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New Perspectives for the EU Accession to the ECHR: The attempt to address the CJEU concerns

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INTRODUCTION

In September 2020, the Secretary General of the Council of Europe (CoE), Marija Pejcinovic, and the European Commission's Vice President for Values and Transparency, Vera Jourova, issued a joint statement concerning the resumption of negotiations for the EU's accession to the European Convention of Human Rights, hereinafter ECHR.

The joint declaration stressed that the EU's accession to the ECHR, which is a legal requirement under the Lisbon Treaty, will further strengthen human rights protection in Europe. It notes that the accession will help guarantee coherence and consistency between EU law and the ECHR system. It will also ensure that the EU is subjected to the same international oversight on human rights as its 27 Member States and 20 other Council of Europe countries that are not members of the EU. It also points to the fact that the accession will allow citizens to challenge the EU's actions before the European Court of Human Rights, from now on ECtHR, and that the Eu will be able to join its Member States in proceedings at the ECtHR concerning alleged violations resulting from EU Law.

This follows the letter sent on 31 October 2019 by the President and the Vice-President of the Commission to the Secretary General of the Council of Europe stating that the EU was ready to resume negotiations on its accession to the ECHR. At its 92nd meeting (26-29 November 2019), the Council of Europe's Steering Committee for Human Rights (CDDH) proposed a series of arrangements for the continuation of the negotiations within an ad hoc group composed of representatives of the 47 Council of Europe Member States and a representative of the EU.

On 15 January 2020, the Ministers Deputies approved the continuation of the ad hoc terms of reference of the CDDH to finalize, as a matter of priority, in cooperation with the representatives of the EU, the legal instruments setting out the modalities of accession.[1]

In light of the above, it seems rather about time one revisited the concerns raised by the Court of Justice of the European Union in its Opinion 2/13 regarding the accession of the EU to the ECHR. To the author of the present, one must not take for granted that further enhancement of fundamental rights protection will occur in the case of accession, as *real* procedural and substantive impediments seem to arise in a post-

[1] EU Law live, *EU Accession to the ECHR: Council of Europe and European Commission issue joint declaration*, 29 September 2020, https://eulawlive.com/eu-accession-to-the-echr-council-of-europe-and-european-commission-issue-joint-declaration/

accession era, which could potentially ultimately lead to a *somewhat* legally uncertain judicial system for the individual.

On this note, a rather thorough examination of the CJEU concerns must occur in light of the resumption of negotiations and a new perspective of accession. Opinion 2/13 essentially represents a mandatory wish list for issues to solve – if they can be solved- the negotiation committee has its work cut out. The present paper attempts to revisit the concerns raised by the CJEU and provide sensible solutions in the case they can be found. These issues can be summed up to six main points: the co-respondent mechanism and the prior involvement of the Court of Justice of the European Union, Article 344 of the Treaty on the Functioning of the European Union, and the exclusivity of the EU adjudication of Member State disputes, Protocol 16 on the optional Advisory opinion procedure, the puzzling nature of both articles 53s of the Charter of Fundamental Rights of the EU and the European Convention of Human Rights and the problem of higher standards, the problem of mutual trust and finally jurisdiction in the Common Foreign Security Policy. [2]

Those issues – which essentially constitute the impediments to accession so far- and are being the focus of the Commission at the moment so as to be resolved will be analyzed in the second part of this paper. The first part will attempt to provide a general overview of the advisory jurisdiction of the Court of Justice and its importance to the judicial system – thus having been uplifted to a binding opinion, not allowing for the Institutions to act in case a negative opinion is issued. Furthermore, it shall dig into the particularities of the two judicial systems and analyze the characteristics that make them unique, as well as their interaction with the Bosphorus ruling in the spotlight. It will also attempt to portray a historical/institutional evolution that leads to the attempt of accession, making a remark to article 6 of the Treaty on the European Union. It will evaluate the Court's objection from a constitutional law perspective putting the autonomy of EU law and the absolute necessity of its preservation in the spotlight while going through the implications of acquiring (maybe too many) legal instruments for the protection of fundamental rights, namely the Charter and the ECHR and how this can lead to being counterproductive for their protection. The status of the Draft Accession Agreement for the Accession of the Union to the European Convention of 2013 will be analyzed along with the legal position the Convention will acquire in the EU legal order in the post-accession era.

All of the above are considered necessary for the reader to acquire a general overview of the circumstances so far, the evolutions and the interactions of the two leading European actors in the protection of fundamental rights, as in the opinion of the author of the present, the Union can be seen as evolving dynamically towards a more and more fundamental rights protection system along with being a particular legal order which accommodates the internal market amongst its Member States and acts proactively to

[2] Eva Nanopoulos, "Killing Two Birds with One Stone: The Court of Justice's Opinion on the EU's Accession to the ECHR," Cambridge Law Journal 74, no. 2 (July 2015): 185-188

facilitate common and harmonious cooperation in many fields, namely the Monetary Union and the Area of Freedom, Security and Justice.

PART I

The EU Accession to the ECHR ante portas?

Chapter A

EU vis-à-vis ECHR

I. How did the EU end up protecting fundamental rights in the first place?

It is well known that the establishing treaties of the European Economic Community contained no reference neither to human rights nor other political issues surpassing the territory of Member State policies. On the contrary, the establishing treaties were highly revolving around economic aspects and the establishment of the internal market. One reasonable introductory remark to this paper would therefore be, how exactly did the European construction as we know it now, the European Union, end up being a more or less human rights law organization, in the words of some authors.[3]

The fact that there was no mention of protection of fundamental rights in the establishing treaties did not pose an impediment to the Court of Justice to start constructing and building upon fundamental rights standards applying in the community legal order. It was only reasonable, but also necessary that the European

[3]Korenica, F. (2015) *The EU accession to the ECHR: between Luxembourg's search for autonomy and Strasbourg's credibility on human rights protection*. Cham: Springer. doi: 10.1007/978-3-319-21759-8., page 35 "EU becoming a Human Rights Law Organization: Starting from Nowhere with a *Gouvernment de Juges*"

Judge acknowledged the protection of fundamental rights as many cases were brought before the Court to check upon the compatibility of community acts with fundamental rights.

The biggest step forward in this direction took place with the notorious *Vand Gend en Loos* judgment.[4] Paragraph 2 of the judgement states as follows:

"Independently of the legislation of Member States, Community Law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the Institutions of the Community"[5]

In Vand Gen den Loos, the Court of Justice set the very first foundations of the Union as we know it today. It proclaimed legal personality and it introduced the very notion of direct effect. This was the first, necessary step forwards fundamental right protection. The individual was from now on attributed the right to invoke its rights. This marks the very essence of the particularity of EU law. The individual becomes now subject of EU law.r

Furthermore, the Court makes another fundamental leap towards fundamental right protection, seven years after issuing its judgement in Vand Gend en Loos, in *Stauder*.[6]

According to the judgement, fundamental rights were not only enshrined in community law, but were also supplemented by the "unwritten community law, derived from the general principles of law in force in the Member States." Evidently, further enforcement of the fundamental right protection standards come into play. This time the Court elevates the fundamental right protection standards into principles of Union law. This automatically and reasonably translates into expanded jurisdiction of the Court on judicial protection of the aforementioned rights. Again, one more step forward in more advanced fundamental right protection.

Merely a year passed after Stauder until the Court of Justice displayed its reflexes toward fundamental rights protection, this time in *Internationale Handelgesellschaft.*[7]

"Respect for fundamental rights forms an integral part of the general principles of law protected by the CJEU. The protection of such rights, whilst inspired by the

[4] Judgment of the Court of 5 February 1963.
NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie - Netherlands.
Case 26-62.

[5] Court of Justice of EU, Van Gend en Loos v. the Netherlands, Case 26/62, Judgment, CJEC, p. 2; See also a very wealthy analysis on the main conceptual outcome of this, at: Weiler (1981), pp. 275 et seq

[6] Judgment of the Court of 12 November 1969.
Erich Stauder v City of Ulm - Sozialamt. Reference for a preliminary ruling: Verwaltungsgericht Stuttgart - Germany.
Case 29-69.

[7] Case 11/70 Internationale Handelsgesellschaft (1970) ECR 114

constitutional traditions common to the Member States must be ensured within the framework of the structure and objectives of the Community. In other words, human rights are an obligation for all community institutions without exception"

It becomes evident that the protection of fundamental rights is a task of the community.

The biggest step to fundamental rights protection in the EU and its link to the ECHR, came after Internationale Handelgeselschaft, in *Nold.* [8]

In Nold, the Court essentially consolidated its human right approach. It captured, for the first time, the relationship between human rights protected and enshrined by community law, and human rights deriving from international law, i.e. international treaties. Paragraph 13 of the judgement states as follows:

"*International treaties for the protection of human rights on which the Member States have collaborated or of which are signatories can supply guidelines which should be followed within the framework of community law"*

One could say that the above paragraph could be portrayed to be the first indication of the intention of the European Judge to engage into commitments of respecting international human right law standards and abide by them under the context of international treaties.

"On the other side, Nold simply opened the way for both the emergence of a community human rights order and the ECHR, keeping in mind that the most binding treaty for community member states at that time was the ECHR. To this extent, Nold served as the implicit step wherein the Court designed a soft relationship with the ECHR, thereby expressing willingness to submit to the Member States' tradition as to the protection of human rights from an international perspective."[9]

Rutilli[10] was no late to arrive after Nold. Nold and Rutilli combined, one can trace the first time there were set the foundations by the Court of Justice for the domestic application of the European Convention of Human Rights. Rutilli pointed out that the

[8] Court of Justice of EU, Nold KG v. Commission, Case 4/73 [1974] ECR 491, judgment.

[9] Korenica, F. (2015) *The eu accession to the echr : between luxembourg's search for autonomy and strasbourg's credibility on human rights protection*. Cham: Springer. doi: 10.1007/978-3-319-21759-8., page 43-44

See also in this regard AG Trabucchi's argument, asserting that: 'As emerges from the case law of this Court, the fundamental rights generally recognized by the Member States form an integral part of our Community system, which, by drawing inspiration from the common traditions of the Member States, guarantees respect for these rights within the limits of the powers conferred on the Community and in accordance with the objectives assigned to it.' (Opinion of Advocate-General Trabucchi Delivered On 28 March 1974, P. 513, in Case. 4/73, Nold KG).

[10] Court of Justice of EU, Roland Rutili v. The Minister for the Interior, Case 36/75, Reference for Preliminary Ruling; Defeis (2000–2001), p. 311; See also how the Court started to treat ECHR as inspiration for the growing human rights law: Lenaerts and de Smijter (2001), p. 90/1.

international human rights law standards were not only to bring inspiration but also to be followed.

The timeline of how the European Union became the fundamental rights guardian that it is perceived to be nowadays is very interesting. Just two years after the issuing of Rutilli, a Joint Declaration[11] of the Institutions was issued. In 1977, the European Commission, the European Parliament and the Council proceeded to outline for the first time the importance of fundamental right protection in the community legal order. The joint declaration displayed tantamount importance to the European Convention of Human Rights which it placed within the community human rights spectrum.

Two years after the Joint Declaration was issued, the Court made evident in its judgment in Hauer[12] that it considered the European Convention to be a general principle of community human rights law. As Advocate General Capotorti stated in that case: *ECHR Must be considered to have been incorporated into the Community legal order.*

It seemed about time to the authors of the Single European Act that the fundamental right case law of the Court was codified. Therefore, for the first time, human rights got their mention in the Treaties in 1987. But the Single European Act did not only assert community human rights as constituting community law, but also made special reference to the European Convention in its preamble[13], as more or less a general principle of community law. The Single European Act was followed by the Maastricht Treaty, six years later, which mentioned: *'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'*[14]

The most prominent achievement of the Union in the codification of fundamental rights protected by it, was the Charter of Fundamental Rights of the European Union, which was introduced in 2000 and gained legal effect with the entry into force of the Lisbon Treaty. The Charter, which shall be further analyzed in the following chapters of the present, provides a catalog of fundamental rights which unlike the European Convention of Human Rights not only makes mention of civil and political rights but also economic and social rights. The Charter did not only gain legal effect with the entry into force of the Lisbon Treaty, but it gained the same legal effect as the Treaty, i.e. it was proclaimed primary law according to Article 6 TEU. This alone displays the

[11] Joint Declaration, 27. 4. 77 Official Journal of the European Communities No C 103/1, p. 1

[12] Court of Justice of EU, Hauer v. Land Rheinland-Pfalz, Case 44/79, Judgment of the Court of 13 December 1979, [1979] ECR 3727;

[13] Single European Act, Official Journal of European Communities. N L 169/2, d. 29.06.1987, p. 2

[14] Maastricht Treaty, Title I, Article F, para. 2, Official Journal of the European Communities, OJ C 191 of 29.07.1992;

tantamount significance that fundamental rights have in the EU legal order. But Article 6 TEU did not only give primary legal effect to the Charter of Fundamental Rights, as we shall see right below…

II. EU's obligation to accede to the ECHR under Article 6 TEU

Article 6 paragraphs 2 and 3 of the Treaty on the Functioning of the European Union:

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

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

This is the proclamation of the Lisbon Treaty on the accession of the Union to the European Convention of Human Rights. Accession becomes an obligation. This was the will of the Member States displayed at their intergovernmental convention in Lisbon. Why did the Member States include such a provision in the Lisbon Treaty? What was the necessity for that? In 1994 the Court of Justice was asked of its opinion on the European Union acceding to the ECHR, under its jurisdiction to what is now Article 218 (11) of the Treaty on the Functioning of the European Union. This was the first and most serious political movement in that direction back then. The Court of Justice responded that the EU essentially lacked the competence to accede to the ECHR and that an amendment would be necessary.[15] And so it happened, thirteen years later, article 6(2) TEU was introduced by the Lisbon Treaty providing not only for competence but for a legal obligation ("the EU shall accede"). [16]

According to some authors, accession is not only an obligation, it is the destination[17] for the EU fundamental rights system to be completed.

There exist three pillars to accession as set out by Article 6 paragraphs 2 and 3 of the Treaty on the European Union and Protocol number 8[18] relating to Article 6 (2) TEU. These pillars were laid down on primary law to provide some safeguards and guarantees for the Union's particular legal order as well as to help with the negotiation and process

[15] Opinion 2/94 [1996] ECR 1-1795

[16] P. Craig , G. De Burca, (2020), *EU Law, Texts, Cases, and Materials,* Oxford, Seventh Edition, p. 455.

[17] Morano-Foadi, S. and Vickers, L. (eds) (2015) *Fundamental rights in the EU: a matter for two courts*. Oxford: Hart Publishing (Modern studies in European law). p. 49
V Reding in 'Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and Beyond' (Council of Europe, 2014) 24.

[18] Protocol (No. 8) relating to Article 6(2) TEU on the Accession of the Union to the European Convention of Human Rights and Fundamental Freedoms

and should be taken into account at all stages[19]. The three pillars are the following as described by Stelios Andreadakis[20]

(a) The EU will accede on an equal footing and will become the 48th Contracting Party to the ECHR. 'Equal footing' means that the Union will enjoy no privilege and will be afforded no preferential or deferential treatment compared to the other Parties. The principle of equal treatment will be applied in all aspects of the Union's participation in the Council of Europe.

(b) The accession of the EU will not bring any radical change to the existing ECHR mechanism, in the sense that it should be left as intact as possible and the EU will be just one more Party. This pillar together with the first one is clearly aimed at maintaining the pre-accession status quo in both the EU and the Council of Europe. As it will be discussed later in the chapter, any change or adaptation essential for the realization of the accession will be made, but it will not result in substantial changes in the organizational structure and operation of the two organizations. Both of them are successful and their success is due to their unique characteristics and distinctive features, which should be preserved at all costs.

(c) The accession should not affect the competencies of the Union or the powers of its institutions.[21] This pillar is focused not on the EU-Council of Europe relationship, but on the EU itself; no new powers should be created for the Union and no alteration should be made to the existing obligations of Member States under the ECHR. The accession is intended to allow the Union to be part of the Council of Europe and fi t the ECHR in its legal order.

It becomes apparent from the above, that although the Member States wished to manifest their political will for accession they were very well aware at the same time of the particularities that accompany the Union legal order, therefore had to set some very foundational rules for the negotiators, to begin with. None of the political readers and signatories of the Lisbon Treaty could, however, as became evident in 2013, that these pillars that were set out to be the minimum guarantees for Union accession to the ECHR as preserving the particularity of the Union's autonomous legal order, would be according to the Court of Justice, exactly that: minimum -and apparently not enough-. The pillars also showcase that accession is to happen place as quickly as possible, *as*

[19] Morano – Foadi and Andreadakis, Report on the Protection of Fundamental Rights in Europe (n. 1) at 67.

[20] Morano-Foadi, S. and Vickers, L. (eds) (2015) *Fundamental rights in the EU: a matter for two courts*. Oxford: Hart Publishing (Modern studies in European law). Stelios Andreadakis writing on the *Problems and Challenges of the EU's Accession to the ECHR: Empirical Findings with a View to the Future* p. 49-67

*Stelios Andreadakis is a Lecturer in Law, the University of Leicester.

[21] Art 2 of Protocol 8 to the Lisbon Treaty

any delay or disagreement, especially as a result of political deliberations, will destabilize the foundations of the whole project[22]

'The most notable effect (of accession) is that fundamental rights will be given the appropriate slot in the architecture of the EU. Accession should be seen as the key to completing this new architecture and a sort of counterbalance for what can be described as repressive powers in the exercise of its [EU] competences'.[23]

[22] Ibid (18) p. 51

[23] Interview C (EU Commission, Brussels, 1 August 2012)

III. The relationship between the two Courts with *Bosphorus* in the spotlight

The relationship between the two high-tier European Courts, the Court of Justice of the European Union and the European Court of Human Rights (hereinafter ECtHR) is far from simple. This paper shall attempt to highlight the particularities of this complex interaction through the Bosphorus judgment issued by the ECtHR.

Before proceeding with this analysis, it is deemed worth mentioning that the accession and the resulting subjection of the EU and its institutions to the judicial review of the ECtHR are not accompanied by the recognition of the Strasbourg Court as a superior body. It is, rather, a recognition as a specialized Court exercising external control over the international law obligations of the Union resulting from the accession to the ECHR.[24] The autonomy of the EU legal order and its competences shall not be affected according to article 6 (2) TEU and Protocol no. 8.

As a judge interviewed in Luxembourg in 2010 said: 'the Courts are already close together not only because they study each other's judgments and also because there is no rivalry. One is the Supreme Court of the Union and the other is a specialized Court on human rights representing a wider range of states, but without having to deal with institutional questions like Luxemburg and to answer questions from the national judges. The ECHR represents the minimum standards of protection, but the CJEU, although not bound by the jurisprudence of the Strasbourg Court, is keen to use it when necessary. In certain issues, the Strasbourg Court has a large number of case-law and more expertise'.[25]

A reasonable question arising out of this statement would be: Would this interaction remain the same after accession? And to what extent was indeed the relationship between the two Courts and the dialogue between the European Judges harmonized? Were there any interferences from the part of the Strasbourg Court to Union law matters which according to article 344 TFEU fall under the exclusive jurisdiction of the Court of Justice, as reaffirmed in article 3 of Protocol no. 8[26]?

One shall attempt to examine these questions through the notorious *Bosphorus*[27] *doctrine.*

[24] European Convention, 'Final Report of Working Group II' CONV 354/02, WG II 16, 12; see also European Parliament, 'Resolution on the Institutional Aspects of Accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms' P7_ TA-PROV (2010) 0184, para 1;

[25] Interview No 4 (CJEU, Luxembourg, 14 December 2010).

[26] Article 3 of Protocol No. 8 relating to Article 6 (2) TEU on the accession of the Union to the European Convention of Human Rights and Fundamental Freedoms: Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

[27] Bosphorus Hava Yollari Turizm VeTicaret Anonim Sirketiv Ireland App no 45036/98 [2005]

In Bosphorus, the European Court of Human Rights was called upon to clarify when States could be held responsible for actions taken while committing their obligations deriving from EU law. Therefore, the Strasbourg Court was given the opportunity to further refine its relationship with Luxembourg.

Bosphorus somehow managed to include the vast majority of the peculiarities treating the Strasbourg-Luxembourg relationship, in one ruling. The Strasbourg Court acknowledged that the European Union offers fundamental right protection *equivalent* to the one offered by the European Convention. Although this might sound satisfying at first glance, it hinders some tricks. Firstly, that the Strasbourg Judge would be able to proceed to a test[28] every time a union fundamental rights case was brought before him, to decide on whether adequate or equivalent standards of fundamental right protection were offered by the Union in conjunction with the Convention. This is the so-called *Bosphorus presumption.* In the paragraph following the introduction of the Bosphorus presumption, the Strasbourg Court continued to point out that in case fundamental right protection standards offered by the Union were "manifestly deficient", then the presumption could be rebutted.[29] In the same paragraph the European Court of Human Rights proceeds to call itself a "constitutional instrument of European public order" and in case 'deficient protection' is displayed -by the Union in this case- then this would result in a violation of the Convention. [30]

Consequently, the ECtHR made clear that it has jurisdiction to review EU law in the field of fundamental rights as the case revolved around national measures implementing obligations deriving directly or indirectly from EU law.

The Bosphorus presumption essentially poses a barrier to the level of scrutiny applied by the Strasbourg Court to Union law, as the latter shall start its examinations from the presumption the Union law offers an equivalent protection of fundamental right protection standards to the one offered by the European Convention. However, this does not mean that Union law enjoys full immunity, it only acknowledges that the protection standards are the same as the ones provided by all the existing Contracting Parties of the Council of Europe. The equivalent protection presumption would facilitate a smoother interaction between Luxembourg and Strasbourg and most importantly, during the negotiation process. However, one might perceive this as to create "double standards" between the Union and the rest of the Contracting Parties of the Convention. This argument would not be found highly truthful as in practical terms, the Union has developed a multi-layered fundamental right protection system and has prominent ways to ensure the invocation and application of these rights from judicial remedies to primary law which enjoys direct effect, namely the Charter of Fundamental Rights.

[28] Bosphorus Hava Yollari Turizm VeTicaret Anonim Sirketiv Ireland App no 45036/98 [2005] par 155
[29] Bosphorus Hava Yollari Turizm VeTicaret Anonim Sirketiv Ireland App no 45036/98 [2005] par 156
[30] Ibid

All the above are to be in place prior to accession. What happens post-accession? Would this presumption -meaning little in practical terms- still seize to exist post-accession? Would the European Court of Human Rights continue to acknowledge this 'privilege' to the EU? Would it treat the European Union as the rest Contracting Parties? The answers to these questions are hard to be found. One cannot possibly be sure of the judicial interaction which would arise and the terms and conditions under which this interaction would take place. One thing is for sure: Autonomy as a particular and essential element of the EU legal order has to be preserved. This was the will of the drafters of the Lisbon Treaty when they introduced Article 6 (2) TEU. The competences of the Union shall not be affected. The European construction as it is shall remain the same. Nonetheless, even the Bosphorus presumption, which - phenomenally- offers a privilege to the Union as a future contracting party, seems rather, to place the ECtHR in a hierarchically higher position compared to the Court of Justice, as the first is to decide on whether an equivalent standard of fundamental right protection is offered by the Union – equivalent to the Convention-. This is the opinion of the author of the present accompanied by a consideration of why an equivalent protection standard to the *Convention* is needed - since the Union is very much capable of protecting fundamental rights through the mechanisms it has developed itself.

IV. Autonomy as a key element of the EU legal order

Why does the Union need to be autonomous? Was it not enough to create another international organization? Why did the founding fathers decide to build on an autonomous legal order?

The Member States transferred some of their competences in order to serve their objective which lies in the Schuman Declaration. After WWII, the spirit was to create a United Europe which would avoid future war. Autonomy meant the creation of a new legal order which could only be achieved by the transfer of competences. The usual model of the international organization was not sufficient for these objectives to be achieved. As long as States were remaining fully sovereign, they were absolute masters so they would have the capability of waging war. This meant that we needed to speak about *integration* – which is totally different from collaboration.

After proclaiming autonomy in Vand Gen den Loos and Costa v Enel[31], the Court issued Opinion 1/91[32]. The Court had to give its opinion on a Treaty that was about to be concluded between the EU and its Member States on one part and the EFTA States = Free Trade Association MS. The objective of the said Agreement was to found the European Economic Area (which enables the extension of the European Union's single market to member states of the European Free Trade Association). The Court was asked about the provisions that concerned the jurisdiction of a potential Court to be found in such an area. The Court here analyzed the provisions which concerned the judicial mechanisms. The Court once more referred to the special characteristics of the EU legal order. Opinion 1/91:

"With regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties.

In contrast, as far as the Community is concerned, the rules on free trade and competition, which the agreement seeks to extend to the whole territory of the Contracting Parties, have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement."

Yes, we have created a new community the purpose of which is to achieve integration.

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[31] Judgment of the Court of 15 July 1964.
Flaminio Costa v E.N.E.L.
Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy.
Case 6-64.

[32] Opinion of the Court of 14 December 1991.
Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.
Opinion 1/91

"It is in the light of the contradiction which has just been identified that it must be considered whether the proposed system of courts may undermine the autonomy of the Community legal order in pursuing its own particular objectives."[33]

Autonomy is linked to the objectives of the Community and anything that threatens its autonomy has to be rejected. The new Court to be founded, was about to review the acts of the EU which were Autonomous, a characteristic attributed to it by the Treaties, and the purpose of integration and the limitation of sovereignty. So, to give another organ/ Court the right to review EU acts would undermine the Autonomy of the EU legal order.

This brings us smoothly to Opinion 2/13[34]. When the Court was asked to issue an opinion under its pre-emptive jurisdiction deriving from article 218 (11) TFEU on the Draft Accession Agreement, namely opinion 2/13 – which will be further analyzed below-, it described the core role autonomy plays as a key element of the EU legal order while including its findings in its previous case law and displaying the necessity of preserving it. Namely, paragraph 170 of the Opinion goes as follows:

"The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU…"

We know from *Kadi*[35] that the Court perceives the European Union to be a constitutional entity.[36] The Court explained once more that the fact that the EU is a particular legal entity with unique features made it absolutely necessary for the Draft Accession Agreement to take into account its key distinguishing elements, namely the autonomy of EU law and the role of the Court of Justice in safeguarding it. The DAA was according to the Court not paying sufficient account to the following procedural and substantive issues[37]: The relationship between article 53 of the Charter of Fundamental Rights of the EU and article 53 of the Convention, the problematic (un)consideration of the principle of mutual trust, the potential undermining of the preliminary reference procedure, the special features of judicial review in the area of Common Foreign and Security Policy. As for the procedural issues emerging from the Draft Agreement, the Court highlighted among them the potential breach of Article 344 TFEU, which is also explicitly mentioned in Protocol no. 8 for the Accession of the Union to the Convention, the practical inapplicability of the co-respondent mechanism, and finally the shortcomings of the prior involvement procedure. All of the above

[33] Ibid par. 30

[34] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454

[35] Judgment of the Court (Grand Chamber) of 3 September 2008.
Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities.

[36] Halberstam, D. (2015) *"'it's the Autonomy, Stupid!' a Modest Defense of Opinion 2/13 on the Accession to the ECHR, and the Way Forward,"* German Law Journal, 16(1), pp. 105–146. doi: 10.1017/S2071832200019441. p. 115

[37] Eva Nanopoulos, Killing Two Birds with One Stone: The Court of Justice's Opinion on the EU's Accession to the ECHR, 74 Cambridge L.J. 185 (2015).

distinct issues seem to circumvent how the autonomy of EU law is perceived and will be further analysed below, in the respective sections of the present.

Chapter B

Placing Accession in its context

I. The Draft Accession Agreement: High Hopes?

The European Union could not become a member to the European Convention as easily as its Member States. Simply because it is not a State. And as the Convention regime stood before the introduction of Protocol No. 14[38], only States could become parties to the Convention. Therefore, it was clear that an amendment to the Convention had to take place in order for it to be able to accommodate the accession of the European Union.[39] On the other hand, the Union would have to enter into an international law procedure as a potential Contracting Party to the Convention. It was decided that the Union would accede to the Convention via an Accession Treaty, as this was perceived to be the simplest and less time-consuming way, i.e. following the traditional way of accession of States. Such a Treaty would have to be ratified by the High Contracting Parties of the Convention, the EU Institutions and the EU Member States, which are all parties to the Treaty. What's interesting about the Accession Treaty is that it would continue to have a legal effect even post-accession, thus being able to be used as a legal instrument either by the Union, the Convention or the Member States.[40]

After the introduction of Protocol No. 14, as noted above, there was made room for the accession of the Union to the Convention. Had not the Protocol been attached to the Convention, the Court of Justice of the EU would declare the accession process incompatible with the EU Treaties at a very early stage (and not through Opinion 2/13) as according to Opinion 2/91 issued by the Court, the EU cannot become party to agreements that can only be ratified by States. [41]

[38] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194)

[39] Lickovaʹ (2008), p. 463/4, who argues that the EU 'escapes the traditional categories of constitutional and international law.' One needs to compare this to the accession procedure and its effects on the EU law.

[40] Gragl (2013), p. 93

[41] Court of Justice of EU, Opinion 2/91 [1993] ECR I-1061, par. 4, 5 and 37

But the fact that the EU is not a state, means that it has its own peculiar characteristics, which should be taken into account while drafting the Accession Treaty. The autonomy that describes the EU legal order manifests itself in various ways, either substantial or procedural. Both of these elements had to be thoroughly examined so as for the final Draft of the 'Treaty' to be in line with EU primary law, which would not alter its scope and procedural mechanisms. However, this proved to be far from possible. In order for the EU to accede to the Convention, the already existing EU procedures had to be amended in a way that they could cooperate with the Convention judicial system, and even utterly new mechanisms had to be introduced to facilitate the harmonious interaction between the two systems, but most importantly the interaction between the two Courts: Luxembourg and Strasbourg.

The above is not to say that amendments to the Convention system would not emerge. However, the Union is a whole legal order. Its procedures and judicial system have been built to facilitate not only the protection of fundamental human rights but all judicial aspects where the Union has competence. There exists intense cooperation between the Union's Institutions on the one hand and equally intense cooperation between the Union and the Member States on the other. The system of the European Convention on the other is mostly revolving around the judicial protection of fundamental rights and it has a very specific hierarchical position in the legal order of its Contracting Parties. On this last note, the position of the Union's law on the national legal orders of its Member States is very specific as well, enjoying primacy over national constitutions and laws while being autonomous toward international law. These key elements of the legal order of the EU had to be undoubtedly preserved during the negotiation process of the accession. Therefore, amendments to the Convention system were not to be as substantial and controversial as the ones to the Union.

In 2013, the Draft Accession Agreement was finalized and welcomed by the majority of the European legal world'[42]. But the Court of Justice had to give its opinion as underlined by Article 218 (11) TFEU which would be binding to the Institutions. And so it did on December 18, 2014. Until the CJEU gives its *consent*, the Draft Accession Agreement will remain an 'envisaged agreement[43]. The lacks and misconceptions of the Draft Accession Agreement will be further analyzed below while examining the Opinion of the Court.

[42] Council of Bars and Law Societies of Europe (CCBE) Statement on the European Union accession to the European Convention on Human Rights, July 2013, p. 1, which welcomes the final draft agreement.

[43] Court of Justice of EU, Opinion 1/94,[1994] ECR I-5267, para 12

II. Status of the Convention and the DAA in the EU legal order

If the DAA was to be ratified by the EU, it is only reasonable for one to think: What would its legal status be in the EU legal in the post-accession era? Would it be another international agreement? As we know from Kadi, international agreements form an integral part of the EU legal order. They are not, however, to be placed above or on the same level as EU primary law in the hierarchy of norms. Treaty provisions and the Charter of Fundamental Rights remain on the top of the list, with international agreements concluded by the Union following second and being placed above EU secondary law, which comes third. Would this be the case with the DAA and the Convention? If yes, that would solve all issues. Even if there was a conflict between EU primary law and the Convention Articles, it would be the Treaties or the Charter prevailing. But the reality is far from simple when it comes to this particular international agreement. The Convention is perceived to have been incorporated into the EU legal order – albeit not contractually- already. The constitutional standards of the Convention are part of EU law. The Charter was drafted in the image of the Convention, as is recognized in the Fifth Recital of its Preamble and Declaration No. 1 to the Lisbon Treaty. Therefore, it seems that the Convention can already be perceived as primary law that the European Judge has the discretion to call upon it whenever he feels suited, as he is not bound by it. It is a discretion and not an obligation as the EU has developed various other ways to protect fundamental rights as we shall see below, namely the Charter.

The Member States decided to introduce the obligation of the Union to accede to the European Convention, in the Lisbon Treaty; through Article 6 TEU and Protocol 8. Accession is according to Article 6 (2) conditional on non-interference from the part of the Convention on the competences of the EU.

Article 6 (3) TEU connotes that: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute *general principles of the Union's law*". There is no doubt, therefore, that the Convention shall be perceived as a general principle of Union law – contractually hereinafter, i.e. bindingly. It is the EU primary law itself that connotes that. [44] What's more, article 6 (3) does not specify to which sectors the Convention shall enjoy

[44] Regarding this relationship, the EU Court has ruled in Cinetheque that: 'Although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law.' Court of Justice of EU, Cinetheque v Federation nationale des cine ́mas franc ̧ais [1985] ECR 2605, Judgment of 11 July 1985 in Joined Cases 60 and 61/84, p. 2618.

primacy. Is it in the fields where the Charter is non-applicable? Such a distinction should have been made clear, in my opinion. It has not, nonetheless. Therefore, one should logically estimate that the Convention as a general principle of law, is not sector-specific, and will be able to be recalled in all aspects of EU law, even fundamental rights that are protected by the Charter. On that note, the Charter is introduced in the Lisbon Treaty by the very same article as the obligation to accede to the Convention, namely Article 6 (1) TEU. This paragraph provides primacy to the Charter of Fundamental Rights, i.e. same legal value as the Treaties. In my view, this creates a blurry concept of the norms to be recalled in the fundamental right protection spectrum. The same article provides for two legal instruments, of the same legal value, which deal with the same fundamental values – the Charter protects social and economic rights as well, that the Convention is not-. Which one is to be invoked?

Article 52 (3) of the Charter, as primary law reads as follows:

"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning, and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection"

Should the Charter provisions be interpreted as mere transportation of the Convention rights in the EU legal order? If yes, what is the meaning of accession if all Convention rights have already been asserted into the EU legal order through the Charter which is *not preventing Union law from providing more extensive protection*? [45]

It follows from the above that the legal position of the Convention post-accession provokes many questions that one could not possibly answer, in my opinion, at this point in time. It would be a job fit only to the judges to decide ad hoc, on a case-by-case basis how to construct the interaction between the norms offered by EU primary law to protect fundamental rights. The Member States, however, have not made it an easy job for the judges with the introduction of Article 6 in the Lisbon Treaty.

[45] See also: O'Meara (2011), p. 1819; Martin and De Nanclares (2013), p. 4; Referring to another agreement, ECJ had ruled that: 'The fact that the provisions of the agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically.' (Court of Justice of EU, Opinion 1/91 (1991) ECR I-6079, para. 14); Cf.: de Rivery and Chassaing (2013), p. 3, who argue that the Charter is put by Art. 6 TEU in the same level of hierarchy with the general principles of law and ECHR in the pool of EU legal order.

III. The Charter of Fundamental Rights and the ECHR: Accommodating Multiple Instruments?

As the German Federal Constitutional Court has explicitly held: A catalogue of fundamental rights strives to define the basic values of a polity, and thereby controls and guides the legislative, executive, and judicial functions of a state.[46] In our case, it is the Union and its Institutions that the Charter regulates. The Charter is the bill of rights of the EU and can be invoked directly or indirectly by every EU citizen. It was drafted in 2000 but did not acquire legal authority, therefore it was not binding. Nonetheless, it was used as a reference point by the Court of Justice.[47] The fact however that the Charter was not legally binding, but at the same time was referred by the Court as a source of EU law which would create legal effects to the litigants, raised questions about its status in the EU legal order. It was in the Lisbon Treaty that the Charter gained the utmost legal recognition. It became part of EU primary law by the introduction of Article 6 which proclaims the same legal status to the Charter as to the Treaties of the European Union.

The Charter was drafted according to the standards laid down in the European Convention. However, it did not only consist of a bill of rights enshrining civil and political rights. It was also including social and economic rights. Taking this into account, one could observe that the Charter is perhaps offering an even higher standard of fundamental rights protection than the Convention. Nevertheless, the question remaining is: What would the interaction between the Charter and the Convention be in a post-accession era? Also, why is it necessary / beneficiary for EU citizens for the Union to accede to the ECHR since the first has incorporated already the Charter in its legal order? Especially, when the Charter is a recently drafted legal document, containing modern and current language which adapts to the technological innovations of our time.

One should take into account the scope of application of the Charter while examining its legal status . Article 51 (2) of the Charter reads as follows:

"The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties."

In *Akerberg*[48], the CJEU clearly declared that the Charter only applies when there exists a substantive link between the action or omission and the EU's involvement.[49] Therefore the Charter only applies when the Member States commit their obligations which derive from EU law. However, deciding when an affair falls under the scope of

[46] See R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002), 352 citing the German Federal Constitutional Court, BVerfGE 39, 1 (41).
[47] Court of Justice of EU, Unibet v. Justitiekanslern, Case C-432/05 [2007] ECR I-2271.
[48] Court of Justice of EU, Åkerberg Fransson, C-617/10, 26 February 2013
[49] Court of Justice of EU, Åkerberg Fransson, C-617/10, 26 February 2013, par. 19

EU or national law, is oftentimes an unclear task as national legislation may at the same time regulate obligations that derive from EU law simultaneously with including national objectives in the legislation. In the end, it all falls down to the issue of competence. Which fundamental right areas - and subareas of each right- does the EU have the competence to regulate? Where the EU does not have competence[50] then the task of protecting a fundamental right in the national legal order falls under national legislation and the obligations of the State deriving from the ECHR, where all EU Member States are contracting parties of the Convention.

These blurry lines between competences and the situations where the Charter draws application or not, lead to an equally unclear set of rules for the application either of the Charter or the European Convention in each situation. For this reason, it is absolutely necessary that regulation of the scope of application of each legal instrument is settled, so as for procedural and substantive disruptions to be avoided in a post-accession scenario. Therefore, legal certainty must be safeguarded.

This was reaffirmed by the Court in its Opinion 2/13 which stressed the necessity of not undermining the effectiveness of the Charter when the Member States apply their obligations deriving from the European Convention. The drafters of the Charter tried to fix the issue by inserting an Article in the Charter itself which reads as follows:

Art. 52(3) reads:

"Insofar as this Charter contains rights that correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning, and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law from providing more extensive protection."

This Article seems highly disruptive, in the opinion of the author of the present. While it seems like the drafters of the Charter wished to set the minimum standards of protection in the first period of the Article ("*Insofar as this Charter contains rights that correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning, and scope of those rights shall be the same as those laid down by the said Convention…"),* which minimum standards would be the Convention, it somehow seems to contradict to the ratio of the second period of the Article *("…This provision shall not prevent Union law from providing more extensive protection").* This – the first period- makes it seem like the Court of Justice would be obliged to refer to the Convention standards in each case. That could potentially pose implications on the very notion of the autonomy of EU law, as it makes it seem that the Convention takes precedence over the Charter. The second period provides for further protection of fundamental rights by the Union – compared to those standards offered

[50] Contra.: Gragl argues that by extending the basis of the application of fundamental rights limitations on Member States when they apply EU law, the Luxembourg Court actively expanded the areas of EU law over national law, therefore simultaneously 'increasing the EU competences at the expense of those of the Member States'. See: Gragl (2013), p. 55/6.

by the Convention-. This could, on the other hand, be read as a mechanism to protect EU law autonomy.[51]

However, apart from the ratio of the Article there lies also its interpretation. As Article 52 (3) is highly unclear in its objectives and standards, the task fit for the judge is a difficult one. Judges are called upon to interpret the Charter while examining the minimum standards offered by the Convention, while at the same time the Court of Justice has developed over the years a concrete and autonomous precedence of fundamental rights protection.

Grainne de Burca has noted in this respect:

"There are still concerns, despite the 'judicial diplomacy' which has developed between the CJEU and the European Court of Human Rights, that a disparity between the approaches of the two courts – to the detriment of human rights protection – may grow if the CJEU increasingly distances itself from the jurisprudence of the Strasbourg Court and places emphasis on an autonomous EU approach to the interpretation of the Charter."[52]

To the opinion of the present, this statement of de Bruca stems from a conceptual basis, that being that the ratio of Article 52 (3) is clear and precise and that the drafters of the Charter wished to regulate its interaction to the ECHR by putting the latter in a higher hierarchical position comparing to the Charter. In my opinion, however, the fact that the Convention is portrayed as a "minimum set of standards" does not place it above the Charter. These minimum standards can provide some guidance, and they are to be respected of course as they also constitute common constitutional traditions of the Member States which make the general principles of Union law, but they are not to take away the Freedom of the Court of Justice to choose amongst the sources of EU primary law.

Following the above, it is beyond doubt that the legal relationship between the Charter and the Convention and their interaction so far has been more than interesting for academia. When it comes to legal certainty, however, and the protection of the rights of individuals it is true that implications start to arise. It is correct to say, in my opinion, that the existence of one sole legal instrument for the protection of the rights of EU citizens would create more legal certainty and would simplify the procedures. That is not to say however that a multi-layered system cannot produce and provoke even further fundamental right protection as productive judicial dialogue and stimulations between Luxembourg and Strasbourg can lead to further amelioration of one another.

[51] Gragl argues that the last word of Art. 52 (3) ChFR, establishing that EU law may provide more extensive protection, marks the mechanism to preserve the EU law autonomy. Art. 52 ChFR, according to Gragl, is a 'dynamic norm of reference' to the Strasbourg's case-law.
[52] de Burca (2013), p. 172.

IV. The advisory jurisdiction of the CJEU and its binding nature

The Court of Justice has a very distinct role to play when it comes to the conclusion of international agreements by the Union. This is the advisory jurisdiction of the CJEU according to Article 218 (11) of the Treaty on the Functioning of the European Union, which reads as follows:

A Member State, the European Parliament, the Council, or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

It follows from the above that Article 218 (11) includes a preventing control procedure in the Treaty context for the CJEU to examine on the compatibility of international agreements with the EU Treaties. This preventing control has two aims: First, it guarantees the legality of the agreement in the EU legal order, and second it prevents future ambiguities that could potentially derive from the agreement that the EU concluded, thus protecting at the same time the international credibility of the Union.

The advisory jurisdiction of the Court only gets activated once one of those mentioned in Article 218 (11) asks for it (a Member State, the European Parliament, the Council or the Commission). Therefore, from the wording of the Article, as well, one concludes that the jurisdiction of the Court in this respect is potential. The reason for that is that the conclusion of international agreements has traditionally been, in national legal orders as well, a highly political matter. However, when an international agreement deals extensively with legal issues, it is only reasonable that the Commission, in its capacity as a negotiator, would consider it necessary to ask for the Opinion of the Court. Even in the case, however, that the Commission does not activate Article 218 (11) TFEU, there can be no judicial challenge against the omission as it remains at the discretion of the Commission to do so.

The Court can only check the compatibility of the international agreement with the Treaties of the European Union. The reason for that could be, that the mechanism of advisory jurisdiction of the Court reflects the national constitutional legal systems and traditions of the Member States, where when the National Constitutional Court is called to check upon the compatibility of an international agreement to be concluded by the State, it only does so in relation to the national constitution. Therefore, the EU Treaties, being perceived as the Union's "Constitutional Charter", are the ones by which an international agreement has to abide.

The Court, once it is asked, has jurisdiction to examine the compatibility to the Treaties of any kind of international agreement that can interfere with the EU legal order and alter it, interfere in the Union's legal sphere, however, this agreement may be called. This was the case for the Draft Accession Agreement as well, where the CJEU was able

to conduct a thorough, textual, and teleological examination of its provisions so as to fully check their compatibility with the Treaties.

The advisory jurisdiction of the Court creates binding legal effects. This means that once issued, it binds not only the Member State or the Institution that referred the question to the Court, but the whole Union. Therefore, once a negative opinion is issued, none of the Institutions or Member States can proceed with concluding the relevant international agreement, as it was ruled to be incompatible with the Treaties.

In the case that the Opinion is negative, then the second period of Article 218 (11) TFEU is to be followed, i.e.: *The agreement envisaged may not enter into force unless it is amended or the Treaties are revised.*

Whether a revision of the Treaties is to be executed or an amendment to the agreement, so as for the latter to be able to be concluded by the Union, depends at what stage of the procedures, the Court was asked to issue its opinion. There can be times, however, that there exists such a fundamental incompatibility with the Treaties that it seems impossible for the Union to conclude the agreement, even if the Treaties were to be revised. The reason for this is first that there exist provisions in the EU Treaties that can not be revised, just like the national constitutions. The rationale for this is known to all jurists and is quite reasonable: A legal order should always maintain some minimum – foundational characteristics that preserve its key elements. Such elements can include but are not limited to, provisions that preserve the democratic values of a State, its polity, etc. In the case of the Union Treaties, one has one extra element to bare in mind, and that is its autonomy. Whatever amendment to the Treaties would derive from the wish to conclude an international agreement and could potentially interfere and circumvent the autonomy of the Union's legal order, must be cautiously examined. This has been reaffirmed by the CJEU in previous opinions it had issued, namely Opinion 1/91 which was examined above.

That being said, the next Chapters of the present, will attempt to address the concerns that were raised by the CJEU in its Opinion 2/13 in relation to the Draft Accession Agreement for the Accession of the Union to the European Convention of Human Rights.

PART II

Concerns raised by the CJEU

Chapter A

Procedural and Institutional Objections

I. The Co-Respondent Mechanism and the Issue of Division of Competences

Article 19, paragraph 1, second subparagraph TEU lays down a rule that characterizes the very particularity of the whole EU legal order; It is the Member States who apply EU law, therefore it is the Member States that *shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*. From this general rule, derives that when an act or omission – even when in the field of EU law- occurs, it is the Member States' Courts that shall offer judicial protection. The Court of Justice and the General Court only have jurisdiction when an act or omission has taken place on the part of the EU Institutions, agencies, and bodies. [53] However, it is often times difficult to tell between the lines which Court -national, or European- has jurisdiction as the issue of competence between the Member States and the Union affects the jurisdiction of the Courts as well.

The Draft Accession Agreement was introducing through its article, 3 the co-respondent mechanism. According to Article 3 of the DAA, a new paragraph was to be added to Article 36 of the ECHR to accommodate it. The goal of this Article was to tackle the aforementioned difficulty in the division of competences between the Union and its Member States while applying EU law, so as to facilitate the righteous system

[53] TFEU, Articles 263, 265, 267, 268 and 270.

of attribution of liability for infringements of the European Convention. Such a mechanism was necessary to be invented, according to Protocol 8 Article 1 for the accession of the Union to the ECHR. It was necessary as the Union would be able to become a litigant before the European Court of Human Rights post-accession. That comes with some implications. As said before, all of the Member States of the Union, are Contracting Parties of the European Convention, which means that they can stand before the ECtHR. The Union and its Member States are not completely divided entities. The Union is made up of its Member States and all of them apply Union law. Member States do of course apply national law, but as mentioned above, when applying EU law, the lines are not always clear between the competences. The co-respondent mechanism would constitute being able to attribute to the Union and the Member States the capacity of being co-respondents, against another Member State, or there could be a situation where the Member States would be co-respondents against the Union.

It would be difficult for the applicant to know whether It was the EU or the Member State that infringed his/her fundamental rights. Nevertheless, if the choice of the defendant was incorrect, that would declare the application inadmissible.

For this reason, the negotiators of the Draft Accession Agreement came up with the co-respondent mechanism where in case of doubt of who (Member State or the Union) committed or omitted, where the Union can intervene as a co-respondent to the proceedings. This benefits the Member States which will not be held liable by the Court of Justice for violation of the Treaties - as they were obliged to act according to their obligations deriving from Union law - as well as the Union that will be capable to defend the act before the ECtHR.

In case of the need for activation of the co-respondent mechanism, the ECtHR would be able to either examine an application of the Union to intervene or invite her to the procedure itself -where the participation from the part of the Union or the Member State would not be obligatory-. When the intervention became valid, then the ruling would refer both to the Union as well as the Member State.

The CJEU in its Opinion 2/13[54], examined the compatibility of the co-respondent mechanism to the Treaties. It found that at the stage where the ECtHR would examine the validity of the intervention -therefore, not in the cases where it invited the Union or the Member State to intervene, but in the case where they applied- this could potentially lead to an interference of the ECtHR into the Union's system of competences. This is because in order to examine whether the Union or the Member State would be able to intervene would depend on if and to what extent they participated in the act and if each of them had responsibility to act or a negative obligation not to act. Thus, the ECtHR would rule upon competences and dig into the scope of the very principle of conferral which ultimately leads to the issue of primacy of EU law. Furthermore, the CJEU found that, as according to article 3 paragraph 7, the ECtHR was able to decide that either the Member State or the Union would carry the burden of liability, or both at the same time

[54] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454

was problematic, as it was also capable of affecting the division of competences between the Union and the Member States.[55]

To conclude, one could say that the procedural impediments that treat the co-respondent mechanism could be cured. However, there exists the substantial hidden problem of interference of the ECtHR into the very particular system of division of competences within the EU. As long as it is the Strasbourg Court alone that examines whether the Union or the Member States are capable to intervene, the CJEU is correct in its Opinion to claim that this could have as a result that the Strasbourg Court proceeds to a substantial interpretation of EU law.[56]

[55] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par. 215- 235
[56] Ibid

II. Prior Involvement: To what extent does it actually involve the CJEU?

In order to better facilitate the harmonized interaction between the Strasbourg and Luxembourg Courts, the negotiators of the DAA came up with the prior involvement mechanism. The mechanism was introduced to treat the issue of challenging EU acts by individuals, before the ECtHR.

In order for an individual to have standing before the ECtHR, they shall first exhaust all the means of internal judicial remedy, i.e. in the case the act the individual wishes to challenge, is an EU act, then the individual will have to first refer to the General Court according to article 263 of the TFEU, then the individual can plea before the Court of Justice and as a final and last step, the individual can refer to the ECtHR. In a prior to accession era, this system works smoothly as the Luxembourg Courts will be able to have ruled upon the case without prior involvement of the Strasbourg Court.

The prior involvement mechanism of the DAA, in its article 3, paragraph 6 wishes to examine the issue of an individual challenging a national measure before national courts, where the national measure derives from EU law obligations of the Member State. In this case, the national court must necessarily proceed to an examination of the legality of the EU act to check upon the legality of the national act, and that would create no problem in a prior to-accession era as, as highlighted above, *it is the national judge that is the natural judge of the EU legal order*. When such an issue of the potential illegality of an EU act occurs before the national court, the latter is capable of submitting a preliminary reference question to the CJEU to verify (or not) the illegality of the EU measure, However, it can also proceed without doing so when it is convinced of the validity of the EU measure.

As mentioned above, the individual can plea before the ECtHR as a last step. Nonetheless, in the case that the CJEU had not been involved in the procedure priorly, there occurs a major issue. The CJEU must be able to have a say on the validity of the EU act before it ends up being examined by the ECtHR. This is because the competences of the Institutions of the Union would be very likely to be circumvented otherwise.[57]

Article 3, paragraph 6 of the DAA was introducing the prior involvement mechanism, according to which the Union would be able to intervene before the ECtHR had ruled upon the case. This could only happen provided that the Union was a co-respondent in the proceedings, which itself causes issues that we examined right above and that the CJEU has not made issued any precedence in regards to the case at issue.

In its Opinion, the CJEU states that the second requirement for the EU to be priorly involved in the proceedings creates problems of transferring of competence from Luxembourg to Strasbourg. More specifically, the fact whether relevant precedence has

[57] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par 236-248

been issued is a task only fit for Luxembourg – the relevancy is to be examined and constitutes a substantial issue -. [58] As relevancy is a substantial and not procedural issue per se, so is the examination of a provision of secondary EU law in accordance with the ECHR provisions. Article 3, paragraph 6 of the DAA, by making the ECtHR capable of interpreting EU secondary law – before the CJEU has had the opportunity to do so- seems to infringe the exclusive competence of the CJEU to interpret EU law.

The aforementioned issues are mostly procedural. The lack in the construction of the prior involvement mechanism could be solved with the addition perhaps of another provision that would involve the CJEU in the procedure without requirements of the Union being a co-respondent. But what is more necessary is that it is the Union's Institutions that decide on whether precedence exists or not, as well as to be given a chance to interpret EU secondary law before the ECtHR does so. Therefore, although highly procedural the matter, it does cause substantial questions that were, raised by the CJEU.[59]

[58] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par 236-248
[59] Ibid

III. Exclusive jurisdiction of the CJEU according to Article 344 TFEU:

A likely Circumvention?

Article 344 TFEU provides that: *"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method or settlement other than those provided for therein"*

The CJEU in its Opinion raised many concerns regarding the exclusivity clause, which found the Advocate General in accord, in general. This concern, can again, be treated as a procedural as well as a substantive one.

This issue becomes complicated, as once the Union accedes to the European Convention., the Convention will become part of EU law, as explicated above regarding the legal status of the Convention in the EU legal order. In a legal order, as particular as the European Union, which differs substantially from any other International Organization[60], Article 344 reaffirms this particularity by enhancing and preserving the notion of the autonomy of EU law. The Member States are prohibited from referring issues of Union Law to other international courts, even if they are in accord. It is not a matter of discretion for the Member States, as there exists a legal obligation deriving from their very participation in this particular legal order namely the EU. Article 344 TFEU proclaims -along with other articles-[61] the autonomy of the EU legal order. The CJEU enjoys exclusivity to rule upon issues touching upon EU law. The obligation of the Member States to abstain from referring issues of EU law to other international courts (or even arbitration) derives from the principle of sincere cooperation which is enshrined in Article 4 paragraph 3 TEU.

As regards international agreements concluded by the Union, the CJEU has made it clear that it is the only competent authority to rule upon their provisions, as they constitute part of EU law and the CJEU has to interpret them so as for the interpretation to be harmonious.[62] This interpretation offered by the CJEU is binding to all of Union Institutions as well as its Member States -not third States-.

Therefore, conflicts between Member States, deriving from the interpretation of international agreements as well as measures adopted by national governmental entities to implement such agreements, must be referred to the CJEU.

Following the above, once the EU accedes to the ECHR, and as the latter will have become part of EU law, the CJEU must have exclusive jurisdiction to rule upon its provisions. [63] In the post-accession era, the problem lies within the jurisdiction of Strasbourg and Luxembourg to interpret the Convention provisions. According to articles 33 and 55 of the ECHR, the Contracting Parties of the Convention agreed not

[60] See to this respect the rulings of the CJEU in Vand Gen den Loos and Costa v Enel
[61] Article 4 paragraph 3 TEU, article 267 TFEU. Article 19 TEU
[62] CJEU C-53/96, Hermès International / FHT Marketing Choice, par. 32.
[63] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par 204

to refer any issues of convention law to any other court rather than the ECtHR. This is evidently, highly problematic, as these provisions are clearly opposing Article 344 TFEU. In the post-accession era, the Member States of the Union, which are all parties to the convention seem like they are put in a position to choose between opposing jurisdictions which would end up holding them liable before the one they did not choose. According to Article 33 of the Convention, if the Union or the Member States refer to the ECtHR, then the latter will rule upon the case.[64]

In their effort to resolve the issue, the negotiators introduced Article 5 in the DAA which stated that judicial proceedings before the CJEU would not be considered a dispute resolution system in the sense of article 55 ECHR, by adding in the explanatory report that article 55 does not prohibit the application of Article 344 TFEU. In the opinion of the present of the author, this does not provide any kind of solution to the issue at stake. The fact that article 344 TFEU is not prohibited to be applied, does not mean it will be. Although the negotiators seemed to believe that Article 5 would turn the exclusive jurisdictions of the two Courts into the discretion of the applicant to choose amongst the two, only solves the issue from the part of the European Convention, as for the latter, the EU judicial system is not being perceived as a dispute resolution system in the context of article 55 ECHR. This being said, the fact that the CJEU can have concurrent jurisdiction along with ECtHR is not an impediment to the Convention. However, it remains an infringement of Article 344 TFEU, as the CJEU remains to acquire exclusive jurisdiction.

What is more, there exists a fundamental connection between articles 344 TFEU and Article 19 TEU. The latter reaffirms the exclusive jurisdiction of the CJEU with a different ratio, an even more substantive one that attaches of issues of the autonomy of the EU legal order. It is not just a matter of jurisdiction that we are being confronted with here, it is also, and most importantly a matter of interpretation of Union law, primary and secondary. The DAA fails to deal, in my opinion with the issue of exclusive jurisdiction to rule upon cases deriving from EU acts and to interpret the Union law of the CJEU. One could even claim that an accession could not be made possible without the transfer of jurisdiction of the CJEU to the ECtHR or the establishment of concurrent jurisdiction between the two. This, however, touches upon key elements of the EU as the particular organization that it is, and it would end up altering its scope fundamentally. In combination with the prior involvement mechanism which was analyzed above, the negotiators considered it would be enough if the CJEU managed to offer its opinion before the ECtHR issued its ruling. Nevertheless, there is no guarantee that the ECtHR will abide by Luxembourg's opinion, nor is it obliged to.

In conclusion, the issue of opposing / concurrent jurisdictions seems unsolvable, in the opinion of the author of the present. The only way for the DAA to be able to be concluded as regards article 344 TFEU, would be through a Treaty amendment, according to article 218 paragraph 11 TFEU. There exist, nonetheless, some provisions

[64] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par 209

in the Treaties which touch upon fundamental issues of EU law autonomy, amongst those being articles 344 TFEU and Article 19 TEU. If they were to be amended, the Union would turn into a different kind of international organization, distant from what it is today, and from what the Member States themselves wanted it to be.

Chapter B

Substantive and Systemic Objections

I. Articles 53: Contradicting and Confusing for the Member States

The Charter Fundamental Rights of the EU lays down in Article 53:

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are parties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

Whereas Article 53 of the European Convention of Human Rights reads as:

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

The aim of Article 53 of the Charter is to prevent conflict between the provisions of the Charter and other sources of fundamental rights protection. The CJEU has explicitly held that nothing is to limit the scope and level of protection the Charter is offering in relation to Union law, international law, international agreements concluded by the Union or all the Member States and especially the ECHR, as well as the constitutions of the Member States. [65] The provision has also been interpreted by the Court in *Melloni*, as safeguarding the uniformity and effectiveness of EU law.[66]

[65] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par. 187-190.
[66] C- 399/11, Melloni par. 59 onwards

Article 53 has been interpreted by the Court in conjunction with the notion of the supremacy of EU law, as a key element of Union law, deriving from and complementing the autonomy of Union law. The fact that a Member State may call upon national law provisions, even if they may be of constitutional nature[67], does not in case affect how effective Union law is in the Member State. Through Article 53 CFR it is reaffirmed that Member States can protect fundamental rights through provisions of national law, as the Member States' constitutions is a source of fundamental rights protection law of the EU, so long as these national provisions offer the same level of protection as the Charter.

As regards to the Convention's article 53, it allows its Contracting Parties to offer a higher level of human rights protection, compared to the one it is offering. Therefore, Contracting Parties to the Convention which are also Member States of the EU can provide an even higher standard of protection. This is troubling. The different scope of each of Article 53 is evident and contradicting. Once the Union accedes to the ECHR, article 53 of the Convention will become part of EU law, for the reasons explained above. There will be a major inconsistency in EU law, as the EU primary law -article 53 of the Charter- and the Convention, which will be below primary EU law, will be contradicting one another. The first is clear in its scope that it offers the maximum level of fundamental rights protection and preserves the effectiveness and supremacy of EU law in its text. The latter leaves room to the Member States to essentially derogate from Article 53 of the Charter, i.e. infringe EU primary law. This is highly problematic and dangerous. The Union is going through challenging times as regards the perception of the notion of supremacy by Member States and National Courts[68]. Giving the Member States a tool to derogate from it, would only lead to the circumvention of the EU legal order.

The DAA does not mention to the relationship between Article 53 CFR and Article 53 ECHR. However, the contradiction is obvious. The CJEU in its opinion touched upon the issue stating that there was a void in the DAA in this regard. In my opinion, and in case an amendment to the Charter was proposed, the rationale for not doing so would be the same as with Article 344 TFEU and Article 19 TEU. They all constitute key provisions, essential to the construction of the EU legal order and necessary for its preservation. It is, therefore, to my view, highly unlikely that this would happen, and against the interests of the Union in a new negotiation process.

[67] Judgment of the Court of 17 December 1970.
Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.
Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany.
Case 11-70. par. 3

[68] Judgment of the Court (Grand Chamber) of 11 December 2018.
Proceedings brought by Heinrich Weiss and Others.
Request for a preliminary ruling from the Bundesverfassungsgericht.

II. Undermining the Preliminary Reference Procedure of Article 267 TFEU through the application of Protocol No. 16?

One of the key elements of the EU's judicial system is the preliminary reference procedure. It facilitates the judicial dialogue between the national judge and the European Judge. The national judge as the one who applies and checks upon EU law through the cases brought before him must be able to communicate with Luxembourg for the interpretation of EU law provisions. Therefore, article 267 TFEU enshrines the procedure under which this communication is accommodated. [69] The Court of Justice when being referred with a preliminary reference question by a national court is either to provide guidelines for the interpretation of the relevant EU law provision or to rule on its legitimacy, without interfering with the facts of the case which is the job of the national court.

According to Article 267, paragraph 3 TFEU, the national courts are obliged to refer to the CJEU with a preliminary reference question when all means of domestic judicial protection have been exhausted. This can mean that not only higher domestic courts are capable of sending preliminary references to the CJEU, but all national courts that rule on first and last grade. The obligation derives from the necessity to clarify a disputed EU law provision.

Protocol no. 16, of the ECHR, seems to affect the specific characteristics of the preliminary reference procedure. The EU would not become a party to the said Protocol, but its Member States are, and according to Protocol no. 16 Member State High Courts can refer to the ECtHR asking for an advisory opinion for issues of ECHR interpretation.

In this respect, it is worth examining the Opinion of the Advocate General on the DAA. The Advocate General simply states a fact: Protocol 16 would exist with or without Accession. The Member States would be able to make use of protocol 16 asking the Strasbourg Court for an advisory opinion. Therefore, this seems to be an issue regardless of accession or not.

The advisory jurisdiction of the ECtHR and the preliminary rulings that the CJEU issues under the preliminary reference procedure seem to have a lot in common. There is one

[69] Judgment of the Court of 5 February 1963.
NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.
Reference for a preliminary ruling: Tariefcommissie - Netherlands.
Case 26-62. par. 23

distinct difference, however. The latter issues rulings that are binding to the referring court whereas ECtHR's opinions are not binding.

As highlighted above, the referring national Court is obliged to refer to the CJEU under Article 267 TFEU where it finds that an interpretation of an EU law provision is needed. The exact same courts are at the same time given the chance by the ECHR to ask the ECtHR for interpretations of the Convention. The Draft Accession Agreement did not preclude a provision dealing with this topic. The reason why the negotiators did not include this issue in the negotiation process is highly likely to be that the EU would not accede to Protocol No. 16. However, as the Advocate General observed, this would remain an issue with or without the accession of the Union to the ECHR in general.

Post-accession, the ECHR would become part of EU law, which means, as pointed out in the present, that the CJEU would have jurisdiction to interpret it under the preliminary reference procedure as it has for every EU law provision. In this case, which Court would be legitimized to refer a question to? Strasbourg or Luxembourg? This creates major confusion for the Member States. What is more, what would happen if an interpretation of the provisions of the Charter – which correspond to ECHR provisions- was asked? This seems highly likely to affect the effectiveness of the preliminary reference procedure under article 267 TFEU. [70]

In this context, the national referring court is able to ask for an opinion of the ECtHR under Protocol 16 to interpret its provisions and at the same time refer with a preliminary question to CJEU to interpret the EU law provisions that the national measure is applying. In the case that the applicant is not satisfied, they are able to plea before the ECtHR. Therefore, why wouldn't the national judge choose to refer a question directly to Strasbourg since the individual applicant will seek to bring the procedures before the latter as the latest stage of the judicial proceedings?

This conflict of procedures is highly likely to create de facto situations where the national judge tries to avoid their preliminary reference obligations. Therefore, we are gradually being led to a circumvention of the preliminary reference procedure, which will ultimately lead to miscommunication, if not the lack of communication at all, between the national domestic and EU courts. This would significantly affect the notion of autonomy as the very particularity of the EU is that the judicial dialogue between the aforementioned courts is not only encouraged -as this is the case with the ECHR system- but it is also necessary for the effectiveness of the EU law to be preserved.

[70] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par. 196-200.

III. Mutual Trust and the importance of its preservation

One of the most substantive concerns the CJEU raised in its opinion on the Draft Accession Agreement was the issue of the compatibility of the DAA with the principle of mutual trust. Mutual trust is capable of creating and preserving a space without internal borders, as the CJEU explicitly said.[71] The whole concept of the European Project is based on the principle of mutual trust. The Member States upon acceding commit to an obligation to cooperate sincerely – the principle of sincere cooperation- between one another. Without the principle of mutual trust, there would be no guarantee that the Member States would mutually respect one another and that they would cooperate under the conception of trustworthiness. It all inaugurates from one simple fundamental basis: All Member States are to expect and believe that the rest of the Member States will abide by their obligations deriving from EU law without the need to check on it. In the field of fundamental rights protection, the Member States trust that the rest are abiding by their commitments under EU law to respect and protect fundamental rights. Without this principle which transforms into a major practical tool, the EU would not be able to function properly. The CJEU has declared the principle of mutual trust as a general principle of Union law, i.e. primary law. As a general principle of EU law, mutual trust must be respected by all of the Member States as well as the Union's Institutions.

It is in the Area of Freedom, Security, and Justice that the principle of mutual trust proves to be of even more prominent significance, The CJEU in its Opinion 2/13[72] made reference to the principle of mutual trust in regard to cases attaching to the Area of Freedom, Security, and Justice. [73] When implementing fundamental rights protection in this Area -but not exclusively- the Court said that the Member States should take as a given that fundamental rights are being protected by the rest of the Member States, as while the latter are doing so, they are at the same time implementing their obligations deriving from EU law, i.e. the Charter and all the sources of fundamental right protection that the Charter is making reference to. As highlighted previously, the Charter aims at preserving the effectiveness of Union law, including the field of fundamental rights. Therefore, fundamental right standards are the same in every state -to the extent that they are protected by Union law. This was reaffirmed by the CJEU in *Melloni*.

The principle of mutual trust is also linked to the principle of mutual recognition of judicial rulings, which constitutes a fundamental element of judicial cooperation. According to the latter, the recognition and implementation of the judgments issued in a Member State is absolutely necessary and obligatory, the reasons to decline from this would have to be very specific.

[71] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par. 191-195
[72] Ibid
[73] Ibid

The Draft Accession Agreement did not entail any provision regarding the preservation of the principle of Mutual Trust. There exists an incompatibility, according to the CJEU between the said principle and the ECHR system. Under the ECHR system, a Contracting Party can check whether another Contracting Party is respecting and protecting fundamental human rights. Evidently, if the EU were to accede there would exist a fundamental infringement of one of the core fundamental values of the European construction.

It seems highly unlikely that a solution would be found in this respect unless the European Union was willing to give away one of its most distinct characteristics or the ECHR was willing to do the same. The ECHR system does not prohibit -and even promotes, one could say- the examination of whether fundamental rights protection standards are being safeguarded by the Contracting Parties. Perhaps this is the rationale of an even further amelioration of the system of fundamental right protection standards, which would find the author of the present in accord with such a practice. However, one needs to bare in mind the significance of mutual trust in the EU. This is not to say that the EU is putting mutual trust higher than the standards it offers for fundamental rights protection. On the contrary, the EU has developed and accommodates multiple instruments for the protection of the said rights. One could say that the judicial dialogue which is so often and so constructive and occurs between domestic courts and Luxembourg is an indication of how the EU keeps ameliorating in the field of fundamental right protection, along with the extent of case law of the CJEU and the hard-law instruments the EU acquires. Let’s bare in mind that almost all of the legal instruments attaching to fundamental rights have been put on the top in the hierarchy of norms in the EU legal order, i.e. they have been made primary law.

IV. CFSP and the double standards of jurisdiction

Common Foreign and Security Policy constitutes one of the most complex issues of EU law -if one could even put it this way- in my view. It concerns the creation of a common defense policy in the future, which could potentially lead to common defense for the EU Member States. Article 24 of the TEU lays down the competence of the EU in the field of the CFSP. The Council, which is the main actor in the CFSP area is assisted by the High Representative of the Union for External Relations and Defense Policy.

CFSP is a common example of intergovernmental cooperation. In this field, it is hard to speak about supranational cooperation as the Member States have kept the majority of the competences and a vast autonomy to act as they wish in the sphere of external relations. For example, decisions are not being made according to the ordinary procedures laid down by the Treaties as the rest of the Union's activities. In contrast, the European Council and the Council of the European Union, i.e. the Council of Ministers decide by unanimity – a system which has by now been abolished in most areas of legislative procedures and is considered to be quite obsolete-. But then again, we are in the field of political decisions and not legislative ones. Unanimity can also be found in another political procedure, the one laid down in Article 7 TEU. Legislative acts are forbidden to be adopted in the area of the CFSP, under article 24 TEU. Derogations from unanimity can occur and the latter can be replaced by a qualified majority when the European Council decides so.

The Court of Justice has no jurisdiction to rule upon CFSP decisions nor is it capable to check upon the legality of the acts adopted under a CFSP mandate, as enshrined in article 275 TFEU. Ever since the European Single Act and the insertion of the CFSP into primary law, the Court had no jurisdiction over it, with the exception of article 24, paragraph 1 TEU and the exception provided for in article 275 TFEU, which were introduced in the Treaties quite recently. Under article 275 TFEU, the CJEU has jurisdiction over a CFSP decision when it contains measures against natural or legal persons. These persons can make use of Article 263 TFEU. This exception was only introduced in the Treaties after the notorious judgment of the Court in *Kadi and Al Barakaat.* [74]

It follows from the above, that as the Court has no jurisdiction, any remedy sought under articles 258 TFEU and 273 TFEU would be declared inadmissible. Moreover, no preliminary reference ruling can be issued under article 267 TFEU for decisions of the CFSP.

When the EU accedes to the European Convention, the ECtHR will be able to adjudicate on cases of the whole spectrum of EU law, brought before it by natural or

[74] Judgment of the Court (Grand Chamber) of 3 September 2008.
Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities.

legal persons and States. This means, in the CFSP area as well. When the ECtHR will be ruling upon CFSP decisions, the Union can be held liable for infringements of the European Convention, when at the same time not even the Court of Justice can decide that. This is a major paradox. In case this happened, judicial control of the acts of the Union would be transferred completely to an external judicial body – the ECtHR-, no matter if the evaluation of the act only took place in the field of fundamental rights protection where the ECtHR has jurisdiction.

Following the above, it is evident that the peculiarity in the CFSP area consists of the different levels of control of the two courts; Luxembourg has no jurisdiction apart from exceptional cases, which were mentioned above, and Strasbourg faces no barriers to jurisdiction – apart from its self-limiting nature of course of only ruling upon issues of fundamental right protection.

In this respect, the Advocate General proposed that article 275 be read expansively to also cover cases of seeking compensation as well as including the preliminary reference procedure in the scope of article 275 TFEU. [75] The Court held, however, that this would result in a non-consistent interpretation of the Treaties, as it would also create new judicial remedies in the CFSP, which were not in the Treaties and do not abide by the ratio of provisions 24 TEU and 275 TFEU. Although highly convenient, this would alter the scope of the Treaties so fundamentally that a Treaty amendment would be needed. [76]

The CJEU concluded in its Opinion that it is not possible for an external Court to be able to rule upon EU acts that the CJEU has no jurisdiction, not merely to express an opinion. It is true that the scope of CFSP acts is fundamentally different from EU legislative acts. However, when there exists an article such as article 344 TFEU which proclaims the exclusive jurisdiction of the CJEU on EU acts, it is highly contradictory if not disturbing to claim that an external court can check on decisions made within the EU legal order, as the European Council and the Council of the European Union constitute Institutions of the European Union according to article 13 TEU. Therefore, as Institutions of the Union, to transfer the check of validity/conformity with fundamental rights protection standards to an external court undermines the role of the Court of Justice heavily.

This incompatibility of accession to the Treaties could be dealt by a Treaty amendment, nevertheless. If Member States decided to transfer more competences to the Union in the Areas – but not necessarily-, if they decided to expand the jurisdiction of the Court of Justice – to be more precise-, then Luxembourg and Strasbourg could cooperate under the co-respondent and prior involvement mechanisms – although these mechanisms raise concerns themselves, as we examined above-. The essential question to be asked here would be: If the Member States do not wish to transfer jurisdiction to the CJEU for decisions they make in the CFSP area, why would they wish to do so for

[75] Opinion of the Advocate General, Juianne Kokkote, par. 82-103, Opinion 2/13, ECLI:EU:C:2014:2475
[76] Opinion 2/13 of the Court (Full Chamber) of December 18 2014, ECLI:EU:C:2014:2454 par 249-257

the European Court for Human Rights? Although highly political the questions, it has legal parameters, and if a political “consensus” is not to be found, then neither will a legal one.

CONCLUSIONS

In light of the above one could be drawn to the following conclusions:

The Union has is a very particular legal order as the Court notoriously held in Costa v Enel and Vand Gend en Loos. These judgments treat the whole European project and their scope and prominent significance have not been altered to this day. Although the CJEU has developed its reflexes to adjust the European Union as a leading global actor, as well to facilitate the relationship of the EU's Institutions and mechanisms with its Member States, these said judgments remain to this day at the heart of EU law. They provided for the notions of supremacy and autonomy of EU law. Without them, and without direct effect, we would be talking about yet another international organization. But the Member States of the Union did not wish to create yet another international organization. They wished to accommodate close cooperation in various fields through a supranational legal order.

It was inevitable for that supranational behemoth that emerged in 1951 not to interfere into the sphere of fundamental rights protection since it declared that individuals would be subjects of it in Vand Gend en Loos. The EU legal order, realizing that it had to protect the rights of its individuals, along with preserving its key elements, namely its autonomy, developed many ways to do so. Together with the Court of Justice and its case law, the Member States and the Institutions cooperated to facilitate human rights protection for decades. The insertion of the Charter of Fundamental Rights in the EU legal order first, and the acknowledgment to it of the same legal status as the Treaties, made clear the EU was doing its utmost to accommodate all actors.

A future accession of the Union to the European Convention, could, as observed by CJEU's objections – procedural and substantive- prove to alter the nature of EU law. The European Convention is itself interfering into the legal order of the Union's Member States already. However, when issues touching upon EU law reach the European Court of Human Rights and it rules upon them, there exists a major conflict between that and Article 344 TFEU which declares the exclusive jurisdiction of the CJEU to rule upon acts deriving from EU law obligations.

All, without any exception, of the concerns that were raised by the CJEU in Opinion 2/13, hinder one prominent concern: The circumvention of the autonomy of EU law. Many commentators have been heavily critical towards the Court in this respect, characterizing as being obsessed over the autonomy of EU law, possessive, or even not "caring" as much for fundamental human rights as it does to preserve its autonomy.

This does not find me in accord. This critical stance begins from one conceptual basis which is very subjective: That the CJEU is not protecting fundamental rights as the ECHR, therefore the need to accede it. In my view, the long standing and consistent case law of the CJEU in the field of fundamental rights protection proves the opposite. A prominent example would be the case of Kadi and Al Barakaat, where one could say

that the Court of Justice of the European Union ended up safeguarding fundamental human rights despite the resolutions of the Security Council of the United Nations. This is not for the present to be analysed, however it is an indicative example of how far the CJEU has gone to protect fundamental rights that it is the one who affects international organizations to amend their mandates to conform with fundamental rights standards, as the UN did after the judgement of the Court in Kadi.

That is not to say that a future accession would be an impediment to fundamental rights protection in Europe – although as the DAA of the 2013 it could potentially create legal uncertainty for the individual-, but as the DAA stands, the EU will no longer be able to offer an even higher standard of human rights protections as it can right now, and as Article 53 of the Charter enshrines, for the simple reason that it will lose a major part of its competences. The CJEU will not be able to continue its even growing and evolving case law.

In my view, the current negotiators for a new Accession Agreement would have to start from a very different conceptual starting point. The ECHR could change so as to accommodate the accession of a cooperating actor which will not be perceived as a State at all. That is to say that although the ECHR system merely changed to facilitate the accession of the Union as a non-state contracting party, it was treated mostly in the DAA as a State. Most of the procedural and substantive objections of the CJEU derive from the fact that the ECtHR is being seen -although not formally said- as hierarchically above the CJEU in a post-accession era. The point of all these is, that between the Union and the Convention there cannot exist a hierarchy. It is absolutely necessary for the Union to preserve its characteristics to keep acting for the benefit of its people.

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