2020

Document Version:
Publisher's PDF, also known as Version of record

Link to publication

Citation for published version (APA):
Öberg, M.-L. (2020). Autonomy of the EU Legal Order: A Concept in Need of Revision? *European Public Law*, *26*(3), 705-740.

Total number of authors:
1

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Autonomy of the EU Legal Order: A Concept in Need of Revision?

Marja-Liisa Öberg*

The issuing of Opinion 2/13 on the European Union's (EU's) accession to the European Convention on Human Rights by the Court of Justice of the EU (CJEU), followed by Case C-284/16 Achmea and Opinion 1/17 on the compatibility with EU law of the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), brought the concept of the autonomy of the EU legal order to the persistent limelight of scholarly attention. An important yet unanswered question that arises in the light of the CJEU's case law is to what extent the concept of the autonomy of the EU legal order or its specific application by the CJEU has been outlived in the context of EU external relations. Closely connected to the expansion of the EU's normative influence globally and in its neighbourhood is the necessity to set up effective institutional and procedural frameworks, including judicial protection mechanisms. The keen protection of the autonomy of the EU legal order in such instances conflicts sharply with the Union's interests and foreign policy strategies and may well warrant a review of the current paradigm of the autonomy of the EU legal order. This article provides a critical account of the compatibility of the concept of autonomy as developed by the CJEU over the past several decades with the Union's aspirations as a normative superpower.

Keywords: Autonomy, EU legal order, Opinion 2/13, Achmea, Opinion 1/17, unity, effectiveness, norms export, EU external action, European Economic Area

1 INTRODUCTION

The concept of the autonomy of the European Union (EU) legal order has been employed by the Court of Justice of the EU (CJEU) in a strand of case law initiating in the 1970s, culminating in the trenchantly criticized Opinion 2/13.[1] A great deal of disapproval has since been pointed directly at the 'selfishness' of the CJEU in protecting its own autonomy over other values, such as judicial dialogue, a high standard of human rights protection and the exporting of the Union's values.[2] In contrast to these positions, this article

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1 Opinion 2/13 *ECHR II* ECLI:EU:C:2014:2454. For a list of comments on Opinion 2/13 *see* e.g. D. Halberstam, '*It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward,* 16(3) German L. J. 105 (2015).

2 B. de Witte, *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union*, in *The European Court of Justice and External Relations Law: Constitutional Challenges*

Öberg, Marja-Liisa. 'Autonomy of the EU Legal Order: A Concept in Need of Revision?'. *European Public Law* 26, no. 3 (2020): 705–740.
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takes a more sympathetic approach to the CJEU's case law. Whilst the concept of autonomy of the EU legal order intrinsically frustrates parts of the Union's ambitious agenda as a global player, the article argues that the CJEU's application of autonomy is both predictable and legitimate in the present context of European integration. Criticisms against references to the autonomy to the EU legal order in the CJEU's case law should thus be perceived as exaggerated and unjustified against the backdrop of the objectives of the Treaties while securing the Union's role as a normative superpower in the neighbourhood and beyond.

The implications of the CJEU's treatment of the concept of autonomy for the Union as a global actor and, specifically, as a norms exporter[3] have once again been thrown into sharp relief by Brexit and the imminent necessity to carve out a structure for the future relationship between the EU and the United Kingdom. The precise outcome of the post-Brexit legal and institutional solution pending, some potential pitfalls resulting from the concept of autonomy have been alluded by the CJEU's earlier case law.

As possible post-Brexit options for the United Kingdom, several of the arrangements by which the Union currently exports its internal market *acquis* to the neighbourhood countries in exchange for (partial) access to the internal market have been discussed.[4] Examples of such agreements include the comprehensive European Economic Area (EEA) Agreement as well as the more limited treaties concluded with Switzerland, the countries of the Western Balkans, Turkey and some states in the Caucasus and the Southern Mediterranean.[5] Whether or not a future Brexit deal will follow the example of the existing agreements, an economic partnership 'with a comprehensive and balanced Free Trade Agreement at its core' having been identified as the starting point for the negotiations on a future deal,[6] *acquis*-exporting agreements are a growing trend

33 (M. Cremona & A. Thies eds, Hart Publishing 2014); E. Spaventa, *A Very Fearful Court?: The Protection of Fundamental Rights in the European Union After Opinion 2/13*, 22 Maastricht J. Eur. & Comp. L. 35 (2015); P Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, 38 Fordham Int'l L. J. 955 (2015); J. Odermatt, *The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?*, in *Structural Principles in EU External Relations Law* 291 (M Cremona ed., Hart Publishing 2018).

3 *See* further: M Cremona, *The Union as a Global Actor: Roles, Models and Identity*, 41 Com. Mkt. L. Rev. 553 (2004).

4 *See* e.g. European Union Committee, UK-EU relations after Brexit (HL 2017–19, 17); European Parliament, *Future Trade Relations Between the EU and the UK: Options After Brexit*, (Mar. 2018); A Biondi, P Birkinshaw & M Kendrick, *Brexit: The Legal Implications* (Kluwer 2018).

5 In addition to bilateral agreements, the Treaty establishing the Energy Community [2006] OJ L198/18, the Agreement on the establishment of a European Common Aviation Area [2006] OJ L285/3, and the Treaty establishing the Transport Community [2017] OJ L278/3 stand out as agreements boasting a high degree of integration with the respective sectors of the internal market.

6 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] OJ C34/1, paras 3 and 17.

in the Union's external relations.[7] The EU's possibilities of increasing its role as a regional and global rule maker and thereby integrating third countries into the internal market are, however, curtailed by the need to preserve the autonomy of the EU legal order. Specifically, the quest for autonomy hinders the adoption of effective institutional solutions to ensure homogeneity between the internal market *acquis* as applied within the EU and in the relevant third countries. Homogeneity, in turn, is essential for the sake of the smooth functioning of the internal market in its expanded dimension.

Whereas, in EU external relations, there are two main contexts in which the autonomy concept reveals itself – the export of the EU's *acquis* to third countries and trade agreements[8] – the current article focuses on the former. Its modest ambition is to analyse why and how does the concept of the autonomy of the EU legal order restrain the effectiveness of the Union's normative influence in the neighbourhood specifically, and whether these restrictions can be justified. The article, firstly, scrutinizes the meaning and rationale of autonomy in the Union's legal order from the internal and external perspectives (section 2). The motivations for the creation, specification and continued application of the concept of autonomy – the unity and effectiveness of the EU legal order – help explain the limitations that the concept imposes on the Union's normative influence. The relevant constraints are illustrated by the CJEU's jurisprudence (albeit not static nor even fully developed) whereby the principle of autonomy obstructs the creation of institutional structures that are necessary to support the Union's norms export (section 3). Finally, an evaluation is provided of the effects of the application of autonomy on the Union's external activities as a normative superpower (section 4).

2 AUTONOMY OF THE EU LEGAL ORDER: THE CONCEPT

Manifestly undefined in scholarly debates,[9] the concept of the autonomy of a legal order is not EU-specific but has developed with reference to the relationship

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[7] Examples include the modernization of the European Neighbourhood Policy (ENP) through the conclusion of the new generation Association Agreements coupled with Deep and Comprehensive Free Trade Areas (AA/DCFTAs) that feature a strong component of EU *acquis*. The Union's current foreign policy strategy, furthermore, foresees the establishing of an 'economic area' that comprises countries which implement DCFTAs, Trans-European Networks and the Energy Community and links neighbourhood countries to the EU via the Union's *acquis*: European External Action Service, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy* 49, http://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf (accessed 29 Apr. 2020).

[8] *See* e.g.s, C Contartese, *The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the 'Essential' to the 'Specific Characteristics' of the Union and Back Again,* 54(151) Com. Mkt. L. Rev. 1627 (2017).

[9] M. Klamert, *The Autonomy of the EU (and of EU Law): Through the Kaleidoscope,* 42 Eur. L. Rev. 815, 815–816 (2017).

between national legal systems and international law. It has maintained its relevance in the EU's internal context but is presenting ever more complications for the Union's external actions, especially as concerns the possibilities to effectively export the Union's *acquis* to third countries. Analysis in sub-section A reveals how the concept of autonomy has emerged in the CJEU's jurisprudence and the role it has assumed in the EU's legal edifice. Sub-section B treats the concept in the specific context of international agreements concluded by the EU, in particular with the aim of exporting Union *acquis* to third countries.

2.1 Autonomy in relation to national legal orders

The concept of an autonomous legal order refers, first and foremost, to its self-referential character. An autonomous legal order is able to create, validate, apply, and interpret legal rules on the basis of the tools found within the legal order itself without constant validation by another legal order.[10] The notion of autonomy originates from the idea of sovereignty. The allocation of competences and, thereby, powers between the EU and the Member States is ultimately a question of dividing sovereign powers.[11] The founding treaties of the EU are concluded under public international law and in accordance with national constitutional requirements regarding their negotiation, signature, conclusion and application. By virtue of the international agreements, the Member States have set up a number of institutions tasked with decision-making, administrative and judicial duties. Although based on an original recognition by the Member States, the institutions of the EU enjoy the powers conferred on them to the extent specified by the Treaties.[12] Once established, the institutional framework thus operates independently of the Member States.

There is more than one doctrinal approach to the concept of autonomy of the EU legal order, illustrated by the renowned debate between Schilling, Weiler and Haltern. It is useful to proceed from Schilling's classification of autonomy. Autonomy could, according to Schilling, refer to either the absolute, original constituent power ('original autonomy'); independent power that is, however, accorded by another, original constituent power ('derivative autonomy'); or the power to interpret the highest rules in a legal order ('interpretive autonomy').[13] The latter, according to Schilling, belongs to the concept of original autonomy but

[10] R. Barents, *The Autonomy of Community Law* 172 (Kluwer Law International 2004).
[11] P. Pescatore, *The Law of Integration* 30 (Sijthoff 1974).
[12] Article 5(2) TEU.
[13] T. Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 Harv. Int'l L. J. 389, 389–390 (1996).

not necessarily to the legal orders that enjoy derivative autonomy. The EU Treaties possess derivative autonomy by virtue of the Member States.[14]

In contrast, Weiler and Haltern argue that the Member States do not possess the right of 'auto-decision' over the meaning of the Treaties; this is notwithstanding the practice of the Member States' judiciaries to delimit the competences between the EU and the Member States.[15] The CJEU is, indeed, the 'ultimate umpire' in the EU legal system. This position of the CJEU is enshrined in the Treaty articles that require Member State compliance with the CJEU's judgments under Article 260(1) Treaty on the Functining of the European Union (TFEU); the jurisdiction of the CJEU to review the validity and legality of EU measures under Article 263 TFEU, among others on grounds of a lack of competence; and the obligation of the Member States' courts of last instance under Article 267 TFEU to refer for preliminary ruling to the CJEU any matter on the interpretation of the Treaties or the validity or interpretation of an EU legal act.

Another key assumption in the discussion is that the CJEU enjoys judicial *Kompetenz-Kompetenz* – the power to determine the limits of the EU's competences.[16] Article 267 TFEU allocates judicial *Kompetenz-Kompetenz* to the CJEU to provide authoritative interpretations of EU law and rule on its validity. The ultimate authority to rule on the limits of the powers conferred on the Union is exercised by the CJEU and not by the courts of the Member States.[17]

Several judgments of the CJEU as well as national courts confirm that the Member States have transferred part of their sovereignty to the EU.[18] This, in turn, is a crucial element in making the determination that the EU legal order is, indeed, one of autonomous character,[19] recognized both by the supranational legal order itself and the national legal orders from which the EU derives its autonomy. For the EU Member States, the duty to fully apply the Treaties entails a partial loss of sovereignty insofar as the Union has been set up for 'unlimited duration, having its

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[14] *Ibid.*, at 404.

[15] J. H. H. Weiler & U. R. Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37 Harv. Int'l L. J. 411, 424–425 (1996).

[16] *Ibid.*, at 436–437.

[17] As concerns EU law or the Court's rulings adopted *ultra vires*, in violation of fundamental rights and infringing national constitutional identity, the German Constitutional Court and the Czech Constitutional Court beg to differ. *See* M. Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice*, 48 Com. Mkt. L. Rev. 9 (2011); J. Komárek, *Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII*, 8 Eur. Const. L. Rev. 323 (2012).

[18] Case 26/62 *Van Gend en Loos* EU:C:1963:1; Case 6/64 *Costa v. ENEL* EU:C:1964:66; the German Constitutional Court's ruling 1 BvR 248/63, 216/67 *EWG-Verordnungen* [1967] BVerfGE 22, 293, para. 15.

[19] F. C. Mayer, *Van Gend en Loos: The Foundation of a Community of Law*, in *The Past and Future of EU Law* 16, 20 (M. Poiares Maduro & L. Azoulai eds, Hart Publishing 2010).

own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, *real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community*'.[20] It would be incompatible with the terms and spirit of the Treaty as well as the obligation of the Member States to give effect to the Treaties in their national legal orders were the Member States to overrule the authority of the EU legal system by giving precedence to their own unilateral acts,[21] and to, thereby, exercise 'auto-decision'.

The fundamental rationale behind the claim for autonomy of the EU legal order is the desire to uphold the unity of the legal order and, consequently, to ensure its proper functioning.[22] The principle of effectiveness is one of the most important cornerstones of the EU legal order.[23] It emerges from the principle of sincere cooperation enshrined in Article 4(3) Treaty on European Union (TEU) and is guaranteed by unity and coherence.[24] Unity is also closely related to the principle of primacy. Were one legal order to penetrate the interpretation or application of the rules of another legal order, such as that of the EU, the latter could not justify its independent existence nor could the objectives of the Union be reached. This inevitably leads to the creation of a supranational legal order characterized by the notion of autonomy and serving the common aims of the Member States.[25]

The concept of autonomy requires in addition to the EU Treaties determining the legal remedies available under EU law also that the content of those rights and obligations be found in the Treaties. For the sake of ensuring the uniformity and efficacy of EU law, the validity of the measures adopted by the EU institutions may only be judged in the light of EU law itself and not on the basis of national laws and legal concepts.[26] Moreover, recourse to national interpretations of EU law is impossible due to the Treaties constituting an 'independent source of law' which is autonomous from the national legal orders.[27] As such, the validity of the Treaties cannot be questioned by national courts without questioning the very foundations

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[20] Case 6/64 *Costa v. ENEL*, *supra* n. 18 (emphasis added).
[21] *Ibid*.
[22] Barents, *supra* n. 10, at 171–172.
[23] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* EU:C:1996:79, para. 95. *See also* Joined Cases 281/85, 283/85, 284/85, 285/85 and 287/85 *Germany and others v. Commission* EU:C:1987:169, Opinion of Advocate General Mancini, paras 16 and 18; Case C-301/87 *France v. Commission* EU:C:1989:357, Opinion of Advocate General Jacobs, para. 39.
[24] Case 33/76 *Rewe* EU:C:1976:188, para. 5; Case C-213/89 *Factortame* EU:C:1990:257, paras 19–21; Case C-312/93 *Peterbroeck* EU:C:1995:437, para. 12.
[25] Pescatore, *supra* n. 11, at 50–51.
[26] Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para. 3.
[27] *Ibid*.

of the EU legal order as a whole, not even on grounds of an alleged violation of fundamental rights as recognized by national constitutional law.[28]

The self-referential character of the EU legal order is, moreover, inextricably linked to the EU's institutional framework. The latter upholds the independence of the legal order from external claims of authority and ensures that the rules of the legal order are interpreted and applied consistently with the principles inherent to the legal order.[29] The CJEU has repeatedly overruled attempts by the Member States' governments to challenge the refusal of EU institutions to take account of national laws and, thus, the autonomy of those institutions.[30] The autonomy of the institutions does not, however, mean that the latter are the only ones endowed with the task of giving effect to EU law. National institutions and judiciaries form part of the general institutional framework of the EU whereas the ultimate authority to give binding interpretations of EU law and to declare the latter invalid rests pursuant to Article 267 TFEU with the CJEU.[31]

Referring back to the classification by Schilling, the CJEU and the national courts proceed to consider the EU legal order as one possessing 'derivative autonomy',[32] yet having reached 'interpretive autonomy' to the extent that it is the CJEU that interprets EU law and determines the validity of EU secondary legal acts, including draft international agreements, in the light of the Treaties. It is, therefore, also the CJEU that decides what is necessary to uphold the autonomous, self-validating character of the EU legal order for the purpose of ensuring that the Treaty objectives can be attained.

The effectiveness of the norms export from the Union to third countries is vitally dependent on institutions that support a timely and efficient transfer of new or amended rules from the Union's legal order to the legal orders of the non-Member States. The role of efficient institutions is ever more relevant bearing in mind that norms transfer in this case takes place by means of 'regular' international agreements and not via the supranational EU Treaties whereas the desired outcome of the norms exporting exercise is homogeneity of the *acquis* within and outside the EU. Maintaining the autonomy of the Union's legal order, however, demands that even in this specifically external context the Union shall maintain 'auto-

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28 *Ibid.*

29 Barents, *supra* n. 10, at 262–263.

30 Case 1/58 *Stork v. High Authority* EU:C:1959:4, 26; Joined Cases 7/56 and 3–7/57 *Alegra v. Common Assembly* EU:C:1957:7, 57; Case 30/59 *Gezamenlijke Steenkolenmijnen* EU:C:1961:2, 22. This is notwithstanding the fact that the autonomy of the EU legal order has mutual application in the sense that neither does the EU possess the power to annul national rules that conflict with the obligations of the Member States under EU law: Case 6/60 *Humblet* EU:C:1960:48, 568.

31 Case 314/85 *Foto-Frost* EU:C:1987:452, para. 17; G. Bebr, *The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis,* 58 Colum. L. Rev. 767, 769–770 (1958).

32 *See* e.g. 2 BvE 2/08 et al *Lissabon* [2009] BVerfG 123, 231.

decision' over the content and the scope of the *acquis* and that interpretations given by third country courts shall not encroach upon the judicial *Kompetenz-Kompetenz* or the interpretative autonomy of the CJEU. It is difficult to achieve a balance between creating institutions that are able to uphold the homogeneity of *acquis* in the EU and outside while preserving the prerogatives of the CJEU as illustrated by examples in section 3 below.

2.2 Autonomy in relation to international law

The second dimension in which the autonomy of the EU legal order traditionally manifests itself is *vis-à-vis* international law. The EU is a vigorous player on the international stage, interacting with other states and international organizations as well as fostering international cooperation to develop common responses to global challenges. The Union is, thus, not isolated from other international actors, processes, and decision-making and dispute settlement mechanisms but an active participant. However, the fact that the EU, too, derives its competence from an international legal instrument and is thereby both a creature of and an actor in the making of international law gives rise to complex issues concerning the relationship between EU law and international law.

From the external perspective, the autonomy of the EU legal order is a means of controlling the normative influence of legal norms and principles that emanate from outside the EU.[33] The EU legal order exists within the international community whereas its autonomous character precludes the authoritative influence of international norms that have not become part thereof. The EU is thus rendered independent to determine the applicability and the legal effect of international law on its territory. The CJEU has generally adopted an accommodating approach towards the influences of international law on EU law. It does not preclude an interpretation of EU law in the light of the general principles of international law or customary international law, the provisions of international agreements to which the EU is a party itself or by proxy of the Member States, or the decisions of international courts and tribunals the jurisdiction of which is binding on the Union.

When it has considered it necessary to protect the Union's legal order from excessive influence, however, the CJEU's stance has been firm. The landmark judgments in *Kadi I* and *Kadi II* are key cases in point. The cases touched upon the fundamental issue of the interaction between the EU Treaties and the Charter of the United Nations (UN). The EU not being a member of the organization, the obligations of the UN Charter do not bind the Union directly. A question,

[33] Barents, *supra* n. 10, at 261.

nevertheless, arose regarding the indirect influence of the UN Charter on the EU legal order. In *Kadi I*, the Court of First Instance (CFI) ruled that the Member States' obligations under the UN Charter including the resolutions of the Security Council, enjoy primacy over all domestic and international law obligations including the EU Treaties by virtue of international customary law and Articles 5, 27 and 30 of the Vienna Convention on the Law of Treaties (VCLT) as well as under Article 103 UN Charter and the case law of the International Court of Justice (ICJ).[34] Furthermore, since the Member States' obligations under the UN Charter predate the conclusion of the EU Treaties, the Member States must give precedence to the Charter and leave conflicting measures of EU law unapplied.[35]

In the appeal to *Kadi I* brought before the CJEU,[36] it was ruled that in its legislative action, including when implementing UN anti-terrorist sanctions on the EU territory, the Union is bound by the requirements of international fundamental rights protection. In the light of these considerations and the fact that the EU legal order is an autonomous one, the CJEU concluded in *Kadi II* that international obligations cannot prevail over the constitutional principles of EU Treaties, including respect for fundamental rights which is a precondition for the lawfulness of EU measures.[37] Neither can measures adopted by the Member States for the purpose of maintaining peace and international security or international agreements concluded before accession to the EU be given precedence under Articles 347 and 351 TFEU at the expense of the protection of fundamental rights by the EU.[38] The main thrust of the CJEU's autonomy argument in *Kadi* was to uphold the Union's standard of protection of fundamental rights and not so much the jurisdiction of the CJEU.[39] The latter aspect has, however, been of key importance in a handful of other cases.

Most frequently, the Union courts deal with the interaction between EU and international law in cases that concern the interpretation of EU or national rules, including EU law of international law origin, in the light of international law. The latter category includes international agreements concluded by the EU, or by the Member States in instances where the EU as an international organization cannot accede to an international instrument in its field of competence due to restrictions imposed by the instrument itself. In *Cipra and Kvasnicka*, for example, the CJEU examined its own jurisdiction to interpret the European Agreement concerning

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34 Case T-315/01 *Kadi* EU:T:2005:332, paras 181–184; Case T-306/01 *Yusuf and Al Barakaat* EU:T:2005:331, paras 231–234.

35 Case T-315/01 *Kadi, supra* n. 34, paras 185–190; Case T-306/01 *Yusuf and Al Barakaat, supra* n. 34, paras 235–240.

36 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* EU:C:2008:461.

37 *Ibid.,* paras 282 and 285; Case 5/88 *Wachauf* EU:C:1989:321, para. 19.

38 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat, supra* n. 36, paras 302–304.

39 Klamert, *supra* n. 9, at 829.

the Work of Crews of Vehicles engaged in International Road Transport (the AETR Agreement).[40] The AETR Agreement was concluded by the EU Member States only and not by the European Economic Community (EEC) although it covers a field of competence shared between the EU and the Member States. At the time of initial negotiations, the EEC had not yet legislated in the field.[41] With the adoption of Regulation No 543/69 on the harmonization of certain social legislation relating to road transport, the EU assumed exclusive competence over the subject matter of the Agreement.[42] In order not to undermine the ongoing negotiations it was decided by the Commission and the Council that the Member States could proceed to conclude the Agreement.[43] In so doing, however, the Member States acted 'in the interest and on behalf of the [Union]'[44] and the provisions of the AETR Agreement, subsequently, formed part of EU law.[45] As a consequence, the CJEU claimed jurisdiction to interpret the agreement,[46] even though the Union is not formally a party to the agreement. The sphere of EU law in which the CJEU enjoys judicial *Kompetenz-Kompetenz*, thus, exceeds measures officially adopted by the Union's institutions.

Close cooperation between the Member States and the EU is required in the stages of negotiation, conclusion as well as the fulfilment of the commitments entered into on the international plane,[47] including both AETR-type situations and mixed agreements. In fact, it is 'the inherent nature of the system'[48] of the EU to strive for unity in operation and representation by means of cooperation between the Union institutions and the Member States, including their judiciaries. The unity of standards protected in *Kadi II* and the unity of the EU's external action represent two sides of the same coin – protecting the effectiveness of the Union's policies and, eventually, the good functioning of the Treaties and the attainment of the objectives set out therein.

As regards mixed agreements, the CJEU has generally held that since agreements concluded by the Union are acts of EU institutions, it has jurisdiction to rule on their validity and interpretation at least regarding those parts of the agreement that fall within the scope of Union competence.[49] The Member States, in turn, have under Article 216(2) TFEU a duty *vis-à-vis* the EU to ensure the proper

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40 Case C-439/01 *Cipra and Kvasnicka* EU:C:2003:31.
41 Case 22/70 *Commission v. Council (AETR)* EU:C:1971:32, paras 82–83.
42 *Ibid.,* paras 30–31.
43 *Ibid.,* paras 86–87.
44 *Ibid.,* para. 90; Case C-439/01 *Cipra and Kvasnicka, supra* n. 40 para. 23.
45 Case C-439/01 *Cipra and Kvasnicka, supra* n. 40, para. 24.
46 *Ibid.*
47 Opinion 1/94 *WTO* EU:C:1994:384, para. 108.
48 Case C-53/96 *Hermès v. FHT* EU:C:1997:539, Opinion of AG Tesauro, para. 21.
49 *See* e.g. Case 181/73 *Haegeman* EU:C:1974:41, paras 4–6; Case 12/86 *Demirel* EU:C:1987:400, para. 7.

fulfilment of the obligations arising from international agreements concluded by the Union.[50] The question of the CJEU's jurisdiction to interpret those provisions of mixed agreements that deal with issues falling within the sphere of shared competences but on which the EU has not yet legislated first arose in the context of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). In the cases *Hèrmes* and *Dior*, the CJEU found that the jurisdiction to interpret the provisions of the TRIPs Agreement, which was concluded jointly by the EU and the Member States, requires for the purpose of unity uniform interpretation by both the judiciaries of the Member States and of the EU.[51] In order to ensure this uniformity, the CJEU extended its jurisdiction in *Dior* to interpret Article 50 of TRIPs regarding intellectual property law beyond issues of trade mark regulation which fell within the scope of Community competence.[52] The CJEU thereby overstepped the competence boundaries between the EU and the Member States in a mixed agreement without, however, clarifying the exact link between jurisdiction and competences.[53] Finally, in *Merck Genéricos*, the CJEU established that while the Member States' courts have the jurisdiction to interpret those provisions of mixed agreements that fall within their sphere of competence, the assessment on the exact division of competences must for the purposes of ensuring uniformity on the EU level be made by the CJEU.[54] This includes the question of determining whether a provision of a mixed agreement has direct effect; in areas that fall within the Member States' sphere of competence the determination rests with the national courts.[55] By protecting the division of competences laid out in the Treaties and its own role in the Union's institutional set-up, the CJEU shows profound determination to safeguard the unity of the EU legal order, be it from the influence of the Member States or third country counterparts to international agreements.

Other situations in which the interaction between international law and EU law can give rise to conflicts concern the interpretation of EU law by international actors. An example is provided by the *MOX Plant* case,[56] which concerned a non-EU judiciary – an international arbitral tribunal – being called upon by an EU Member State to rule on the application and interpretation of EU law. *MOX Plant* concerned infringement proceedings initiated by the Commission against Ireland. The Irish government had submitted a case against the United Kingdom to an

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50 Case 104/81 *Kupferberg* EU:C:1982:362, para. 2.

51 Case C-53/96 *Hermès v. FHT* EU:C:1998:292, para. 32; Joined Cases C-300/98 and C-392/98 *Dior* EU:C:2000:688, paras 37–38.

52 Joined Cases C-300/98 and C-392/98 *Dior, supra* n. 51, para. 39.

53 Case C-240/09 *Lesoochranárske zoskupenie VLK* EU:C:2010:436, Opinion of AG Sharpston, para. 50.

54 Case C-431/05 *Merck Genéricos* EU:C:2007:496, paras 33–38.

55 Joined Cases C-300/98 and C-392/98 *Dior, supra* n. 51, para. 48; *Ibid.,* para. 34.

56 Case C-459/03 *Commission v. Ireland (MOX Plant)* EU:C:2006:345.

arbitral tribunal established under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic which the EU, too, has concluded. In addition, Ireland submitted a request for provisional measures to the International Tribunal for the Law of the Sea (ITLOS). The arbitral tribunal, recognizing that it would have to rule on matters of EU law including the division of competences between the Union and the Member States and the exclusive jurisdiction of the CJEU, decided to suspend the proceedings and await the CJEU's decision as to its exclusive jurisdiction to adjudicate on the matter.[57]

The CJEU considered that the fact that the Tribunal was to interpret EU law constituted a threat to the autonomy of the EU legal order. This is a step further from *Hèrmes, Dior* and *Merck Genericos* in which the CJEU made explicit links between its interpretative monopoly and unity but not with the autonomy of the EU legal order. The legal rules that were the subject of Ireland's submission fell within the scope of EU competence which led to an exclusive jurisdiction of the CJEU to rule on the matter.[58] The CJEU pointed out that the division of competences in the EU legal order between the EU and the Member States cannot be altered by an international agreement as that would adversely affect the autonomy of the EU legal order.[59] The CJEU's judgment was based on Article 344 TFEU pursuant to which the 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 in the Treaties.[60] This rule is closely connected to the duty of sincere cooperation between the Member States under Article 4(3) TEU.[61] In the case at hand, though, a solution to the question of conflicting jurisdictions was provided in the United Nations Convention on the Law of the Sea (UNCLOS) to which both the EU and its Member States are parties. Pursuant to Article 282 UNCLOS, if the parties to the Convention have agreed to submit disputes arising between them to a procedure that results in a binding decision, that procedure shall take precedence over the dispute settlement mechanisms provided by the UNCLOS. The Convention, therefore, pays full respect to the autonomy of the EU legal order in terms of not exercising jurisdiction over EU law which, in *MOX Plant*, concerned both the provisions of an international agreement concluded by the EU and the Member States as well as EU directives. The matter under dispute fell within the competence of the EU by virtue of Ireland relying in its argumentation before the tribunal on EU directives.[62]

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57 *Ibid.*, paras 42–48.
58 *Ibid.,* paras 120–121.
59 *Ibid.,* para. 123.
60 *Ibid.,* para. 123.
61 *Ibid.,* para. 169.
62 *Ibid.,* paras 119–121.

Since the Convention is a mixed agreement and the EU enjoys exclusive competence in the relevant fields, the CJEU deemed the case to be decided on the basis of the EU Treaties, which included the CJEU's exclusive jurisdiction.[63] Ireland was, subsequently, held to have breached its obligations under EU law.[64]

The line of case law discussed above illustrates well the perception of the EU as an autonomous legal order – 'municipal' in the words of Advocate General (AG) Poiares Maduro,[65] yet not as one completely isolated from the international legal regime. Respect for international law is deeply rooted in the EU legal order. However, the CJEU maintains its keenness to protect the many facets of the unity and, thereby, also the autonomy of the legal order by controlling the influence of international law and alongside that its own jurisdiction to interpret and adjudicate EU law. The latter includes, especially, the parts of mixed agreements that fall within the scope of EU's exclusive competence as well as agreements which have been concluded by the Member States acting in the interests of the Union.

The bilateral and multilateral *acquis*-exporting agreements are usually concluded as mixed or exclusively EU agreements and include, for the sake of guaranteeing unity of interpretation, more or less complex institutional mechanisms. All of these aspects can, in the light of the case law discussed above, lead to conflicts between the CJEU safeguarding the effectiveness of the functioning of the Treaties, including its own prerogatives, and the effectiveness of norms transferral by means of international agreements. This pertains especially to the difficulty of designing appropriate judicial mechanisms to ensure the homogeneous interpretation of exported norms while preserving the CJEU's interpretive autonomy.

3 THE IMPLICATIONS OF AUTONOMY FOR THE UNION'S EXTERNAL ACTION

The CJEU's broad view on its own jurisdiction and the requirements for maintaining the uniform interpretation and application of EU law have led to obstacles in the effective pursuit of the Union's foreign policy. Many international agreements to be concluded by the EU may potentially encroach upon the autonomy of the legal order, leaving both the Union negotiators and their third country counterparts in a limbo in search for solutions that would pass the CJEU's rigorous scrutiny.

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63 *Ibid.,* paras 126–127.

64 *Ibid.,* para. 182.

65 Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* EU:C:2008:11, Opinion of AG Poiares Maduro, para. 21.

Whereas the key mechanism for maintaining the effectiveness of EU law is embedded in the EU's supranational principles such as primacy, direct effect and state liability,[66] the safeguards against threats to the autonomy of the EU legal order lie, primarily, in institutional arrangements and the legal rules that ensure its proper functioning.[67] By upholding the authority to determine its institutional structure, the EU is able to preserve its 'independence of action' or, in other words, 'autonomy'.[68] In a sequence of case law, the CJEU has examined the compatibility with the principle of autonomy of a number of institutional arrangements in international agreements. Many of these cases are opinions provided by the CJEU under Article 218(11) TFEU, several of which directly concern agreements that export EU *acquis* to third countries. Characteristic to the latter agreements is that in order to achieve the aims of norms export – not infrequently homogeneity with the internal market[69] –, the agreements must provide supporting institutional structures to enable a swift and precise transferral of new *acquis* from the EU to the third country contracting parties. Suitable institutional arrangements, however, often give rise to conflicts with the principle of autonomy.

The conditions for deeming an institutional framework established by an international agreement compatible with the EU legal order can be divided into two distinct groups that have been summarized in Opinion 1/00.[70] The catalogue is broad but follows the essential aspects outlined by the CJEU in the case law discussed in the previous section. The first requirement of preserving the autonomy of the EU legal order demands that the essential character of the powers and the institutions of the EU remain unaffected so as not to necessitate an amendment of the Treaties. The second requirement stipulates that the EU and its institutions maintain their independence of interpreting EU law – interpretive autonomy – in the exercise of their internal powers and not be bound by an interpretation given to identical *acquis* in the context of an international agreement rather than the EU Treaties.

Maintaining the essential character of the EU's powers and institutions concerns a number of different issues: firstly, the relationship between the Member States in the context of the EU including the 'mutual trust' between them; secondly, the idea that the objectives of the EU must be obtained by 'common

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66 D. Leczykiewicz, *Effectiveness of EU Law Before National Courts: Direct Effect, Effective Judicial Protection, and State Liability*, in *Oxford Handbook of European Union* Law 212–248 (A. Arnull & D. Chalmers eds, Oxford University Press 2015).

67 *See* Opinion 2/13 *ECHR II, supra* n. 1, para. 158.

68 Opinion 1/76 *European Laying-up Fund for Inland Waterway Vessels* EU:C:1977:63, para. 12. In the original French text the 'independence of action' is referred to as '*l'autonomie d'action*'.

69 Article 1(1) EEA Agreement; Art. 2 Energy Community Treaty; Art. 1(1) ECAA Agreement; Art. 1(1) Transport Community Treaty.

70 Opinion 1/00 *ECAA* EU:C:2002:231, paras 12–13.

action' of the Member States; and, thirdly, the understanding that the EU institutions may not transfer to 'non-EU organisms' powers of the Union. The fourth category of essential elements in safeguarding autonomy relates to the nature of the powers of the EU and of its institutions as conceived in the Treaties. On the one hand, the powers of the Commission may be extended to third countries provided that the nature of the powers remains intact; on the other, EU representatives cannot be replaced by those of the Member States in the organs of international organizations; and, moreover, the 'nature of the function of the CJEU' requires that its judgments be binding. The fifth and sixth aspect concern the role of national courts as 'ordinary' courts in the 'complete system of legal remedies and procedures', and remedies to individuals following an infringement of EU law by a Member State.

Safeguarding the independence of the Union's institutions when interpreting EU law follows from the basic premise posited in the previous section according to which the EU institutions enjoy interpretive autonomy and the CJEU, in particular, possesses judicial *Kompetenz-Kompetenz*. Interpretive autonomy inevitably entails the exclusive jurisdiction of the EU judiciary to interpret and apply EU law, including the obligation of the Member States under Article 344 TFEU not to submit disputes relating to the interpretation or application of EU law to other methods of adjudication than the one provided in the Treaties. Judicial *Kompetenz-Kompetenz* necessitates the exclusive jurisdiction of the CJEU to delimit the competences between the EU and its Member States and to declare invalid an act of EU institutions under Article 263 TFEU. Interpretive autonomy further requires that the judges of the CJEU maintain 'complete independence' when interpreting EU law. The following sub-sections examine each of these elements in the context of the CJEU's case law.

3.1 Opinion 1/76 European laying-up fund

The very first case to deal with the question of international agreements threatening to distort the institutional system of the EU was Opinion 1/76 on the Draft Agreement establishing a European laying-up fund for inland waterway vessels.[71] The Draft Agreement sought to set up an international organization to regulate inland waterway navigation on the river Rhine. While the CJEU endorsed, generally, the establishment of such an international organization, it contested certain solutions proposed for its institutional design. The Draft Agreement intended to privilege some Member States over others as regards their participation in the organs of the organization. This, according to the CJEU, was to 'alter in a

[71] Opinion 1/76 *European Laying-up Fund for Inland Waterway Vessels, supra* n. 68.

manner inconsistent with the Treaty the relationships between Member States within the context of the Community'.[72] More precisely, pursuant to Recital 2 of the preamble to the EEC Treaty, the objectives of the Community must be obtained by 'common action'. 'Common action' requires the participation of all Member States without even a voluntary exclusion of one or more Member States, as well as that the same participation rules of individual Member States as have been determined by the Treaties in the respective policy field apply to the decision-making procedures of an international agreement.[73] Together these factors constituted, according to the CJEU, 'a surrender of the independence of action of the Community in its external relations' as well as an alteration in the 'internal constitution of the Community' by virtue of a change in the essential elements of the Community structure concerning the powers of the institutions as well as the relationship between the Member States.[74] In turn, these elements conflict with the principles of unity and solidarity in the Community. Today, common action has in the light of the increased use of flexibility mechanisms, especially opt-outs, become accepted as compatible with both the unity and, subsequently, even autonomy of the EU legal order. The absence of one or more Member States in any of those policies or decision-making procedures that are not subject to opt-outs would, on the other hand, still be likely to fail a test of compatibility with the Treaties.

Regarding decision-making procedures, the CJEU considered incompatible with the EEC Treaty provisions of the Draft Agreement that replaced the EEC institutions with the Member States in the organs of the treaty that dealt with matters that fell within the competences of the EEC and restricted, thereby, the powers of the Commission.[75] In the same Opinion, regarding decision-making procedures, the CJEU had to analyse the compatibility with the EEC Treaty of a provision of the draft agreement by which direct applicability would be granted to all decisions of the organs of the fund in the territories of the contracting parties, including the Community. Here, a peculiar question of *Kompetenz-Kompetenz* arose. The question referred to the authority of the EU institutions to transfer to 'non-Community organisms' the powers of the Community and thus subject the Member States to the direct applicability of rules created by this international body outside the decision-making framework of the EEC Treaty.[76] Indeed, a transfer of such powers to another international organization would render the Community

[72] *Ibid.*, para. 10.
[73] *Ibid.*, para. 11(b).
[74] *Ibid.*, para. 12.
[75] *Ibid.*, paras 10–11(a).
[76] *Ibid.*, para. 15.

legal order subject to the authority of another legal order and thus deprive it of its autonomous nature. The situation is different when the international agreement itself specifies the possible direct effect of its provisions.[77] The CJEU, however, refrained from answering the question because according to the provisions of the Draft Agreement the powers to be transferred were of executive nature only and thus not liable to bind the contracting parties, including the Community, to supra-supranational rules.[78]

As concerns the judicial system envisaged by the Draft Agreement in Opinion 1/76, the CJEU considered that including a non-Member State in the legal system of the agreement would preclude the effective legal protection of the rights of individuals.[79] The participation of the judges of the CJEU in the fund tribunal would, according to the Court, prejudice their impartiality in deciding cases brought before the CJEU after the same legal question has already been considered by the fund tribunal in the presence of the same judges and vice versa. Whereas homogeneity would be preserved, the uniformity of interpretation was not considered by the CJEU to outweigh the value of a development of EU law in a manner completely independent of external influences beyond those that the CJEU considers to be compatible with the Treaties.[80] The only acceptable solution from the perspective of the autonomy of the EU legal order would, therefore, be for the judges of the CJEU not to participate in judicial institutions established by international agreements concluded by the Union, at least in situations where the envisaged court or tribunal could potentially be faced with the task of interpreting or applying EU law.

The CJEU recognized the value of the Draft Agreement as an example for future agreements concluded between the EU and/or its Member States and third countries. Its rejection of the proposed institutional structure was, thus, justified to avoid a progressive and irreversible weakening of Union action. All future agreements must, therefore, conform to the requirements pronounced by the CJEU in order to receive a green light in the preliminary opinion procedure.

3.2 Opinion 1/91 EEA I

Some of the issues that arose in Opinion 1/76 recurred in the landmark Opinion 1/91 concerning the compatibility with the Treaties of the draft EEA Agreement.[81] In the Opinion, the CJEU confined its analysis of the compatibility

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77 Case 104/81 *Kupferberg, supra* n. 50, para. 17.
78 Opinion 1/76 *European Laying-up Fund for Inland Waterway Vessels, supra* n. 63, para. 16.
79 *Ibid.,* para. 21.
80 *Ibid.,* para. 22.
81 Opinion 1/91 *EEA I* EU:C:1991:490.

of the draft agreement with the autonomy of the EU legal order to the proposed judicial architecture only. What is remarkable in this Opinion are the explicit references to the notion of autonomy of the EU legal order in the context of international agreements exporting EU *acquis* – a terminological affirmation which the CJEU has maintained in subsequent case law.

The judicial autonomy of the EU legal order, as elaborated in Opinion 1/91, rests on two main premises: Articles 19(1) TEU and 344 TFEU. These provisions assert the exclusive jurisdiction of the EU judiciary to ensure that in the interpretation and application of the Treaties the law is observed, and the obligation of the Member States not to submit EU law disputes to external fora, respectively. The EEA Court envisaged by the Draft EEA Agreement would have been conferred jurisdiction to hear disputes between the contracting parties. Subsequently, the EEA Court would have had to interpret the term 'Contracting Party' in the context of the EEA Agreement and thereby determine who – the EU, the Member States or the EU and the Member States together – were indeed contracting parties in a case brought before the EEA Court. The tasks of the EEA Court would, therefore, have entailed a delimitation of competences between the EU and its Member States that constitutes an interpretation of the Treaties by a judicial body other than the CJEU.[82] The CJEU maintained that the creation of an international court the decisions of which are binding on EU institutions including the CJEU itself is not *per se* contrary to the Treaties.[83] Yet a distinction was made with respect to 'an essential part of the rules – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, *fundamental provisions of the Community legal order*'.[84] A homogeneous interpretation of the exported *acquis* that is identical to EU provisions would, according to the CJEU, add up to an interpretation of EU law itself. In the absence of an obligation on behalf of the EEA Court to provide an interpretation of EEA law that is identical with the interpretations given by the CJEU after the signature of the EEA Agreement, the mechanism for maintaining homogeneity would have threatened the independence of the CJEU to determine the meaning and application of EU rules and thus the 'very foundations' of the EU and the autonomy of the EU legal order.[85]

Interestingly, the CJEU did not consider in this respect its own freedom to deviate from the homogeneity objective in favour of preserving autonomy should a conflict arise between the interpretations given by both itself and the EEA Court.

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82 *Ibid.,* paras 31–35.
83 *Ibid.,* paras 39–40.
84 *Ibid.,* para. 41 (emphasis added).
85 *Ibid.,* paras 44–46.

With this Opinion, the CJEU endeavoured to ensure that the draft EEA Agreement would comply fully with the requirements of the Treaties; and that the autonomy of the EU legal order be safeguarded without propelling the CJEU to breach its own obligations under the EEA Agreement to maintain homogeneity within the EEA legal order. Homogeneity in the EEA was, thus, not sacrificed on the altar of autonomy.

In terms of the composition of the EEA Court, as in Opinion 1/76 the CJEU considered it in Opinion 1/91 incompatible with the concept of autonomy that judges of the CJEU sit in the EEA Court.[86] The CJEU was concerned that its own judges would need to juggle between different methods of interpretation when applying and interpreting identical rules in two different treaty contexts that also feature different objectives as to the depth of integration.[87] According to the CJEU, this task would challenge the 'open minds' and 'complete independence' of the judges when interpreting EU law and thus jeopardize the idea of autonomy as independence from legal sources external to the EU.[88] The CJEU has generally not been averse towards drawing inspiration from public international law or national legal systems for the purpose of interpreting EU law. The problematic aspect here was, however, the CJEU's perception that faced with a situation of multiple loyalties the judges would not be fully independent to interpret EU law solely on the basis of the objectives and context of the EU Treaties.

Finally, the CJEU considered in Opinion 1/91 the compatibility with the Treaties of the system of preliminary rulings under the draft EEA Agreement. The draft Protocol 34 conferred upon the EEA European Free Trade Association (EFTA(EFTA) States' courts a right to make references for a preliminary ruling to the CJEU. In the meantime, each of the contracting parties could determine the extent to which the protocol would apply to the courts and tribunals under their jurisdiction, whether an obligation would be imposed on the highest courts to make a referral, and whether the CJEU's rulings would have binding effect or not.[89] It is not contrary to the Treaties to confer on the CJEU the task to provide preliminary rulings to third country courts on the basis of an international agreement or to allow third countries to decide whether or not to permit their courts or tribunals to make use of the preliminary ruling procedure; it is, however, incompatible with the Treaty structure if in instances where the CJEU has given a preliminary ruling there are no guarantees to ensure its binding force.[90] Pursuant to the CJEU, the lack of a binding force of its preliminary rulings would defeat 'the

[86] *Ibid.,* para. 47.
[87] *Ibid.,* para. 51.
[88] *Ibid.,* paras 52–53.
[89] *Ibid.,* paras 56–58.
[90] *Ibid.,* paras 59–61.

nature of the function of the Court of Justice […] namely that of a court whose judgments are binding'.[91] It is remarkable that the CJEU considered as problematic only the binding effect of the preliminary rulings rather than the lack of a general obligation of the highest courts to request a preliminary ruling as if the latter did not belong to the 'nature of the function of the Court of Justice'. The former aspect concerns the function of the CJEU of not being an advisory body and the latter aspect the function of the procedure that might not guarantee unity if requests for preliminary rulings were kept optional. As a clarification, the CJEU noted that all preliminary rulings, even those given in response to possible requests by the EEA EFTA countries, are binding on the Member States. Yet confusion could arise among Member State courts as to the general effect of preliminary rulings when applying preliminary rulings that are not binding on the courts of the EEA EFTA States that are potentially their direct addressees.[92]

3.3 Opinion 1/92 EEA II

Having struck down the first version of the draft EEA Agreement, the CJEU had the opportunity to reassess the compatibility with the Treaties of its second version in Opinion 1/92.[93] Firstly, the second version of the EEA Agreement no longer envisaged the creation of an EEA Court but an EFTA Court that would only adjudicate on disputes between the EEA EFTA States and in which only judges from the EEA EFTA countries would sit. The concerns raised by the CJEU in the previous Opinion 1/91 were, thus, met. Secondly, the CJEU was given the possibility to be involved in the dispute settlement procedure by giving rulings on the interpretation of those rules contained in the EEA Agreement that are identical to those of the Treaties. Thirdly, the EEA EFTA States were provided an opportunity to decide on whether they wished to receive binding preliminary rulings from the CJEU on the interpretation of the provisions of the EEA Agreement. And finally, there was no longer a requirement for the CJEU to take account of the decisions of other courts.[94] The Union's judicial *Kompetenz-Kompetenz*, interpretive autonomy and the unity of the legal order were, therefore, safeguarded.

Instead of a common EEA Court, the updated EEA Agreement provides for the creation of a political body – the Joint Committee – to track the development of the case law of the CJEU. The CJEU deemed this solution to be compatible

[91] *Ibid.,* para. 61.
[92] *Ibid.,* paras 62–63.
[93] Opinion 1/92 *EEA II* EU:C:1992:189.
[94] *Ibid.,* paras 13–16.

with the Treaties insofar as it does not alter the binding force of the rulings of the CJEU within the EU.[95] It is somewhat peculiar that the CJEU dismissed the previous design that did not alter the effect of the CJEU's rulings within the EU, simply because of a potential confusion among national courts. Since the decisions of the EEA Joint Committee were declared not to affect the case law of the CJEU, the autonomy of the EU legal order was considered thereby to be preserved.[96]

Regarding the Joint Committee, the CJEU established that the only autonomy-conform solution would be to accord binding force to the dispute settlement procedure envisaged in Article 105 EEA Agreement.[97] In addition, the Joint Committee could not in the course of the dispute settlement procedures under either Article 105 or 111 EEA Agreement issue a decision that would render the case law of the CJEU inapplicable on the territory of the non-EFTA contracting parties.[98] The hands of the Joint Committee are, therefore, tied to taking decisions that follow the case law of the CJEU.

The CJEU further affirmed that it was in keeping with the Treaties to confer on the CJEU additional powers only pursuant to the Treaty revision procedures unless the new powers did not alter the 'nature of the function of the Court', such as that the CJEU's judgments have binding force.[99] The new preliminary ruling procedure envisaged by the updated EEA Agreement, however, only concerns the dispute settlement procedure of Article 111(3) EEA Agreement which accords binding force to the interpretations provided by the CJEU and does not, therefore, affect the nature of the function of the CJEU in an adverse manner.[100] The contracting parties also have the possibility to request binding preliminary references from the CJEU.[101] The arbitration procedure, on the other hand, cannot be used when the object of interpretation is the identical *acquis*. This means that EU law will not be given authoritative interpretation by non-EU judicial mechanisms, and that the autonomy of the EU legal order can thus be upheld.[102] The Commission and the Member States' and the EEA EFTA States' governments succeeded in walking a tightrope between arriving at a homogeneity mechanism while maintaining a close relationship between the EU and EEA institutions without compromising the autonomy of the EU. From the perspective of the EU, the balance is about a 'comfortable duality' whereby third countries are given

[95] *Ibid.*, paras 22–23.
[96] *Ibid.*, paras 24 and 29.
[97] *Ibid.*, para. 25.
[98] *Ibid.*, paras 26 and 28–30.
[99] *Ibid.*, paras 32–33.
[100] *Ibid.*, para. 35.
[101] *Ibid.*, para. 37.
[102] *Ibid.*, para. 36.

the opportunity to participate in a common project without, however, deciding on its 'nature, scope, development or authoritative interpretation'.[103]

In addition to the judicial mechanisms, the autonomy of the EU legal order also requires the preservation of other institutional arrangements established by the Treaties to the extent of maintaining the 'nature of the powers of the Community and of its institutions as conceived in the [Treaties]'.[104] The sharing of surveillance tasks in the field of competition between the Commission and the EFTA Surveillance Authority is, according to the CJEU, compatible with the Treaties.[105] All in all, the CJEU deemed the new version of the EEA Agreement to conform to the requirements of the Treaties, especially as concerns the guarantees for preserving the autonomy of the EU legal order.

3.4 Opinion 1/00 ECAA

In the subsequent Opinion 1/00 on the draft Agreement establishing the European Common Aviation Area (ECAA) – also exporting EU *acquis* to third countries –, the CJEU consolidated its previous case law and recapitulated the main requirements on international agreements regarding compatibility with the autonomy of the EU legal order. In the forefront of the compatibility test stand the essential character of the powers of the Community and its institutions and the canons of interpretation of EU law.[106] An alteration of the foundations of the EU would inevitably require an amendment of the Treaties and international agreements cannot be used to circumvent the regular Treaty amendment procedures provided in Article 48 TEU.[107] This was also the reason for the CJEU in Opinion 2/94 to consider the planned accession by the Community to the European Convention on Human Rights (ECHR) incompatible with Community law on institutional as well as substantive grounds owing to the lack of competence of the EU under the now Article 352 TFEU.[108] The CJEU considered that compatibility with the Treaties requires that the institutional solutions of the ECAA either demonstrate a clearer separation between the EU and the non-EU pillars of contracting parties, or that all contracting parties be placed together in one single organization with distinct organs that function parallel to those of the EU, such as in the case of the EFTA.[109]

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[103] A. Magen, *Transformative Engagement through Law: The Acquis Communautaire as an Instrument of EU External Influence*, 9 Eur. J. L. Reform 361, 388 (2007).
[104] Opinion 1/92 *EEA II, supra* n. 93, para. 41.
[105] *Ibid.*, paras 38–42.
[106] Opinion 1/00 *ECAA, supra* n. 70 (n. 73) para. 5.
[107] *Ibid.*
[108] 'Fundamental institutional implications' of 'constitutional significance' would require an amendment of the Treaties: Opinion 2/94 *ECHR I* EU:C:1996:140, paras 30 and 35.
[109] Opinion 1/00 *ECAA, supra* n. 70, para. 6.

Because there is no separate international organization comparable to the EFTA in the field of air transport, the ECAA Agreement provides for a 'single pillar' structure instead of the 'twin pillar' solution opted for in the EEA Agreement.[110] The ECAA does not feature a surveillance body other than the European Commission nor a separate court. Instead, a political organ – the ECAA Joint Committee – is tasked with dispute settlement and the contracting parties have a possibility to request preliminary rulings from the CJEU. The CJEU deemed the extension of the powers of the Commission and the creation of new institutional links with third countries to be compatible with the Treaties insofar as the nature of the powers remains intact and the question mainly concerns the geographic expansion of the power. The draft ECAA Agreement thereby passed the test of compatibility with the Treaties.

A great advantage in terms of autonomy-conform treaty design is the conclusion of an agreement in a field of EU exclusive competence, such as the Energy Community Treaty (EnCT)[111] or the Transport Community Treaty (TCT),[112] which are other notable examples of the EU's *acquis*-exporting agreements. Where only the EU is party to the agreement there is never a need for the treaty organs to interpret the term 'Contracting Party' to the effect of ruling on the division of competences between the EU and its Member States in a given matter.[113] Furthermore, only in the event of mixed agreements or agreements to which the EU is not a party yet the subject matter of which falls within EU competence is there a danger that the Member States could violate Article 344 TFEU.[114] The conclusion of the EnCT and the TCT, therefore, never necessitated an opinion of the CJEU pursuant to Article 218(11) TFEU.

In all of the opinions on agreements exporting the *acquis* the general tone of the CJEU has been protective towards the autonomy of the EU legal order. Differently from the reconciling tenor in Opinion 1/91, however, Opinion 1/00 demonstrates that the CJEU is undoubtedly willing to sacrifice the homogeneity objective of the *acquis*-exporting agreements for the need to preserve the autonomy of the EU legal order. In spite of forming part of the EU legal order as a provision of an international agreement, the homogeneity objectives featured in, for example, the EEA and the ECAA Agreements do not belong to the core mechanisms preserving an effective functioning of the Treaties. The CJEU made clear that it is not bound to pursue a political agenda of expanding a homogeneous internal market beyond the EU but rather assesses the mechanisms put in place for

[110] *Ibid.,* para. 7.
[111] Treaty establishing the Energy Community [2006] OJ L198/18.
[112] Treaty establishing the Transport Community [2017] OJ L278/3.
[113] *Ibid.,* para. 16.
[114] *Ibid.,* para. 17.

that aim from the strict prism of maintaining the autonomy of the EU legal order.[115]

A common feature of the case law discussed in this section as well as *MOX Plant* is that they deal with the interpretation by a non-EU judiciary or body of either EU law or legal rules that mirror EU *acquis*. The CJEU has previously affirmed that it is not as such contrary to the concept of the autonomy of the EU legal order to accept the jurisdiction of an international court or tribunal for the purpose of interpreting rules of international law. A threat to autonomy occurs in cases where an external judiciary is tasked with the interpretation of EU law and, thereby, potentially encroaches upon the CJEU's interpretive autonomy. While the latter can be accepted as a reasonable conclusion, it is nevertheless remarkable that the CJEU stroke down the EEA Court for the reason that the participation of the judges of the CJEU would prevent them from remaining impartial when deciding on cases concerning identically worded provisions in either the EU Treaties or the EEA Agreement. The question of open minds is puzzling considering that the CJEU interprets both the provisions of the EU Treaties and the EEA Agreement and does, thereby, differentiate, where appropriate, between the different objectives of the agreements. The mere fact that the judges of the CJEU actually deal with the interpretation of identical internal market *acquis* in two or more different contexts does not jeopardize the autonomy of the EU legal order. The fact of the 'double-hatting' of the judges, however, does so by virtue of the fact that the judges may encounter difficulties when switching identities between the CJEU and the EEA Court.

A situation involving the autonomy of the EU, slightly different from those discussed above, occurred in *Reynolds v. Commission*.[116] In that case, the CJEU had to rule on the compatibility with the concept of the autonomy of the EU legal order of a civil action that the Commission had brought before a US court against certain American tobacco manufacturers. The applicants submitted that if a US court were to determine the Commission's competence to commence proceedings in a non-Member State for recovery of allegedly unpaid customs duties and VAT this would violate the autonomy of the EU legal order and breach Article 344 TFEU.[117] The CJEU swiftly overruled these arguments and stated that a third country court's decision as to the power of the Commission to bring before it legal proceedings does not bind the EU institutions to a particular interpretation of EU law in exercising their internal powers and, subsequently, does not affect the autonomy of the EU legal order.[118] The criteria for assessing the maintenance of

[115] *See* e.g. *ibid.,* paras 41 and 45.
[116] Case C-131/03 P *Reynolds v. Commission* EU:C:2006:541.
[117] *Ibid.,* paras 97–98.
[118] *Ibid.,* para. 102.

the autonomy of the EU legal order have thus been deveoped in a clear and systematic manner.

3.5 Opinion 1/09 Patents Court

The CJEU's systematic reading of the principle of autonomy continued in the next opinion on the compatibility of a draft international agreement with the Treaties. In Opinion 1/09,[119] the CJEU was requested to assess whether the envisaged agreement setting up a European and Community Patents Court was in conformity with the Treaties and, in particular, the autonomy of the EU legal order. The CJEU recalled that it is in general compatible with EU law to create an international court for the purpose of interpreting the provisions of an international agreement. It is, in fact, part of the autonomy of the EU legal order to be able to voluntarily submit itself to the jurisdiction of an external judiciary.[120] The possibility to set up such a court isconditional upon the determination of whether the judicial mechanism thereby created might violate the essential characteristics of the judicial power of the CJEU. The envisaged Patents Court was to not only interpret an international agreement but also future EU patent legislation and *acquis* in the fields of intellectual property, internal market and competition policy. In addition, the Patents Court would have been able to interpret the provisions of EU law in the light of fundamental rights, general principles of EU law, and even determine the validity of an EU measure.[121]

The Patents Court was not designed to resolve disputes between individuals in the field of EU patent law or to replace the jurisdiction of the CJEU. Rather, its task was to take on the respective responsibilities of the national courts and to, thus, unify patent litigation across the Union. The fact that the national courts would, thereby, be dispossessed of their power to apply and interpret EU law and request preliminary rulings from the CJEU in the fields covered by the agreement – a task assumed by the Patents Court – would, according to the CJEU, deprive the former of their tasks as 'ordinary' courts. This would, in turn, jeopardize the foundations of the EU legal system and render the envisaged Patents Court system incompatible with the Treaties.[122] The 'very nature of EU law' would be adversely affected by an alteration of the complete system of legal remedies and procedures for reviewing the validity of EU measures that includes both the Member States' courts and the EU judiciary without a due revision of the

[119] Opinion 1/09 *Patents Court* EU:C:2011:123.
[120] *Ibid.,* para. 74.
[121] *Ibid.,* para. 78.
[122] *Ibid.,* paras 80, 85 and 89.

Treaties.[123] The autonomy of the EU legal order does, therefore, reach beyond EU law and EU institutions to include also the functions of the Member States' institutions in the general institutional framework of the Union that contribute to upholding the unity and effectiveness of the EU legal order.

A further shortcoming of the Patents Court system was the fact that in the EU legal system individual rights are protected by the obligation of the Member States to remedy damages incurred by individuals as a result of an infringement of EU law by the Member States including, under specific circumstances, the national judiciaries. Since the Patents Court could not be subjected to infringement proceedings under Articles 258–260 TFEU nor could its decisions give ground to financial liability on behalf of the Member States, the nature of EU law was considered to be altered to the extent incompatible with the provisions of the Treaties.[124] All in all, the CJEU did not accept the proposed institutional format nor the treatment of the foundational principles of EU law, both contributing to the effectiveness of the legal order, in the draft Patents Court agreement.

The Benelux Court under scrutiny in *Parfums Christian Dior*[125] was, however, deemed by the CJEU to be compatible with the Treaties because of its position within the judicial system of the EU and it, therefore, being subject to the judicial review mechanisms of the Treaties.[126] Proceedings before the Benelux Court form part of the proceedings before national courts and do not deprive the national courts of their powers to interact with the CJEU by virtue of the preliminary ruling procedure. Also, the Benelux Court itself is to be regarded as part of the national judicial systems to the extent that it serves to provide a common interpretation to a set of rules common to the Benelux countries.[127]

3.6 Opinion 2/13 ECHR II

The most widely contested of the CJEU's opinions is undoubtedly Opinion 2/13 on the EU's accession to the ECHR.[128] Following the first failed attempt in 1994 to design an agreement of the EU's accession to the ECHR,[129] the new Draft Agreement was drawn up in hope that the substantive shortcomings impeding the conclusion of the first agreement had been remedied by Article 6(2) TEU and that the new Draft Agreement would, therefore, be accepted by the CJEU. Both

[123] *Ibid.*, paras 70 and 85; citing Case C-50/00 P *Unión de Pequeños Agricultores* EU:C:2002:462, para. 40.
[124] Opinion 1/09 *Patents Court, supra* n. 117, paras 86–89.
[125] Case C-337/95 *Parfums Christian Dior* EU:C:1997:517.
[126] Opinion 1/09 *Patents Court, supra* n. 117, para. 81.
[127] Case C-337/95 *Parfums Christian Dior, supra* n. 123, paras 21–23; Case C-196/09 *Miles and Others* EU:C:2011:388, para. 41.
[128] Opinion 2/13 *ECHR II, supra* n. 1.
[129] Opinion 2/94 *ECHR I, supra* n. 108.

Article 6(2) and Protocol No 8 TEU as well as the Declaration on Article 6(2) annexed to the TEU stipulate that the EU's accession to the ECHR must preserve the 'specific characteristics of the EU'[130] pertaining both to its 'constitutional structure' and the 'institutional framework'.[131] The accession may, thus, not affect the Union's competences, the powers of the institutions or the relationship between the Member States in relation to the ECHR, nor infringe Article 344 TFEU.[132] Unexpectedly to many observers,[133] the CJEU, however, refuted the compatibility of the Draft Accession Agreement with the Treaties on a number of different reasons pertaining to the preservation of the specific characteristics and the autonomy of the EU legal order.

The CJEU first contended that Article 53 ECHR that allows the Member States to lay down higher standards of fundamental rights protection requires coordination with Article 53 of the EU Charter in order for the Member States not to introduce standards higher than necessary under the Charter and for the primacy, unity and effectiveness of EU law to be maintained.[134] Secondly, the CJEU found that in accordance with the principle of 'mutual trust', the Member States especially in the field of the Area of Freedom, Security and Justice may not, other than in exceptional circumstances, deem other Member States to breach EU law including fundamental rights and not, therefore, control the other Member States' performance in that regard.[135] The fact that the envisaged agreement allowed for the Member States to check on each other's performance record in protecting fundamental rights was considered by the CJEU to undermine both the 'underlying balance of the EU' as well as the autonomy of the EU legal order.[136] Both instances would threaten the effective and uniform application of EU law. In order for the 'self-referential' character of the EU legal order to be upheld, however, any control over compliance with fundamental rights can only be undertaken by the Union itself in accordance with EU-internal standards.

As a third aspect, the CJEU pointed out the possibility of the Member States under Protocol 16 of the ECHR to refer to the European Court of Human Rights (ECtHR) requests for advisory opinions on the interpretation and application of the Convention. At the same time, upon the EU's accession to the ECHR, the Convention would become an inherent part of EU law and its interpretation would fall within the jurisdiction of the CJEU. Insofar as the Draft Agreement

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130 Article. 1, Protocol No 8.
131 Opinion 2/13 *ECHR II, supra* n. 1, para. 165.
132 Articles 2 and 3, Protocol No 8.
133 *See supra* n. 2.
134 Opinion 2/13 *ECHR II, supra* n. 1, para. 189. *See also* Case C-399/11 *Melloni* EU:C:2013:107, paras 56–60.
135 Opinion 2/13 *ECHR II, supra* n. 1, paras 191–192.
136 *Ibid.,* para. 194.

did not regulate the relationship between the EU's preliminary ruling procedure and the advisory opinion procedure under Protocol 16 ECHR the latter would jeopardize the autonomy and the effectiveness of the preliminary ruling procedure, which is 'a keystone of the judicial system' of the EU, insofar as the Member States could possibly circumvent it via a procedure for the prior involvement of the CJEU.[137]

The connection between autonomy and the preliminary ruling procedure was again highlighted in *Achmea*.[138] The case concerned an arbitration clause in the bilateral investment treaty (BIT) in force between the Netherlands and Slovakia. Pursuant to Article 8 of the BIT, the parties may submit disputes arising from the subject matter of the BIT to an arbitral tribunal. In the case at hand, Germany was chosen as the place of arbitration. The CJEU was called upon by the German Federal Court of Justice to provide a preliminary ruling on whether it is lawful under the Articles 18, 267 and 344 TFEU to submit disputes arising from an 'intra-EU BIT' to arbitration. The CJEU's judgment was negative. Contrary to the Benelux Court, the BIT tribunal was not integrated in the Union's judicial system and fell thereby outside of the preliminary ruling system.[139] The tribunal's interpretation and application of EU law could therefore lead to a fragmentation of EU law and undermine its effectiveness by means of the CJEU losing its interpretive autonomy. The uniform interpretation of EU law, including the maintenance of the particular nature of EU law which is ensured by the preliminary ruling procedure, is a manifestation of the mutual trust between the Member States.[140] The principle of sincere cooperation obliges the Member States to ensure that uniform interpretation is given to EU law across the Union. A lack of mutual trust, therefore, leads to a breach of the principle of sincere cooperation and, hence, negatively affects the autonomy of the EU legal order.[141]

In Opinion 1/17, the anticipated follow-up to *Achmea*, the CJEU was called upon to review the compatibility with the Treaties and, especially, the principle of autonomy, of the envisaged Comprehensive Economic and Trade Agreement between Canada, of the one part, and the EU and its Member States, of the other part (CETA).[142] The CJEU's scrutiny focused on the whether it itself would be able to maintain the exclusive jurisdiction to give definitive interpretations of EU law in the light of the planned investor-state dispute settlement featuring a CETA Tribunal, an Appellate Tribunal and, eventually, a multilateral investment

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137 *Ibid.,* paras 197–199.
138 Case C-284/16 *Achmea* EU:C:2018:158.
139 *Ibid.,* para. 49.
140 Opinion 2/13 *ECHR II, supra* n. 1, para. 168; Case C-284/16 *Achmea, supra* n. 136, paras 34 and 58.
141 Case C-284/16 *Achmea, supra* n. 136, para. 59.
142 [2017] OJ L11/23.

Tribunal. The CJEU was to answer questions on, firstly, whether the envisaged tribunals would be conferred any powers to interpret or apply EU law other than with regard to the rules and principles of international law; and, secondly, whether the tribunals might have the power to issue awards which, falling short of interpreting or applying EU rules, could curtail the possibilities of the EU's institutions to act within the Union's 'unique' constitutional framework.[143]

The Court pointed out the reciprocal nature of the CETA and the Union's need to maintain an international presence as grounds for accepting the Union's submission to the jurisdiction of dispute settlement bodies, which do not, however, directly interpret or apply EU law nor restrict the EU's institutions' operation in the EU's constitutional framework.[144] On the other hand, any interpretation of the CETA will be undertaken in accordance with the rules of public international law rather than EU law.[145] In the course of 'examining' (but not 'interpreting') the compatibility of EU or host State measures with the CETA, the latter must be treated 'as a matter of fact' and the CETA Tribunal must follow the Court's interpretation of relevant EU law as the 'prevailing interpretation' without binding either the Court, the other EU institutions or the Member States to a particular interpretation of EU law.[146]

It was also examined whether the CETA tribunals might be able to call into question the level of protection of a public interest in EU law in the course of reviewing possible restrictions to an investor's right to conduct business under the CETA.[147] The tribunals would thereby execute a task which under Article 19 TEU is conferred upon the Court to be carried out in accordance with the Treaties, the Charter and the general principles of EU law.[148] The autonomous operation of the EU's institutions would be impaired if the Union or the Member States would be bound to amend or repeal legislation following a decision of a judicial body outside the EU's judicial system.[149] However, the Court considered that no such authority had been granted to the CETA tribunals, thus rendering the agreement compatible with the principle of autonomy and, specifically, its regulatory dimension.[150]

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143 Opinion 1/17 *CETA* EU:C:2019:341, paras 110 and 119.
144 *Ibid.,* para. 117–118.
145 *Ibid.,* para. 122.
146 *Ibid.,* paras 130–131.
147 Such as public order or public safety, the protection of public morals, the protection of health and life of humans and animals, the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection and fundamental rights.
148 Opinion 1/17 *CETA, supra* n. 141, para. 151.
149 *Ibid.,* para. 150.
150 *See* P. Koutrakos, *More on Autonomy – Opinion 1/17 (CETA)*, 44 Eur. L. Rev. 293 (2019).

Reverting back to Opinion 2/13, the CJEU, fourthly, found that its exclusive jurisdiction under Article 344 TFEU – and thereby its interpretive autonomy – was not protected by the Draft Agreement. The latter did not give explicit precedence to the EU dispute settlement procedure over the corresponding procedure under the ECHR in disputes concerning EU law.[151] This is different from the situation in *MOX Plant* where the convention at issue provided a clear rule on the priority of the EU dispute settlement procedures over those specified in the convention.[152] The essence of Article 344 TFEU is that it 'precludes any prior or subsequent external control'[153] and even a mere possibility to refer a case to a non-EU judiciary.[154]

Fifthly, the CJEU scrutinized the co-respondent mechanism under the Draft Accession Agreement and found that it infringed EU law in several ways. Pursuant to the Draft Agreement, the ECtHR would have the possibility to decide on the 'plausibility' of the request from either the Member States or the EU to become a co-respondent in a case before the ECtHR. This would enable the latter court to rule on matters concerning EU law such as the division of competences between the EU and the Member States.[155] The ECtHR would also be able to decide on whether the co-respondents are jointly responsible for a violation, including an assessment of the allocation of powers between the EU and its Member States and the corresponding attribution of responsibility.[156] The latter assessment falls within the sole jurisdiction of the CJEU,[157] and is essential to uphold the autonomous interpretation of EU law by the latter.

As a sixth point, the Draft Accession Agreement provided for a procedure for the prior involvement of the EU which the CJEU considered, indeed, to preserve the competences of the Union and the powers of its institutions including the CJEU.[158] This question concerned the determination of whether a case before the ECtHR had already been decided by the 'competent EU institution whose decision should bind the ECtHR'.[159] The safeguards provided by the draft agreement were not, however, regarded as sufficient to ensure that the ECtHR would never assess the case law of the CJEU and were, thus, deemed insufficient from the perspective of preserving the special characteristics of the EU legal order.[160]

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151 Opinion 2/13 *ECHR II, supra* n. 1, paras 205–208.
152 *Ibid.,* para. 205.
153 *Ibid.,* para. 210.
154 *Ibid.,* para. 212.
155 *Ibid.,* paras 220–225.
156 *Ibid.,* paras 229–231.
157 *Ibid.,* para. 234.
158 *Ibid.,* para. 237.
159 *Ibid.,* para. 238.
160 *Ibid.,* paras 239–240.

Furthermore, the CJEU found that it should be able not only to assess the validity of the provisions that concern the rights contained in the ECHR in EU secondary law and to interpret primary law but to also interpret EU secondary law.[161] The Draft Accession Agreement did not provide for the latter. The impossibility to interpret EU secondary law would, however, defeat the CJEU's exclusive jurisdiction to give definitive interpretations of EU law.[162]

Finally, the CJEU considered it problematic that the draft accession agreement would give the ECtHR the possibility to review the legality of certain Common Foreign and Security Policy (CFSP) acts in the light of the fundamental rights protected by the ECHR. Article 275 TFEU limits the CJEU's jurisdiction in the area of CFSP to monitoring compliance with Article 40 TEU that delimits CFSP and other EU policies, and reviewing the legality of Council decisions that impose restrictive measures against natural or legal persons pursuant to Article 263 TFEU. The CJEU, therefore, cannot exercise a similar fundamental rights review over at least some of the acts of CFSP as would be granted to the ECtHR.[163] The CJEU deemed this, with reference to Opinion 1/09, to conflict with the idea that the jurisdiction of the CJEU in the field of EU law may not be transferred on an exclusive basis to an international court that does not belong to the EU's institutional and judicial framework,[164] regardless of whether the jurisdiction in the case of the CFSP ever belonged to the CJEU. Rather, the object of protection was the character of the CFSP as a policy area that remains outside supranational judicial control. Even if all of the previous arguments of the CJEU can be found justified in the light of previous case law the final statement definitely makes one question the CJEU's selfish attitude towards its own role in the international community of courts. From the perspective of the CFSP belonging into the same EU legal order as other policies and the ECtHR having become an EU constitutional court by gaining jurisdiction over CFSP matters, however, the CJEU's approach may receive more sympathizers.[165] The question that remains is whether the CJEU's stance towards CFSP does concern the autonomy of the EU legal order at all, or simply one of its 'special characteristics'.

In Opinion 2/13 the CJEU surely takes its zealousness in protecting the EU legal order to a new level. On the one hand, this owes to the fact that in the heart of the Union's accession to the ECHR lies the cooperation between two large judicial edifices.[166] The judgments of the ECtHR have much larger resonance

[161] *Ibid.,* paras 242–245.
[162] *Ibid.,* para. 246.
[163] *Ibid.,* para. 254.
[164] *Ibid.,* para. 256.
[165] Halberstam, *supra* n. 1, at141–142.
[166] For a thorough account of judicial dialogue between the two courts *see* Eeckhout, *supra* n. 2.

than those of the EFTA Court or the ECAA Joint Committee which may well lead to the CJEU perceiving a greater amount of threat to the Treaties arising from the Accession Agreement than from the other agreements discussed. A thorough look at case law has, however, demonstrated that the CJEU has always been meticulous when issuing opinions under Article 218(11) TFEU and that over-protection is not a novel feature in its approach to interpreting the Treaties. On the other hand, Opinion 2/13 was not given solely on the basis of the concept of autonomy but also following the explicit requirement in Protocol No 8 to safeguard the 'specific characteristics' of the EU and EU law. Without getting entangled in the terminological variety employed by the CJEU throughout the autonomy jurisprudence, the safeguarding of 'specific characteristics' of the EU legal order is a beast created by the Lisbon Treaty makers and used extensively in Opinion 2/13 owing to the formulation in Protocol No 8.

The CJEU's definition of autonomy, or the way in which the concept has been substantiated over time, has not been systematized to detail. In case law, a number of features have been identified in international agreements as being contrary to the concept of autonomy with the purpose of securing unity and effectiveness of the Union's legal order, especially as concerns the CJEU's interpretive autonomy. Yet it is doubtful whether the interpretation of the concept of autonomy has been broadened to subsume all of the 'specific' and 'essential' characteristics of the EU legal order.[167] The CJEU has refrained from explicitly categorizing all of the autonomy-threatening features of international agreements as the 'essential elements' of the EU legal order. A clear thread is visible in the autonomy case law along the lines of unity and effectiveness, yet there is no concrete definition of autonomy to resort to when assessing the reasonableness of the CJEU's application of the concept of autonomy, and none that the CJEU would consider itself bound by.

Furthermore, In Opinion 2/13 the CJEU does not conclude that the 'specific characteristics' of the EU and its legal order, which are surely many, are the same as the autonomy of the legal order.[168] In fact, the CJEU's treatment of the different shortcomings of the draft Accession Agreement has been re-ordered in the concluding paragraph of the Opinion: only the coordination between Article 53 of the ECHR and Article 53 of the Charter, the principle of Member States' mutual trust under EU law and the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure have been considered explicitly to fall within the category of provisions likely to affect negatively the 'the specific

[167] *See* in comparison, C. Contartese, *supra* n. 8, at 1628.

[168] 'In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, […]': Opinion 2/13 *ECHR II, supra* n. 1, para. 174.

characteristics and the autonomy of EU law'.[169] While in the analysis of the other elements the CJEU has also occasionally referred to autonomy, its careful approach not to refer to the term in excess is notable. 'Autonomy' is not employed synonymously with the 'specific characteristics' of the EU and EU law; rather, the latter concept subsumes the former. All in all, although broad, vague and controversial as a concept, the autonomy of the EU legal order does not deserve to take the blame for all questionable choices made by the CJEU in Opinion 2/13.

Opinion 2/13 provides further instruction on how the CJEU interprets the concept of autonomy and must be taken account of by the EU when concluding international agreements.[170] Yet its implications for exporting Union *acquis* to third countries should not be overstated. Existing frameworks provide plenty of examples of 'approved' institutional structures to support the expansion of the Union's normative influence and are the probable benchmarks for similar arrangements concluded in the future. The establishment and judicialization of a post-Brexit relationship, which will be another likely example of the Union establishing close trade relations with a third country largely based on EU *acquis* is more likely to deviate from existing examples. It is not, however, expected to ever reach the profundity of judicial dialogue that would accompany a possible accession of the EU to the ECHR and to, thus, become a second act in the drama of Opinion 2/13.

4 CONCLUSION

In the context of flexibility in EU integration, the multiplicity of the types of membership in the Union can be justified as a means to safeguard the 'integrity and autonomy' of the EU legal order.[171] Flexible integration does, nonetheless, demand that the unconventional form of membership be identified as such and that the multiplication of membership patterns refrain from effects detrimental the 'core' of the EU legal order. In terms of the interaction between the EU and third countries or international organizations, the integrity and autonomy claim is ever so strong. The case law of the CJEU convincingly demonstrates that safeguarding the autonomy of the EU legal order is one of the key tasks of its judiciary.

It should not, however, be taken for granted that the CJEU's autonomy-protecting case law proceeds from its 'selfish' ambitions.[172] The CJEU's restrictive

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[169] *Ibid.,* para. 258.

[170] *See* Eeckhout, *supra* n. 2, at 963.

[171] M. Cremona, *The 'Dynamic and Homogeneous' EEA: Byzantine Structures and Variable Geometry* 19 Eur. L. Rev. 508, 525 (1994).

[172] *See also* A. Lazowski & R. A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 German L. J. 179, 211 (2015); Odermatt, *supra* n. 2, at 303; Contartese, n. 8, at 1669.

stance is well justified in the light of its role in the EU legal order as an authoritative interpreter and engine for the development of legal doctrines, despite occasional challenges from the Member States. Furthermore, the objective of the principle of autonomy is to maintain an independent operation of EU law and the institutions that support this task. Autonomy serves the broad purpose of uniform application and effectiveness of EU law across the territory of the Union in order to enable the Union to achieve the objectives laid out in the Treaties. Using autonomy as a tool to maintain unity, the CJEU is tasked with protecting the Union from excessive outside influence but also with balancing the centrifugal forces that threaten to tear apart the foundations of the Union from the inside. These forces are not necessarily represented by international agreements concluded between the EU and third countries but find, first and foremost, expression in the internal developments and challenges faced by the Union, including the Coronavirus disease 2019 (COVID-19) pandemic, Brexit, the recent and more distant migration and financial crises and ongoing debates about the rule of law and European values.[173] A consistent and stringent application of the concept of autonomy is indispensable for protecting its instrumental value.[174]

Narrowing the discussion down to the question of transferring EU *acquis* beyond the Union's borders, the core of the debate pertains to the struggle between the autonomy of the Union's legal order and the Union's global influence. The case law analysed demonstrates that the CJEU is particularly (yet not exclusively) assertive in reviewing the compatibility with the autonomy of the EU legal order of those agreements that seek to export EU *acquis* to third countries and set up institutional frameworks for maintaining homogeneity in the internal market thus extended. A more lenient approach to autonomy would enable the Union to more efficiently build partnerships, set up international organizations and bodies as well as to participate in their activities. Specifically, it would enable the Union to establish strong institutions that can uphold the uniformity of EU law applied within and outside the Union and reinforce the effectiveness of the adoption and implementation of the Union's norms in third countries. Ultimately, this would increase the EU's influence as a global and regional actor, especially in its closest neighbourhood where the Union has long-standing experience in using the internal market as a vehicle for integration. This approach can, however, be put into question by the many difficulties currently facing EU integration. While there are obvious benefits for the Union's external action should the CJEU alleviate its strong stance on protecting autonomy, it is in the foreseeable future contestable

[173] *See* e.g. '*Editorial Comments: 2019 Shaping up as a Challenging Year for the Union, not Least as a Community of Values,* 56 Com. Mkt. L. Rev. 3 (209).

[174] Or, in fact, the very existence of the EU: *see* C. Eckes, *The Autonomy of the EU Legal Order*, 4 Europe & World: A L. Rev. 1, 9 (2020).

whether the EU could take on the challenge and risk a loss of effectiveness of its legal order and a further fragmentation of its policies.

The above analysis suggests that the CJEU's rationales behind safeguarding the autonomy of the EU's legal order perforce place strong limitations on the Union's possibilities to enter into international agreements. Nevertheless, whilst the CJEU is more prone to preserve the autonomy of the EU legal order than to further the homogeneity objectives in international agreements, this does not render the aims of exporting EU *acquis* beyond the Union's borders and thereby creating an extended EU legal space a mission impossible. By and large, the problems of conflicts with autonomy can be obviated if in the institutional structures of the agreements the EU and the non-EU pillars are clearly separated, such as in the case of the EnCT or, on the contrary, where one single organization is created for all parties with distinct organs that function in parallel to those of the EU, such as in the EEA Agreement. The final point relates to the relationship between autonomy and the current Treaty framework. The CJEU has repeatedly established in its case law on autonomy that certain institutional designs are incompatible with the current provisions of the Treaties and that the Treaty amendment provisions cannot be replaced by concluding an international agreement. Virtually any institutional framework set up by an international agreement exporting the *acquis* would become compatible with the Treaties and, subsequently, the requirement of autonomy of the EU legal order if the Treaties were amended accordingly. This solution is, however, rather unlikely to be made use of in the fear of thereby opening Pandora's box.[175]

[175] T. Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order,* 48 Com. Mkt. L. Rev. 1025, 1049 (2011).