

TALLINN UNIVERSITY
School of Governance, Law and Society
Law curriculum

Petri Freundlich

**THE AUTONOMY OF EU LAW:
THE ECHR ACCESSION OPINION AND ITS AFTERMATH**
Bachelor's thesis

Supervisor
Associate Professor Samuli Miettinen, LL.D.

Helsinki
2016

Author's declaration

I have written the Bachelor's thesis independently. All the works of other authors, relevant viewpoints, literary sources, and information from other sources have been referenced.

Author: *Petri Freundlich*

(signature)

.....

(date)

I agree with publishing my thesis electronically in Tallinn University's Academic Library's repository.

Author: *Petri Freundlich*

(signature)

.....

(date)

The thesis is in compliance with the valid requirements.

Supervisor: *Samuli Miettinen*

(signature)

.....

(date)

Allowed to defence 20...

Defence committee chairman: *Lauri Railas*

(signature)

TABLE OF CONTENTS

INTRODUCTION	4
I. PRE-LISBON: RATIONALE FOR ACCESSION AND OPINION 2/94	6
1.1. Reasons for acceding to the ECHR.....	6
1.2. Case law of the ECtHR and the <i>Bosphorus</i> - doctrine.....	9
1.3. Opinion 2/94	12
1.3.1. Opinion of the Court	13
1.3.2. Analysis of the opinion	14
II. POST-LISBON ERA	16
2.1. Autonomy of EU legal order	16
2.2. Accession negotiations	20
2.3. Involvement of the Court of Justice in the negotiations	23
2.4. Draft accession agreement	24
2.4.1. Co-respondent mechanism	25
2.4.2. Prior involvement of the CJEU	27
III. OPINION 2/13.....	29
3.1. Opinion of the Court	29
3.1.1. Preliminary remarks	29
3.1.2. Specific characteristics and autonomy of EU law.....	30
3.1.3. Article 344 TFEU.....	32
3.1.4. The co-respondent mechanism.....	32
3.1.5. The procedure for the prior involvement of the Court of Justice.....	33
3.1.6. The specific characteristics of EU law as regards to judicial review in CFSP matters	34
3.2. View of the Advocate General.....	34
3.3. Assessment of the Commission and observations submitted to the Court	36
3.4. Analysis of the opinion	38
3.5. Principle of mutual trust in relation to Opinion 2/13.....	42
IV. AFTER THE OPINION – AVAILABLE ROUTES FOR SOLVING THE SITUATION	44
4.1. Position of the EU	44
4.2. Position of the CoE and its non EU Member States	46
CONCLUSIONS	47
REFERENCES	49
TABLE OF CASES.....	52

ABBREVIATIONS.....	54
ABSTRACT	55

INTRODUCTION

Accession of the European Union to the European Convention on Human Rights (Officially Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR) has been a topic of discussion for decades. First time it was considered in the judicial arena was in mid 90's when the Court of Justice decided that Community at that time did not have competence to accede to the Convention.¹ However, the process had begun almost 20 years earlier when the Commission adopted a memorandum on the accession of (then) European Communities (EC) to the ECHR.² The Commission thought that in the long term the goal should be to amend the treaties to include a list of fundamental rights especially adapted to the institutions. The Commission also thought that as this would be difficult to achieve in the short term the accession to the ECHR would be a good short term solution enhancing fundamental rights protection immediately.³ The plans of the Commission didn't come completely true. Union did manage to create its own Charter of Fundamental Rights but 36 years later the Union is still not a member of the ECHR.

Treaty of Lisbon changed the matter in terms of competence. In Lisbon treaty there was a paragraph added to the Treaty on European Union (TEU) that made it an obligation for the EU to accede to the ECHR.⁴ Also, the ECHR has since been amended to explicitly allow for the EU to accede.⁵ After Lisbon, the Commission started negotiating an agreement and the draft accession agreement was finally concluded in 2013. Once again the Court of Justice was faced with the question of the EU accession to the ECHR and to the surprise of everyone, including the Advocate-General (A.G.), the Commission and all Member States, it once again said no setting several additional conditions to the accession.

The purpose of this thesis is to examine the issue of the autonomy of EU law in the context of the EU accession to the ECHR. Taking into account the focus of this thesis the object is to: identify the reason(s) for the EU accession to the ECHR and potential problem areas therein,

¹ CJEU Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

² Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) final. 2 May 1979. See also L. Besselink: Should the European Union ratify the European Convention for Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice in Follesdal et al. Constituting Europe, Cambridge University Press 2013, pp. 313-314.

³ *Ibid.* Introduction.

⁴ Treaty on European Union Art. 6(2), (OJ C 326, 26.10.2012).

⁵ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Article 17.

examine the issues raised by the Court of Justice in its opinion and draw conclusions on what could or should be done in order for the accession to be possible. Or in the alternative, if accession would be reasonable or even possible in the light of the issues raised.

The first part of this thesis will consist of examining the rationale behind the EU accession, followed by an overview of the situation and problems before the Treaty of Lisbon culminating to the Court of Justice Opinion 2/94. The following chapter deals with the current situation starting from the Treaty of Lisbon. The reason for the division of the thesis into pre- and post-Lisbon eras is that the Treaty of Lisbon brought major constitutional changes, specifically in terms of accession to the ECHR.

As the autonomy of EU law is the focus of this thesis there is a chapter included for the purpose of defining the autonomy of EU law, especially it in the light of case law of the Court of Justice. The reason for the importance of EU law autonomy is that this has usually been the most important obstacle between the EU and international conventions, particularly ones that have their own dispute resolution mechanism, as is the case with the ECHR. The autonomy of EU law was also as one of the most fundamental questions in the accession to the ECHR this time and it turned out to be the key obstacle to the accession.

The last chapters will go through the accession negotiations, draft accession agreement and finally the Opinion 2/13 and its aftermath, including examination for potential next steps on the road to accession. As the large part of the Council documents concerning the accession negotiations have been made public it is possible to examine the goals of the EU negotiators on one hand and the end result on the other and compare them to each other as well as to the Opinion of the Court of Justice. Opinion 2/13 was received with much criticism and especially human rights scholars across Europe were vocal about their objections to the reasoning of the Court. An important part of this thesis is also to collect and summarize the extensive discussion that has resulted from the Opinion. One important notion regarding the source material on this topic is that everything written before the Opinion 2/13 was written from the point of view that the accession will happen as planned. This of course seems to indicate that the opinion of the Court took most observers by surprise. It also raises some interesting questions, especially what will happen next after the negative opinion. The last chapter will examine this issue and different options available.

I. PRE-LISBON: RATIONALE FOR ACCESSION AND OPINION 2/94

Why must EU join the convention? This is a question that has several answers and they are often more philosophical and political than legal in nature. Commission in 2010 identified the main reasons for accession to be: ensuring that anyone who claims to be a victim of violation of the ECHR by a Union institution is able to make a claim to the ECtHR in the same manner as against Member States, reaffirming the role of the ECHR in Europe, strengthening the credibility of the EU when it comes to protection of fundamental rights, complementing Charter of Fundamental rights (CFR), ensuring that the case law of both courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), continue to develop in harmony, and finally allowing claims to be made directly against the EU instead of collectively against the Member States.⁶ Of these reasons first, fourth, fifth and sixth are clearly questions with legal dimension whereas reaffirming the role of the convention and strengthening the credibility of EU are more philosophical and political. The last part – allowing claims to be made directly against the EU – does not only hold possible negative effects against the EU but also guarantees that the EU may present its case and defend its actions before the ECtHR like any other contracting party.

1.1. Reasons for acceding to the ECHR

In *Constituting Europe* Besselink authors a chapter on whether the EU should ratify the ECHR.⁷ He identifies several reasons why the EU accession to the convention would be beneficial. Firstly the accession would increase the number of opportunities for protection of rights of the individuals.⁸ Secondly, the proposed prior-involvement procedure would perhaps open a back door for individuals to the CJEU.⁹ And thirdly, the ECtHR could increase the level of judicial scrutiny in areas of mutual recognition, for example in the fields of criminal law, civil law and asylum law.

So far the relationship between the EU and the ECHR has been somewhat unilateral. The

⁶ Recommendation for a Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms, Brussels 17.3.2010 SEC(2010) 305 final/3. Chapter III.

⁷ L. Besselink. *Should the European Union ratify the European Convention for Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice* in Follesdal et al. *Constituting Europe*, Cambridge University Press 2013, pp. 301-333.

⁸ *Ibid.* pp. 332-333.

⁹ *Ibid.* The proposed prior-involvement of the Court of Justice could enable individuals who would normally not have access to EU courts to have their cases reviewed by the ECJ. See also Chapters 3.4. and 4.2.5.

ECtHR has no legal standing to directly assess actions of the EU (although it is possible to do indirectly through assessing actions of the EU Member States) whereas EU (and particularly CJEU) has first accepted and later integrated the rights guaranteed in the convention to its own legal system.¹⁰ Despite the lack of official interaction there is an ongoing dialogue between the two courts at an unofficial level where the members of the two courts have met and discussed topical issues.¹¹

In addition to unofficial cooperation the two courts have traditionally used the case law of each other in their judgements.¹² This trend has, at least on the side of the CJEU, diminished since the adoption of the CFR. Furthermore, it seems that the Court of Justice has tried to distance EU Fundamental rights jurisprudence from other sources of international human rights law.¹³

There is clearly an interaction between the two systems (although possibly of a diminishing importance). This does not remove the fact that neither of the courts are legally bound to respect the rulings of each other. At the moment the situation is that all the Member States are parties to the convention and the EU is not. This means that when it comes to questions of breach of the Convention it is the Member State (MS) in question that will appear as a defendant. However, it is often the case that the Member States do not have much discretion even in the field of fundamental rights when it comes to implementing EU law. Already in the 70's the Court of Justice ruled that national fundamental rights may not be used to judge validity of then Community law and this has consistently remained the position of the Court.¹⁴ The latest and perhaps most obvious example of this being *Melloni*.¹⁵ It has already been demonstrated by the ECtHR that such a case may appear where a MS is held liable for a breach of the ECHR even if the breach had its origin in EU legislation.¹⁶ This issue will be further examined in chapter 2.2.

This does not mean that the EU and the CJEU do not provide protection of fundamental rights. EU has its own fundamental rights document, Charter of Fundamental Rights, which was

¹⁰ L. Besselink (reference 7), pp. 301-303.

¹¹ *Ibid.*, pp. 306-308.

¹² T. Lock. *The European Court of Justice and International Courts*, Oxford University Press 2015, pp. 167-178 and 212-215.

¹³ G. de Burca. *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?* *Maastricht Journal of European and Comparative Law*, 2 (2013) pp. 171-174.

¹⁴ CJEU 11/70, *Internationale Handelsgesellschaft*, para. 3 of the judgement.

¹⁵ CJEU C-399/11 *Stefano Melloni v. Ministerio Fiscal*.

¹⁶ T. Lock. *Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order*. *Common Market Law review* 48: 1025-1054, 2011.

elevated to the same legal status as the treaties in Lisbon Treaty.¹⁷ This change has strengthened and extended the role of Court of Justice in fundamental rights protection making it more clearly the constitutional court in the EU extending its role into the traditional territory of national constitutional courts.¹⁸ Also in recent years the court has clearly highlighted protection of fundamental rights in its case law. One of the most concrete examples being the *Kadi* cases.¹⁹ The decision of the Court of Justice in *Kadi* was to a great extent highly influenced by the ECtHR judgement in *Behrami*.²⁰ There are of course numerous cases before *Kadi*, one of the earlier examples of the trend being the *Connolly* case.²¹ In this case the applicant claimed violation of article 10 of the ECHR (freedom of expression) in the Court of First Instance (CFI) which ended up giving much broader justification to restricting free speech than the ECtHR. The Court of Justice however adopted a stricter definition, one that was in conjunction with the case law of the ECtHR. This eventually strengthened the role of the Court in guaranteeing fundamental rights.²² The accession would formalize and unify the fundamental rights protection of the EU courts. For example: where the ECtHR has found EU to be in violation of the ECHR and the matter would later come before the CJEU, it would be bound by the ruling of the ECtHR regarding violations of the convention.²³

There is also the possibility (albeit a rare one) of a gap where some cases are completely handled within EU bodies and therefore fall completely outside of the jurisdiction of the ECtHR. Here the main example is the *Connolly* case mentioned in the previous paragraph.²⁴ The case concerned a Commission employee who wrote a book on the shortcomings of the monetary union using rather harsh language, an act which resulted in disciplinary measures against him by the Commission.²⁵ Connolly brought a case before the CFI and later an appeal before the Court of Justice.²⁶ He then made a complaint to the ECtHR claiming violation of his right to a fair trial under the Convention. The action was brought against 15 Member States of the EU because the EU is not a party to the convention and therefore could not be a subject to a claim. His claim was dismissed by the ECtHR on the grounds that the states in question had not been

¹⁷ Treaty on European Union, Article 6(1), (OJ C 326, 26.10.2012).

¹⁸ M. Claes and M. deWissert. The Court of Justice as a Federal Constitutional Court, in Cloots et al.(eds): Federalism in the European Union, Hart Publishing 2012. pp. 102-104.

¹⁹ Joined cases C-402/05 and C-415/05, *Kadi and Al Barakaat v. Council and Commission*.

²⁰ T. Lock (reference 12), p. 170.

²¹ CJEU C-273/99, *Connolly v. Commission*. See also next paragraph.

²² L. Besselink (reference 7) pp. 305-306.

²³ T. Lock (reference 12), p. 238.

²⁴ T. Lock (reference 16).

²⁵ L. Besselink. (reference 7), pp. 304-305.

²⁶ CJEU C-273/99, *Connolly v. Commission*. This was before the creation of the Civil Service Tribunal which would currently hear such cases. The Court of First Instance was renamed as General Court in Treaty of Lisbon.

a part of the proceedings at any stage and the ECtHR did not have *ratio personae* jurisdiction in the case.²⁷ Whether the claim was well-founded or not, this case shows that there could exist actions by the EU where no-one could be held liable for breach of the Convention. This is important because it is sometimes claimed that there is no need for EU accession to ECHR due to the fact that all EU Member States are already parties to the convention. This argument also falls short when we consider the *Bosphorus* doctrine, examined in the next chapter, which shields an EU MS from liability under the ECHR in certain cases. Here also the EU law falls outside of judicial control of the ECtHR (though this is a rebuttable doctrine voluntarily developed by ECtHR and not a strictly legal one as in *Connolly* case).

The decision in *Kadi* was an interesting example of the Court of Justice giving priority to fundamental rights protection within the EU over international legal order. Even though the decision was mostly praised, particularly by human rights scholars, it was also criticised for distancing and separating the EU from international law.²⁸ Interestingly Opinion 2/13 was criticised for largely the same reasons (See Chapter 3.4.), and unlike *Kadi* was largely condemned by human rights scholars. This shows that balancing the autonomy of EU law and international law is not an easy task.

1.2. Case law of the ECtHR and the *Bosphorus*- doctrine

There are two particularly important cases relating to EU Member States' liability before the ECtHR for EU acts that are worth examining further. First one is *Matthews v. United Kingdom* which concerned European Parliament elections in 1994.²⁹ The applicant was denied the right to vote in the European Parliament elections in Gibraltar and brought a claim against the United Kingdom. The most relevant part of the judgement states that as the legislation originating from the EC affects the people in the same way as legislation originating from domestic legislature there is no reason why UK should secure the rights derived from ECHR in only one of these cases. And most importantly, while the ECtHR recognized that competences can be transferred to international organisations, the responsibilities of a state regarding the convention remain the same even after such transfer.³⁰ In the end the ECtHR found that the European parliament is involved enough in legislating and supervision in Gibraltar to constitute part of legislature of

²⁷ *Connolly c. 15 Etats Membres de L'Union Europeenne*, App. No. 73274/01, ECHR.

²⁸ G. de Burca. The European Court of Justice and the International Legal Order After *Kadi*. Harvard International Law Journal. 2010. Vol. 51, No. 1. pp. 1-49.

²⁹ *Matthews v. United Kingdom* [GC], Application no. 24833/94, ECHR 1999-I

³⁰ *Ibid*, § 32-34.

Gibraltar for the purposes of the convention and denying the right to vote thus constituted a breach of it (Article 3, right to free elections).³¹

The second case, *Bosphorus v. Ireland*, concerned UN adopted sanctions against Federal Republic of Yugoslavia which were implemented through an EC regulation.³² Here the ECtHR examined in detail the Human rights protection regime of the (at that time) EC. Firstly the ECtHR repeated its previous finding in *Matthews* stating that powers may be transferred to an international organisation and that that organisation is not liable for the breach of the Convention when it itself is not a member. However, the contracting parties are responsible for the compliance with the Convention.³³ After this the court expanded its reasoning in *Matthews* and stated that state action fulfilling its legal obligations as a member (of here EC) is considered justified "as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".³⁴ Some judges in the case had concerns over the nature of preliminary reference.³⁵ They stated that though binding, the preliminary reference is not an appeal because the national court has discretion on how to apply the ruling of the Court of Justice to the case at hand. Also, because the individual access to CJEU is limited it does not replace an external review of the ECtHR which is launched by an individual application.

Bosphorus case has become perhaps the most defining case in the relationship of the ECHR and the EU and has resulted in what is commonly referred to as the "*Bosphorus*- doctrine". Besselink defines this as "immunity from the ECHR responsibility".³⁶ This means that the contracting parties are not responsible under the ECHR when two conditions are met; first that the obligation was under EU law that left no discretion to the state on the application, and second that protection of the fundamental rights afforded by the CJEU is equivalent to that afforded by ECtHR. It is noteworthy that the CJEU protection of the rights guaranteed by ECHR is presumed but can be rebutted.³⁷ However, as it is doubtful that the presumption would ever be rebutted, the result is practically an immunity.³⁸ It also doesn't seem equal that the EU legal

³¹ *Ibid.*, § 45-54.

³² *Bosphorus v. Ireland*, [GC], Application. no. 45036/98, ECHR 2005-VI

³³ *Ibid.*, §§ 152-153.

³⁴ *Ibid.*, § 155.

³⁵ *Bosphorus v. Ireland*, see Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki. § 3.

³⁶ L. Besselink (reference 7), pp. 308-310.

³⁷ *Ibidem*.

³⁸ T. Lock (reference 12), p. 196.

system enjoys such an immunity as there are certainly legal systems within the ECHR that offer high protection but are not automatically presumed to be in compliance of their fundamental rights obligations.³⁹ This of course stems from the fact that the Union is not a party to the Convention and the doctrine applies only to cases where there was no discretion left to the Member States. This would however be resolved by the accession which would make the doctrine and such a presumption obsolete.

These cases highlight the problematic relationship between EU law and the ECHR. On one hand, as interpreted by the ECtHR, Member States are responsible for human rights obligations even if the powers have been conferred to the EU. On the other hand, as the *Melloni* case shows, states don't necessarily have much leeway in enforcing EU law even if fundamental rights are concerned.⁴⁰ Much at the same time with *Melloni*, the Court of Justice delivered its judgement in *Åkerberg Fransson* where it said that whenever national law falls within the scope of EU law the CFR must be applied.⁴¹ Read together these two judgements demonstrate that EU law doesn't necessarily leave much discretion to Member States when EU law is involved and it could even be argued that the importance of national fundamental rights protection systems is diminishing within the EU.⁴² But it might still be too early to draw such drastic conclusions since it is not settled yet whether these two cases form the rule or the exception.⁴³ This dilemma would however be resolved to a great extent by EU accession as indicated in *Bosphorus* case by the ECtHR. The question still remains whether the EU accession would strengthen the *Bosphorus*- doctrine or lead to its abandonment. It would seem logical that the ECtHR would do the latter and for example Lock considers it the likely result of the accession.⁴⁴ Besselink also points out that it might not have been entirely appropriate for the ECtHR, as a European wide court whose sole purpose is safeguarding fundamental rights, to take a step back in favour of another court.⁴⁵ His argument is that while it may have worked for the German constitutional court as a mean of improving unified interpretation of law, in case of the ECtHR and *Bosphorus* it might work out in a completely opposite way by creating different interpretations of the Convention. So the accession might in fact improve uniformity of interpretation of the ECHR

³⁹ *Ibid.*, p.197. It should however be noted that similar presumption has been afforded to NATO's internal labour dispute settlement machinery, see *Ibid.* p. 199. See also *Gasparini v. Italy and Belgium* Application no. 10750/03, ECHR 2009.

⁴⁰ CJEU C-399/11 *Stefano Melloni v. Ministerio Fiscal*.

⁴¹ CJEU C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, paras 20-21.

⁴² J.H. Reesman and L. Besselink (2013). Editorial: After *Åkerberg Fransson* and *Melloni*, *EuConst*, 9, pp. 169-170.

⁴³ *Ibid.*, pp. 171-172.

⁴⁴ T. Lock (reference 12), p. 239.

⁴⁵ L. Besselink (reference 7) pp. 311-312.

by eliminating this “double standard”. This is based on the presumption that the ECtHR would abandon the *Bosphorus*- doctrine as suggested.

1.3. Opinion 2/94

In 1994 the Court of Justice was for the first time faced with the question of the EU accession to the ECHR. Question(s) facing the Court was whether Community had competence to conclude such an agreement and whether such agreement was compatible with the treaties. The request for an opinion on the accession was submitted to the Court pursuant (what was at that time) article 228 of Treaty on European Communities (TEC) by the Council.⁴⁶ At the time when the opinion was requested there was no draft agreement of any sort. In fact no negotiations were even commenced before the opinion was requested.⁴⁷ So the situation was in fact completely opposite from the WTO opinion in the same year where the agreement was already finished before the opinion was sought.⁴⁸ In both cases the court dismissed the objections raised by certain Member States that the Court didn't have jurisdiction due to the timing of the questions.⁴⁹ This would indicate that the court gives a rather wide interpretation to article 218(11) of the Treaty on the Functioning of the European Union (TFEU). Of course, at least in the case of 2/94, this was a rather obvious decision. The procedure would hardly serve its purpose if the institutions would have to go through the negotiation process in order to get an answer to whether or not they have the competence to conclude such an agreement. And this is also the conclusion the Court came to. It stated that it is in everyone's interests to have the question of competence answered before negotiations are started.⁵⁰ However, the Court also ruled that the question of compatibility with the treaties is inadmissible because it can't be answered without further information on the agreement.⁵¹

Pro accession arguments were given by several MS governments, Commission and the Parliament.⁵² They argued that because the protection of human rights was a Community objective, article 235 could be used as a legal basis. They pointed out that the preamble of the TEC referred to “preservation of peace and liberty” and the preamble of the Single European

⁴⁶ CJEU Opinion 2/94. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴⁷ *Ibid.*, para. 7.

⁴⁸ CJEU Opinion 1/94. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property.

⁴⁹ CJEU Opinion 1/94 paras. 9-12. Opinion 2/94 paras. 1-18.

⁵⁰ CJEU Opinion 2/94. Paras. 17-18.

⁵¹ *Ibid.*, paras. 19-22.

⁵² I. Bernaerts. Opinion 2/94. *Colum. J. Eur. L.* Vol 2. 1995-1996, pp. 372-381.

Act referred to “respect for human rights”. There were also several Member States (France, Portugal, Spain, Ireland and Great Britain) who argued that the Community doesn't have the competence to accede. They argued firstly that the protection of human rights is not a Community objective. Secondly, they argued that the accession is not necessary in order to protect human rights as CJEU accepts and enforces the Convention as part of the legal order of the Community. An interesting notion was made by the Portuguese government which submitted that any discrepancies between the CJEU and the ECtHR case law could be resolved by CJEU making a reference to preliminary ruling to the ECtHR in matters concerning application of the ECHR. It is unclear to me how this would work out as there neither was nor is any provision giving the CJEU competence for such action. What makes it interesting however is that such a measure was introduced in the draft accession agreement and examined later in the Opinion 2/13 which will be dealt with in chapter III.

1.3.1. Opinion of the Court

The actual answer to the question on competence is rather short. The Court stated, much like in 1/94 [WTO agreement], that not only can the competence to conclude international agreement be expressly given in the treaties but it may also be implied.⁵³ The Court only briefly stated that there are no treaty provisions which would give any institution powers to enact rules in the field of human rights or conclude international agreements in this field and thus there are no express or implied powers. The Court then moved to examine whether such competence could be found from then TEC art. 235 (Article 268 TFEU).⁵⁴ The Court highlighted the importance of human rights in the EU framework and referred to its own case law which shows that the ECHR enjoys a “special significance”.⁵⁵ However, the Court concluded that the accession would be a major change in the (then) current system of human rights protection and such a change could only be brought on by treaty amendment.⁵⁶ The court highlighted the fact that TEC art. 235 is supposed to be used as a “gap filling” legal basis where the objectives of the treaty require such measures but they are not conferred in the treaty. However, the article may not be used to adopt measures which would widen the scope of Community powers in a way that would normally require a treaty amendment.

⁵³ CJEU Opinion 2/94, para 26. Opinion 1/94 esp. paras 81-83 and 103.

⁵⁴ Article 235 was replaced by art. 308 in Treaty of Amsterdam and further replaced by art. 268 in Treaty of Lisbon.

⁵⁵ CJEU Opinion 2/94, para 33. C-260/89, para 41.

⁵⁶ Ibid paras 24-35.

1.3.2. Analysis of the opinion

The reasoning of the Court in 2/94 was quite short and by no means without its deficiencies. Professor Eeckhout points out in his book that the Court didn't examine the issue of implied powers at all.⁵⁷ The Court simply noted the principles of implied powers doctrine as developed in its case law and concluded that there are no express or implied powers. The issue of express powers is clear, there wasn't at the time any provisions that would expressly give competence to conclude such an agreement. However, the issue of implied powers is not quite so straightforward. If the respect of human rights is the foundation for all Community acts, shouldn't the institutions have the power to ensure compliance with human rights in all areas where they exercise their powers.⁵⁸ Eeckhout also points out that the Court did very little to assess whether human rights could fit into the scope of art. 235. His criticism of Opinion 2/94 seems valid. In several cases, for example Eeckhout refers to the AETR case,⁵⁹ the Court has been very good at using complex reasoning to find competences but it seems that the Court was not so keen on finding them in this case. Gragl makes similar observation on the opinion in his book, stating that the legal assessment in the opinion was very short and focused on one aspect only.⁶⁰ Therefore, it cannot be concluded from the opinion that the lack of competence was the only obstacle on the road to accession, it was simply the only one that the Court assessed.

There is also another side of the coin to the Court's decision as pointed out by Bernaerts in her commentary.⁶¹ The opinion was given at the time when respect for subsidiarity principle was called for in Europe and the fact that the Court wanted to limit the expansion of competences was not surprising. In fact similar willingness to limit the Community competences can be seen in Opinion 1/94.⁶² Bernaerts also points out that the Court's demand that the accession would require treaty amendment came conveniently just before the Intergovernmental conference in Turin which was aimed at amending the Maastricht treaty.

One could question why the Opinion 2/94 is included in this thesis since the issue of competence was resolved in the Treaty of Lisbon. Gragl argues in his book that the opinion is still relevant today because of the issues that were raised in the proceedings concerning the autonomy of EU

⁵⁷ P. Eeckhout. *EU External Relations Law*, Oxford University Press, 2nd edition 2013, pp. 99-100.

⁵⁸ *Ibidem*.

⁵⁹ CJEU 22/70, *Commission v. Council*.

⁶⁰ P. Gragl. *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing 2013, pp. 80-81.

⁶¹ I. Bernaerts (reference 52).

⁶² P. Eeckhout (reference 57), pp. 94-95.

law.⁶³ Some issues raised remain highly topical and potentially unsolved even after 2/13. Especially noteworthy is the argument of Portugal which stated that in deciding cases concerning EU law the ECtHR would have to assess the division of competences within the EU.⁶⁴ Similar concerns were also raised by other Member States and this highlights the problematic relationship between the EU law autonomy and international law. The arguments are based on the fact that the ECtHR would inevitably have to assess matters of EU law when deciding the cases and this could lead to diminishment of the role of the EU courts and could affect the legal autonomy of the EU. Unfortunately, these questions were not assessed in the Opinion by the Court. It simply stated that it doesn't have necessary information to assess the matter.⁶⁵ However, the issues raised here remained even after the competence issue was resolved and formed a crucial part of the second time the accession was on the agenda of the Court.

⁶³ P. Gragl (reference 60), pp. 76-81.

⁶⁴ *Ibid.*, p. 77.

⁶⁵ CJEU Opinion 2/94 para 35.

II. POST-LISBON ERA

The Treaty of Lisbon introduced an explicit competence (as well as an obligation) for the EU to accede to the ECHR. Article 6(2) TEU states that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.". The second sentence makes it clear that the accession is not without restrictions. It would be easy to assume that the accession is a done deal after the issue of competence that was the obstacle in Opinion 2/94 has been resolved. However, there are several other issues, some of which were raised but never answered in 2/94, that have been raised by the Court of Justice in other cases. Probably the most important one is the autonomy of EU legal order which has been dealt with in several other opinions and cases. These will be examined in order to define the term "autonomy of EU law" and highlight its importance regarding the accession negotiations.

2.1. Autonomy of EU legal order

The EU as a legal order differs from states as well as from international organisations. In the famous *van Gend en Loos* –case the Court of Justice stated that the Community constitutes "a new legal order of international law".⁶⁶ The EU has an autonomous legal order, meaning that it provides for a hierarchy of norms (including for example treaties as primary law, International agreements, directives and regulations as secondary law etc.), principles of division of competences within the EU (including the principles of conferral, primacy and many others).⁶⁷

The importance of autonomy of EU law and legal order is apparent from the external relations case law of the Court of Justice especially when it comes to outside dispute-settlement mechanisms and international courts.⁶⁸ According to DeWitte, the Court has taken a firm, sometimes even selfish, stance on protecting the autonomy of EU law particularly with regard to the dispute-settlement mechanisms of the EU. This means in other terms preserving the position and powers of the CJEU.

The importance of preserving the autonomy of EU legal order regarding the accession to the

⁶⁶ CJEU 26/62, *van Gend en Loos*.

⁶⁷ A. Rosas and L. Armati. *EU Constitutional Law – An Introduction*. Hart Publishing, 2012. P. 15.

⁶⁸ B. DeWitte. *A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union*, in Cremona and Thies (eds): *The European Court of Justice and External Relations Law*, 2013, pp. 33-46.

ECHR comes explicitly from Protocol 8 to Treaty of Lisbon,⁶⁹ which is directly linked with the maintaining autonomy of EU legal order.⁷⁰ Article 1 of the protocol states that the agreement “shall make provision for preserving the specific characteristics of the Union and Union law”. Declaration no. 2 also concerns the same issue by stating that the “accession should be arranged in such a way as to preserve the specific features of Union law”.⁷¹ The requirement is set out in two EU primary law sources making it a question of utmost importance to the EU.

As explained by A.G. Kokott in her view on the Opinion 2/13, the most specific characteristic of EU legal order is that it is an autonomous system of law and that “[t]he protection of that legal order has been one of the cornerstones of the case-law of the Court of Justice for more than 50 years”.⁷² Though this is an issue of great importance for the EU and its Member States (as evidenced by the treaties) as well as for the EU courts, the autonomy of EU legal order is not expressly defined anywhere and the definition(s) has been created by the case law of the Court of Justice. Due to this, it is important for the purpose of this thesis to examine the case law to clarify the meaning of the autonomy of EU legal order.

The first issue that is important for the autonomy of EU law is that an outside body may not assess competences within the EU. This issue was examined by the Court of Justice in Opinion 1/91 concerning creation of the European Economic Area (EEA), and more importantly the envisaged EEA court. This decision is important because, despite the negative outcome, the Court recognized that in principle it is possible for an international agreement to provide for its own system of courts that would have power over EU actions.⁷³ The Court pointed out that if the Community had competence to conclude international agreements it would also have the competence to subject its decisions to a review by an outside court. The decisions of this court could be binding to the Community, including the EU courts. But the opinion of the Court was negative in this case and one of the most important reasons for this was that the envisaged EEA court would have to interpret the division of competences between the Community and the Member States when interpreting the treaty. The Court said that this would likely affect the allocation of powers and the autonomy of the Community legal order and that it is the duty of

⁶⁹ Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

⁷⁰ T. Lock (reference 16), pp. 1025-1054.

⁷¹ 2. Declaration on Article 6(2) of the Treaty on European Union, (OJ C 326, 26.10.2012).

⁷² See also View of A.G. Kokott relating to opinion 2/13, para. 159.

⁷³ CJEU Opinion 1/91. 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. Summary para. 3.

the Court to ensure the respect for this autonomy.⁷⁴ This clearly demonstrates how the Court is unwilling to let any outside body assess the division of competences even if the outside body would be extremely closely linked to the CJEU as would have been the case with the EEA court. The Court stated that the basis for its exclusive jurisdiction comes from the article 219 TEC (Currently Article 344 TFEU) which prohibits Member States from submitting any disputes concerning the treaties to any other forum than those which are provided in the treaties (meaning CJEU). It should also be noted that, as Lock suggests, the wording in 1/91 that the outside court's decision would be binding to Court of Justice implies that the power to invalidate any EU acts would still lie within the CJEU.⁷⁵ It is worth noting that the Court of Justice has insisted on this within the EU as well. In *Foto-Frost* it ruled that it is solely for the CJEU to determine acts of the EU invalid and not for the courts of the Member States.⁷⁶ This shows that this is an important issue for the autonomy of EU law not just within the external context but internally as well. This is also noted on the discussion paper of the CJEU on the accession.⁷⁷ This is a document that the Court of Justice published on its website. It doesn't state the purpose of the document but it can be deduced from the text that it is meant to inform the negotiators of the Court's views.⁷⁸ The paper states that it is solely in the jurisdiction of the Court of Justice to rule on the validity of a Union act and in order to preserve this there shouldn't be a situation where ECtHR would have to rule on compatibility of an act with a treaty if the Court of Justice has not had a possibility to rule on the issue first.

Second important issue in terms of autonomy is that an outside court may not interpret EU law. Also, the position of the Court of Justice as the highest interpreter of EU law is one of the key issues in the autonomy of EU law. In Opinion 1/00 the Court clarified the meaning of this to the autonomy of EU law stating that the procedures for ensuring uniform interpretation of an international agreement and resolving disputes related to it may not be able to bind EU and its institutions to a particular interpretation of EU law.⁷⁹

There are other considerations found in the case law of the Court of Justice concerning the autonomy, including outsourcing jurisdiction of national courts, maintaining the powers of the

⁷⁴ CJEU Opinion 1/91, Para 35.

⁷⁵ T. Lock (reference 16), pp. 1025-1054.

⁷⁶ CJEU 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*. Paras. 14-20.

⁷⁷ Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg 5 May 2010. Paras 8-9.

⁷⁸ L. Besselink (reference 7) pp. 315-316.

⁷⁹ T. Lock (reference 16), pp. 1030-1031. Opinion 1/00, Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area, paras. 12-13.

institutions and the principle of subsidiarity. Opinion 1/09 contained an interesting decision by the Court of Justice on outsourcing dispute settlement to an outside court in a case where the powers of the EU courts were not affected. The opinion concerned the envisaged Patent court which would have had the jurisdiction to deal with patent issues within the participating states. Here the Court of Justice stated that even though the CJEU does not have jurisdiction to adjudge disputes between the private persons and this is solely in the jurisdiction of the domestic courts, these domestic courts are courts in the EU legal system in the sense that they interpret EU law and this jurisdiction may not be transferred to an outside court created by an international agreement.⁸⁰ This would naturally be a different matter regarding ECHR where the national courts retain their jurisdiction. However, this still demonstrates the fact that even though some issue may not directly belong to the jurisdiction of the EU courts, international agreements on those may nevertheless influence the autonomy of EU legal order. In Opinion 1/00 the Court also made it clear that the preservation of autonomy of EU law requires that the powers of the Union and its institutions are not altered.⁸¹ One additional specific characteristic of EU law highlighted by the Court of Justice is the principle of subsidiarity.⁸² The Court sees subsidiarity so that it is primarily the role of the national authorities to ensure fundamental rights protection as guaranteed by the ECHR and individuals have a possibility to complain to ECtHR against the MS and this way “indirectly” challenge compatibility of EU acts with the convention. The discussion paper highlights that because of the importance of subsidiarity principle it must be ensured that any external review must be preceded by internal review by national and EU courts.⁸³ It is somewhat strange that the Court highlights subsidiarity so much in this context and particularly for the purpose of preserving its own powers.

In conclusion, the autonomy of EU law is one of the cornerstones of the whole EU and important to keep in mind particularly when talking about international agreements. It is also clear from the case law of the Court of Justice that two issues remain the key to preserving autonomy of EU law. First is maintaining the powers of the EU and its institutions. Any agreement that would alter these powers would infringe on the autonomy of EU law. Second issue has to do with dispute settlement related to international agreements. The dispute settlement (usually an international court) may not assess competences within EU nor interpret EU law. Furthermore, the dispute settlement may not be allowed to interpret EU law in a sense that would bind the EU or its institutions to any particular interpretation of EU law. The bigger

⁸⁰ CJEU Opinion 1/09, Creation of a unified patent litigation system, Para 80.

⁸¹ CJEU Opinion 1/00, paras. 12-13.

⁸² CJEU Discussion document on ECHR accession. Para 6.

⁸³ *Ibid*, Para 7.

question is whether the autonomy of EU law is the ultimate goal and without limits or could it be seen, as Lock suggests, that the article 6(2) TEU limits the autonomy by creating the obligation for the EU to accede to the ECHR.⁸⁴

2.2. Accession negotiations

In 2010 the Council authorised the Commission to negotiate the accession agreement of the EU to the ECHR.⁸⁵ Council decision was preceded by Commission recommendation to authorize Commission to negotiate the draft agreement.⁸⁶ The draft Council decision provides a good understanding on the position and goals of the EU in the negotiations.⁸⁷ In the document the Council identifies five main principles that should govern the accession and be reflected in the agreement.⁸⁸ The first principle, an obvious one as it is based on the requirement laid down in article 6(2) TEU, is that the accession may not affect the competences or powers of the EU or its institutions. It specifically mentions the CJEU and preserving the “unique legal system” of the EU. Second principle mentions the preservation of the ECHR system and states that if special rules are required to accommodate EU, they should not alter the fundamental nature of the convention. The third principle states that the EU accession may not affect the obligations of or derogations or reservations by the Member States to the Convention. The fourth principle concerns one of the most fundamental questions of the whole accession process, the autonomy of EU law. It states that the relevant Council of Europe (CoE) bodies (ECtHR and the Committee of Ministers) are not to be called upon to interpret EU law. This applies particularly to the competences and powers of the Union institutions. The fifth and final guiding principle that the Council sets is that the EU should be able to participate in the ECtHR and other bodies related to the convention in the same manner as other contracting parties. It should also be noted that even though it is under no legal obligation to do so the Commission had stated beforehand that it will ask for the opinion of the Court pursuant to article 218(11) TFEU, making the involvement of the Court in the negotiation phase also crucial.⁸⁹

⁸⁴ T. Lock (reference 16), pp. 1032-1033.

⁸⁵ Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), 9689/10, 11 May 2010.

⁸⁶ Commission recommendation 17.3.2010 SEC(2010) 305 final/3 has only been partially declassified, Council document 7668/10.

⁸⁷ The draft council decision was originally classified but it was declassified in January 2014 following a judgement of the General Court. See CJEU T-331/11, *Besselink v Council*.

⁸⁸ Draft Council Decision, Annex II, para 1(a-e).

⁸⁹ L. Besselink (reference 7) p. 313.

Council decision also states that the EU should only be held responsible for a failure to adopt an act or measure in cases where it would have had a competence to allow such a measure.⁹⁰ The EU should also have a judge in the ECtHR appointed by the same principles as judges of other contracting parties. Also, the Parliament should be allowed to participate in the parliamentary assembly of the CoE and the Union in the Committee of Ministers when they deal with matters of the convention.⁹¹

The co-respondent mechanism is one of the biggest changes to the current system introduced in the Council decision. The decision states that the EU should be able to join proceedings before the ECtHR as a co-respondent when it contends that the (alleged) violation has a link to an act adopted on the basis of EU primary legislation. Likewise, Member States should be allowed to join the proceedings when they feel there is a link between the (alleged) violation and EU primary legislation (TEU, TFEU or any other provision with the same value).⁹² This is due to the fact that the EU primary legislation is attributable to the Member States.

The draft decision also notes the monopoly of the CJEU on EU law. It states that the Court should have a say in cases where it hasn't had the chance to rule on compatibility of Union act with fundamental rights and it should be given a chance to do so before the ECtHR rules on the case. It requires that in any case the monopoly of the CJEU to annul acts of the Union must be safeguarded.⁹³ Later in 2010 the Council clarified three different options on how to solve the issue of guaranteeing the monopoly of the CJEU.⁹⁴ The first option was that a specific mechanism is not necessary. This option is based on the assumption that the “exhaustion of all domestic remedies” rule in the Convention (Article 35.1) would guarantee that the CJEU has had a chance to rule on the issue. However, the shortcoming of this assumption is, as mentioned in the document, that the domestic courts' obligation to make a preliminary reference is not absolute. The same is noted in the Court's discussion document which states that it is not possible for the preliminary reference to be regarded as a prerequisite for filing a claim at the ECtHR.⁹⁵ One important thing that should also be kept in mind is that the recent case law of the

⁹⁰ Draft Council Decision, Annex II, para 2.

⁹¹ *Ibid.*, paras 6-8.

⁹² *Ibid.*, para 10.

⁹³ *Ibid.*, para 11. It must be noted though that in the footnote it is also stated that this issue was still debated at the time and there were several options on the table.

⁹⁴ Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). -Involvement of ECJ regarding the compatibility of legal acts of the Union with fundamental rights (Paragraph 11 of the Negotiating directives). 10568/10, 2 June 2010.

⁹⁵ CJEU Discussion document on ECHR accession. Paras 10-12.

ECtHR proves that EU Member States may breach article 6(1) of ECHR (the right to a fair trial, access to court) if a preliminary reference is not made by the national court and no reasoning is given as to the reason why this was not made.⁹⁶ So the convention also puts some pressure on the national courts to make preliminary references or give reasons why it considers *acte claire* is applicable in the case. The issue is also examined in the CJEU discussion paper which states that it is not possible to know that a reference is made in every case where there is a question on compatibility of an act and fundamental rights.⁹⁷

The second option is the so-called “Judge Timmermans option”. His option was that the Commission would have the power to ask for a ruling by the Court of Justice once a claim has been made to the ECtHR, although according to the Council legal service this would require a treaty amendment.⁹⁸ In this option the proceedings in ECtHR would be put on hold until the the Court of Justice has had a chance to rule on the matter. Even though this was introduced as a second option and remarkably less space was used to explain this option than the first one, the “Judge Timmermans option” was the one that eventually ended up in the draft agreement. This was also the option advocated by the Court’s discussion document which insisted that there is a system in place where an internal review of an act can be performed by the CJEU before the ECtHR will rule on its compatibility with the ECHR.⁹⁹

Third option was that once a claim has been submitted to the ECtHR and the deadline for submitting written observations given, during the deadline either Commission or the MS in question could ask the Court of Justice to rule on the case. The document states that in such case the decision by the Court of Justice would be binding but it doesn't clarify to whom it would be binding. The document also suggests a fourth option if none of the above mentioned satisfy all the delegations. This option would be to resolve the issue through legally non-binding measures, for example by encouraging national courts to interpret art. 267(3) TFEU more strictly.¹⁰⁰

⁹⁶ *Dhahbi v. Italy*, Application no. 17120/09, ECHR 2014; *Schipani et autres c. Italie*, Application No. 38369/09, ECHR 2015 (at the time of writing only available in French).

⁹⁷ CJEU Discussion document on ECHR accession. Paras 10-12.

⁹⁸ Draft Council Decision 10568/10 refers to the opinion of the Council legal service (9693/10) which is classified in terms of all the relevant parts. I requested access to this document but on letter dated 14th January 2016 the General Secretariat of the Council denied the access stating that the information is sensitive and could undermine the ongoing decision making process and upcoming negotiations.

⁹⁹ CJEU Discussion document on ECHR accession, Luxembourg 5 May 2010. Paras 10-12.

¹⁰⁰ Draft Council Decision 10568/10, para D.

The Council document also raises several concerns if a specific procedure is set up.¹⁰¹ Firstly, this procedure could result in delays to people who have brought cases before the ECtHR. In order to resolve this a suggestion was made by the Romanian delegation that these cases should be dealt with urgency by the Court of Justice. However, the Commission stated that due to the importance of these cases they should be thoroughly examined by the Court. Other concern that was raised in the Council was that this procedure could result in clashes between the two courts, the Court of Justice and the ECtHR. However, as was explained earlier the view of the Court of Justice is that the purpose of this procedure would not be to handle the complaint on EU courts but simply to complete the internal review of the matter before the matter is reviewed externally.

2.3. Involvement of the Court of Justice in the negotiations

What is truly unique in the accession negotiations is the involvement of the Court of Justice in the negotiating phase. The Court was an observer in the Council working party on fundamental rights and free movement of persons that worked on establishing the negotiating mandate for the Commission. Besselink suggests that the status of the Court was not that of a silent observer but rather a participant in the discussions.¹⁰²

As mentioned in the previous chapter, the Council documents also mentioned the “Judge Timmermans' option” regarding the prior-involvement of the Court. Here Besselink notes that Timmermans expressed his views first at a hearing in the European Parliament and stressed that even though he is a member of the Court of Justice he expressed his views in a personal capacity.¹⁰³ In the previous chapter there is also a reference made to “Court's discussion document”. It is an interesting document that appeared on the website of the Court without an explanation as to its purpose although it can be assumed from the timing and format of the document that it is intended for the Council and the Commission to reflect upon.¹⁰⁴ It should be noted that the prior-involvement procedure was not considered necessary by any of the actors in the negotiations (Commission, Member States, CoE) but came to the accession agreement after the Court of Justice stated the necessity of such a procedure.¹⁰⁵ Although originally named

¹⁰¹ *Ibid.*, para C.

¹⁰² L. Besselink (reference 7) p. 318, especially footnote 37.

¹⁰³ *Ibid.*, pp. 314-315.

¹⁰⁴ *Ibid.*, pp. 315-316.

¹⁰⁵ J. Heliskoski. The arrangement Governing the Relationship between the ECtHR and the CJEU in the Draft Treaty on the Accession of the EU to the ECHR in M. Cremona and A. Thies (eds): *The European Court of Justice and External Relations Law*, 2013, pp. 224-227.

“Judge Timmermans option” and made originally in a personal capacity,¹⁰⁶ the option was advocated by the Court of Justice in the discussion document and subsequently adopted into the draft agreement.¹⁰⁷ What is also noteworthy about the prior-involvement mechanism is that the Court doesn't seem to take into account its own case law, particularly *CILFIT* case which already sets the threshold for not referring a question to the CJEU extremely high.¹⁰⁸ The other option is that the Court doesn't trust that the national courts follow and implement EU law properly.¹⁰⁹

2.4. Draft accession agreement

In April 2013 the Council of Europe Steering Committee for Human Rights (CDDH) negotiating group and the European Commission finalised their negotiations which resulted in the final report to the CDDH that contained the draft accession agreement (Appendix I).¹¹⁰ This was achieved a lot later than initially planned because of the numerous objections from various member states, mainly France and UK.¹¹¹ In addition to the draft accession agreement the final report contained four other appendices; Draft declaration by the European Union to be made at the time of signature of the Accession Agreement (Appendix II), Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party (Appendix III), Draft model of memorandum of understanding between the European Union and X [State which is not a member of the European Union] (Appendix IV), and Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (Appendix V). This part of the thesis covers the main issues related to the accession agreement. This means the articles that are of legal importance but the articles that are administrative in nature, for example those relating to representation of the EU in the CoE, costs etc. will not be covered.

The draft accession agreement is slightly different from accession agreements in general. There are several issues that have to be taken into consideration when the contracting party is not a

¹⁰⁶ *Ibid.* p. 227.

¹⁰⁷ Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg 5 May 2010.

¹⁰⁸ CJEU C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.

¹⁰⁹ J. Heliskoski (reference 105), pp. 239-240.

¹¹⁰ Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)08 rev. 2, 10 June 2013.

¹¹¹ L. Besselink (reference 7) pp. 319-320.

sovereign state but an organisation of conferred powers. Paragraph 3 of the agreement takes this issue into account by stating that the EU does not have an obligation under the agreement to perform any acts for which it has no competence under EU law. However, as stated in the explanatory note, only such adjustments are to be made to the convention that are necessary to accommodate the special character of EU as a contracting party.¹¹² This means that the object is not to give preferential treatment to the EU or to accommodate all wishes of it but to modify the Convention in such a way that it is possible for the EU to accede to and function within it. Paragraph 4 introduces an interesting division of responsibilities between the EU Member States and the EU, stating that any acts or omissions of EU MS shall be its responsibility even if the MS was implementing EU law. In these cases, EU might still be held responsible as a co-respondent.

Article 5 of the draft agreement makes important clarifications on how proceedings before the CJEU are viewed in terms of the Convention. It states that the proceedings are not considered as international investigation or dispute settlement, a detail which would otherwise make cases inadmissible according to article 35(2b) of the ECHR. Furthermore, the proceedings before the CJEU are not considered excluded by article 55 of the convention which prohibits high contracting parties to submit disputes to any other means of settlement than those provided for in the ECHR.

2.4.1. Co-respondent mechanism

Article 3 of the draft agreement deals with the co-respondent mechanism. This article would introduce a completely new mechanism into the convention alongside third party intervention and would only concern EU and its Member States (either as an individual co-respondent(s) or collectively) as stated in paragraph 1(b) of the article. The main difference between the co-respondent mechanism and a third party intervention is that in a third party intervention the intervening party neither becomes a party to the case nor is it bound by the judgement of the ECtHR. In co-respondent mechanism all co-respondents are parties and thus bound by the judgement of the Court.¹¹³ Third party intervention simply offers third parties the right to submit their comments and observations to the court concerning particular case. The reason for this new mechanism, as explained in the explanatory report to the agreement, is the unique

¹¹² Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)08 rev. 2, 10 June 2013. Paras 3-7.

¹¹³ *Ibid.*, para 45.

relationship between the EU and its Member States.¹¹⁴ If the EU were to accede to the Convention there could (and most probably would) arise situations where legal acts are adopted by one contracting party and implemented by another. With only sovereign states as contracting parties there could not have been such a situation. Thus, the meaning of the procedure would be to guarantee that there will be no gaps left in the functioning of the Convention. Co-respondent mechanism means that in case the ECtHR finds a violation the EU and the Member State(s) will both be held responsible for the violation unless the court decides that only one of them is liable.¹¹⁵ Paragraph 2 sets out the conditions when the EU can be a co-respondent. This could happen when the alleged violation concerns compatibility of the convention and/or its protocols (to which the EU has acceded) with EU law and if only way to avoid the violation would have been to disregard an obligation under EU law. Paragraph 3 states that where the EU is the respondent, Member States of the EU (jointly) may become co-respondents when there is a possible discrepancy between the convention or the additional protocols and TEU, TFEU or an instrument that has the same legal value and the breach could have been avoided only by disregarding obligation(s) arising out of these documents. In both of the above mentioned cases becoming a co-respondent depends on the decision of the ECtHR. A MS may become a co-respondent in a case against the EU either by accepting an invitation from the Court or by application (subject to approval of the Court).¹¹⁶ Appendix II contains a draft declaration by the EU stating that when the conditions set out in the agreement are met it will apply to become a co-respondent or accept the invitation of the ECtHR to become one.

There is one argument that can be made against the co-respondent mechanism. That is that the mechanism doesn't actually provide anything for the individual applicant and as a matter of fact might even make it more difficult for him or her.¹¹⁷ If a claim is brought against a MS and the EU becomes a co-respondent this would mean that the respondents' resources have increased but this does not reflect in any way to what the applicant gains if the application is successful.¹¹⁸ Of course it was never argued that the co-respondent mechanism was meant for the benefit of the applicants. As described by A.G. Kokott, the goal of the co-respondent mechanism is to ensure the effective defence of EU law.¹¹⁹

¹¹⁴ *Ibid.*, paras 38-39.

¹¹⁵ Draft accession agreement, Article 3, para 7.

¹¹⁶ *Ibid.*, Article 3, para 5.

¹¹⁷ L. Besselink (reference 7) pp. 325-329.

¹¹⁸ *Ibid.*, pp. 327-329.

¹¹⁹ View of A.G. Kokott relating to opinion 2/13. Para 221.

2.4.2. Prior involvement of the CJEU

The co-respondent mechanism takes into consideration the role of CJEU as the interpreter of EU law by introducing a prior involvement mechanism. It provides that when the EU is a co-respondent, and if the CJEU has not assessed the compatibility of the issue with EU law, it will be given sufficient time to do so.¹²⁰ The explanatory note provides further explanation on the rationale behind this. It states that even though applicants must have exhausted all domestic references before submitting an issue to ECtHR preliminary reference to CJEU on validity of EU acts depends on the national courts and the applicant may only suggest it to the court. Thus, the preliminary reference is not a remedy that an applicant must exhaust.¹²¹ However, when preliminary reference is not made, the ECtHR would have to rule on compliance of an EU act with human rights obligations without the CJEU having a say in the matter. To resolve this problem, the prior involvement mechanism is introduced. It should also be noted that this procedure applies only in cases where the EU is a co-respondent. Also in these cases the Court of Justice is not assessing the complaint itself but merely the EU legal basis. The draft declaration in Appendix II further states that in these procedures other High Contracting Parties, ones that are not members of the EU, have the right to submit statements or observations under the same conditions as EU Member States. When it comes to the prior involvement mechanism, it is also important to note that any assessment given by the Court of Justice is not binding to the ECtHR.¹²²

The prior involvement mechanism is a very interesting and delicate suggestion. There are several legitimate concerns on whether it is compatible with legal orders of the Convention and the EU.¹²³ In terms of the ECHR the main issues are firstly the autonomy of the ECtHR as the interpreter of the convention and secondly whether the mechanism puts the EU in a more privileged position vis-a-vis other high contracting parties. The main issue from the point of view of EU law is whether such a system would require treaty amendment(s) and would thus be even contrary to the second sentence in article 6(2) TEU. Baratta argues that the prior involvement mechanism is not only compatible with the ECHR system but also necessary.¹²⁴ He bases this on the fact that it is in the first place the duty of the contracting parties to fulfil and enforce the convention, including providing means for an effective remedy. As mentioned

¹²⁰ Draft accession agreement, Article 3, para 6.

¹²¹ Draft explanatory report, paras 65-66.

¹²² *Ibid.*, paras 67-68.

¹²³ R. Baratta. Accession of the EU to the ECHR: The rationale for the ECJ's Prior involvement mechanism. CMLR 50, 1305-1332. 2013.

¹²⁴ *Ibidem.*

in the previous chapter there is no automatic right to preliminary reference by a party to a case so it is possible that a case (even though it contains issues of EU law) goes from national court to the ECtHR without the CJEU assessing it. The prior involvement mechanism merely provides a chance for the domestic (in this case EU) legal system to correct and solve an issue before the case goes to the ECtHR. In this light the arguments on preferential treatment of EU do not seem to be valid either. Although it is definitely a different system it does not give special preference to the EU but only accommodates its unique legal system. When it comes to other contracting parties and their legal systems the highest court of that legal system usually always has a chance (whether it uses it or not) to rule on the issue before the case ends up in the ECtHR. On the other hand, Besselink disagrees with this argument. He claims it is not always the case that the highest national courts have ruled on all cases that go before the ECtHR and the situation is not unique to the EU.¹²⁵ He argues that the prior-involvement mechanism was not necessary and that the problem could have been resolved with measures internal to the EU.

¹²⁵ L. Besselink (reference 7), pp. 322-324.

III. OPINION 2/13

The long negotiation process culminated to the Opinion 2/13. The opinion of the Court was given by the full Court.¹²⁶ Although it was a full court in name, the opinion was signed by 25 judges. According to the rules of procedure, the Opinion shall be signed by the President and the judges that took part in the deliberations.¹²⁷ This means that, for one reason or another, all of the judges of the Court did not take part in the deliberations.

This chapter will examine the opinion and the issues raised in it as well as provides a brief overview of the submissions made to the Court and the opinion of the A.G. This chapter also provides an overview of the post-opinion discussion (which has been extensive). There is also a separate sub-chapter dedicated to the issue of principle of mutual trust. Although it is a relatively short part of the opinion, it is an important one as it demonstrates a potential friction between the two courts and could possibly explain the tone of Opinion 2/13.

3.1. Opinion of the Court

Sections I-V of the Opinion are dealt with to a great extent earlier in this thesis so the focus will be on the last three sections; The Commission's assessment, main observations submitted to the Court and position of the Court. The substantive part of the position of the Court, which will be the main focus of this part of the thesis, is further divided into five different areas where the Court found incompatibilities; specific characteristics and autonomy of EU law, art 344 TFEU, the co-respondent mechanism, the prior-involvement procedure, and judicial review regarding CFSP. Separate sub-paragraphs have been dedicated for each of these areas. After this, the view of the A.G. and the Commission's assessment and the main observations submitted to the Court will be briefly examined.

3.1.1. Preliminary remarks

Before the actual substantive part, the Court considers some general questions.¹²⁸ The Court recaps in the beginning its earlier position that the EU is a *sui generis* legal order in the sense

¹²⁶ CJEU Opinion 2/13 of the Court (Full Court), Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹²⁷ Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013). Art. 200.

¹²⁸ CJEU Opinion 2/13. Paras 153-177.

that the EU has “a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation”.¹²⁹ In order to ensure that this is taken into account, the accession is subject to some conditions. The Court also elaborates the concept of 'specific characteristics of EU law'. It states that “the EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States [part omitted], and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves”.¹³⁰ This has resulted in “a structured network of principles, rules and mutually independent legal relations” that link the EU and Member States.¹³¹ The Court further states that the whole legal structure of the EU is based on the premise that Member States share a set of common values which are captured in the art. 2 TEU. The autonomy of EU law (the autonomy of EU law in relation to laws of Member States and to international law) requires that these principles are ensured and guaranteed within the framework of the EU. Here the Court refers, among others, to its judgement in *Kadi*.¹³²

3.1.2. Specific characteristics and autonomy of EU law

One of the most controversial questions concerning the accession is the Court's take on the principle of mutual trust. Here the Court refers to its own judgement in *Melloni*, stating that it has interpreted the article 53 of the CFR to mean that national standards can't compromise the level of protection afforded by the Charter, nor can they adversely affect the primacy, unity and effectiveness of EU law.¹³³ Here the Court finds a conflict with article 53 of the ECHR which allows for High Contracting Parties to have higher standards than those afforded by the ECHR. The Court states that the requirements set out in the *Melloni* case should be safeguarded by the accession agreement by way of coordinating the article 53 of the ECHR with article 53 of the CFR (interpreted by the Court of Justice). However, in the accession agreement there is no such provision. Related to this the Court highlights the principle of mutual trust in the EU and that when implementing EU law, a MS may be required to presume that other States respect the fundamental rights. This does not only mean that they may not require a higher level of protection from another MS than what is set out in the EU law but they also may not check if

¹²⁹ *Ibid.* Paras 157-158.

¹³⁰ *Ibid.* Para 166.

¹³¹ *Ibidem.*

¹³² CJEU Joined cases C-402/05 and C-415/05, *Kadi and Al Barakat v. Council and Commission*.

¹³³ CJEU Opinion 2/13. Paras 187-188. See also CJEU C-399/11 *Stefano Melloni v. Ministerio Fiscal*.

the MS has actually respected fundamental rights in a particular case.¹³⁴ The Court further states that the accession agreement treats EU as a state and gives it a similar role than any other contracting party. In doing so the agreement fails to consider the inherent nature of the EU, particularly that the Member States have, by becoming members to the EU, accepted that their relations in the fields that fall under the EU competence governed by EU law to the exclusion (if the EU law so states) any other law. The Court concludes that the fact that the agreement treats the EU and its Member States as regular contracting parties in the relationship with each other, and particularly would require Member States to check on each other's observance of fundamental rights (where EU law governs) even though the EU law principle of mutual trust dictates otherwise, the accession would be liable to disturb the balance of the EU and undermine the autonomy of EU law.¹³⁵

The Court also repeats its earlier case law, that subjecting EU to an outside control is not in principle incompatible with EU law. It is particularly true in this case where it is expressly stated in the Treaty.¹³⁶ The Court reminds however that its powers may be affected by an international agreement only if the essential characteristics of those powers are preserved and that the autonomy of EU law is not adversely affected.¹³⁷ This means that any decision given by the ECtHR as a result of the accession agreement may not bind the EU or its institutions to any particular interpretation of EU law. The Court agrees that it is in the very nature of such an external control that any interpretation of the ECHR by the ECtHR would be binding to the EU (including the CJEU) but that any interpretation given by the Court of Justice on a right guaranteed by the ECHR would not be binding to the ECHR control mechanisms. The Court wishes to stress however that the same would not apply to rulings of the Court of Justice on EU law (including the CFR) and that it should not be possible for the ECtHR to question the Court's findings on the subject matter of EU law.

Lastly, regarding specific characteristics and autonomy of EU law, the Court has reservations on the Protocol 16 of the ECHR. This protocol gives the highest courts of the contracting parties a possibility to request advisory opinions from the ECtHR. Even though the accession agreement doesn't provide for EU accession to this protocol the Court feels that this could affect the autonomy and effectiveness of the preliminary ruling procedure provided for in article 267 TFEU. The Court highlights that the preliminary ruling procedure is a keystone of the EU

¹³⁴ *Ibid.* Paras 191-192.

¹³⁵ *Ibid.* Para 194.

¹³⁶ *Ibid.* Paras 179-182.

¹³⁷ *Ibid.* Para 183.

judicial system and that the failure of the accession agreement to make any provision on the relationship of it and the ECHR advisory opinion is liable to affect the autonomy and effectiveness of the former.¹³⁸ The Court concludes that the envisaged accession to the ECHR is liable to affect adversely the specific characteristics and autonomy of EU law.

3.1.3. Article 344 TFEU

The Court then moves to examine the impact of the envisaged accession to article 344 TFEU.¹³⁹ The Court has some concerns regarding the requirement set out in article 3 in Protocol 8 which demands that the accession must not affect the article 344 TFEU. These concerns relate to article 55 of ECHR which excludes other means of dispute settlement. The Court states that the fact that article 5 in the accession agreement clarifies that proceedings before the Court of Justice do not constitute dispute settlement in the meaning of article 55 ECHR is not sufficient to guarantee the exclusive jurisdiction of the Court. This is due to the fact that this still leaves a possibility for the EU or a MS to submit an application to the ECtHR against a MS or the EU. The Court concludes that even the existence of such a possibility undermines article 344 TFEU and only an express exclusion of jurisdiction of the ECtHR over disputes between EU Member States or a MS and the EU in relation to application of the ECHR that falls in the subject matter of EU law would be compatible with the article 344 TFEU. Since this is not the case in the accession agreement it is deemed liable to affect article 344 TFEU.

3.1.4. The co-respondent mechanism

The Court then considers the co-respondent mechanism set out in the accession agreement.¹⁴⁰ Once more the fundamental question is preserving the specific characteristics of EU law. The Court first states that the procedure where the ECtHR invites a MS to become a co-respondent takes into account these concerns while the procedure where a party applies to become a co-respondent does not. This is due to the fact that, according to the draft agreement, when the EU or a MS wish to become involved in the proceedings they must give reasons for their participation. Based on these reasons it is for the ECtHR to establish whether the conditions for their participation are met. The Court notes that when carrying out such an assessment the ECtHR would be required to review EU law governing division of powers and such a review

¹³⁸ *Ibid.* Paras 198-199.

¹³⁹ *Ibid.* Paras 201-214.

¹⁴⁰ *Ibid.* Paras 215-235.

would be liable to interfere with the division of powers within the EU.

The Court has two additional observations regarding the co-respondent mechanism. First it notes that because the co-respondent mechanism allows for a MS and the EU to be held jointly liable it would be possible that a MS would in this manner be held liable for a violation of a provision that the MS in question has made a reservation to. This outcome would be contrary to article 2 of the Protocol No. 8. Secondly the Court notes that as the draft agreement also makes it possible for the ECtHR to decide that only one of the co-respondents is to be held liable for a violation. This would again require the ECtHR to assess matters of EU law and thus affecting the division of powers between the EU and its Member States. The Court states that even though this decision is made pursuant to reasons given by the respondents, this may still have a negative effect on the autonomy of EU law. The question of allocation of responsibility between the co-respondents should be resolved in accordance with the rules of EU law and possibly by the Court of Justice. The Court feels that if the ECtHR would be allowed to confirm an agreement between the EU and its MS, this would affect the exclusive jurisdiction of Court. Because of the aforementioned reasons the co-respondent mechanism doesn't ensure that the specific characteristics of the EU and EU law are preserved.

3.1.5. The procedure for the prior involvement of the Court of Justice

Next the Court turns its focus on the prior-involvement mechanism.¹⁴¹ Firstly, the Court finds a similar objection as on several earlier points: allowing the ECtHR to assess matters of EU law would infringe on the jurisdiction of the CJEU. In this context it relates to how the prior-involvement procedure is initiated. The Court states that the question of whether the Court of Justice has already ruled on an issue before the ECtHR should be made by the competent EU institution, not by the ECtHR. It is unclear what is meant by “the competent EU institution” but the Court points out that the possibility of the ECtHR assessing matters of EU law is not excluded by the draft agreement. The Court further requires that the EU must be “fully and systematically informed” in any case pending before the ECtHR so that this competent EU institution is able to assess this question.

The Court has also objections on the paragraph 66 of the draft explanatory report which limits the jurisdiction of the Court of Justice to “rule on the validity of a legal provision contained in

¹⁴¹ *Ibid.* Paras 236-248.

secondary law or on the interpretation of a provision of primary law”. Here the Court makes a very reasonable observation that it should be able to rule on the interpretation of the secondary legislation as well. If the Court of Justice is unable to rule on the interpretation of the secondary law, the ECtHR would have to interpret the law in order to determine its compatibility with the treaty. This would have an adverse effect on the jurisdiction of the Court of Justice. Because of these two reasons the prior-involvement procedure in the draft agreement doesn't preserve the specific characteristics of the EU and EU law.

3.1.6. The specific characteristics of EU law as regards to judicial review in CFSP matters

The last issue that the Court examines in its Opinion is the judicial review of CFSP matters.¹⁴² Judicial review of the CFSP area is a sensitive topic as currently the CJEU has a very limited jurisdiction over them.¹⁴³ The Court explains that this system is inherent to the way that the treaties determine the powers of the CJEU. The draft agreement would grant jurisdiction to the ECtHR to review certain acts within the CFSP that fall outside of the jurisdiction of the CJEU. According to the Court this would give an outside court exclusive jurisdiction to rule on certain acts, actions, or omissions on the part of the EU. Here the Court refers to Opinion 1/09 and states that judicial review of these matters, also in the field of fundamental rights, can't be conferred to an international court that functions outside of the EU judicial system. The Court acknowledges that this is a result of how its jurisdiction is currently structured but still finds that the draft agreement fails to preserve the specific characteristics of EU law with regard to judicial review of CFSP matters.

3.2. View of the Advocate General

The view of Advocate General was given by A.G. Kokott who made an impressive and thorough analysis of all the legal questions concerning the accession. The view is 280 paragraphs long so for practical reasons the focus is on the parts that are strictly related to the Opinion of the Court in order to have a chance to compare them. The A.G. begins by introducing the goals of the accession procedure as improving the effectiveness of human rights in Europe and sending a strong signal of EU's commitment to human rights.¹⁴⁴ In the first paragraph she states that: "[a]s a result of this accession, the EU itself will be subject to a form of external control as

¹⁴² *Ibid.* Paras 249-257.

¹⁴³ TEU, Article 24(1), 2nd paragraph.

¹⁴⁴ CJEU View of A.G. Kokott relating to Opinion 2/13, paras 1-4.

regards compliance with basic standards of fundamental rights that has long been widely called for. In this way, the EU will ultimately allow the same rules to apply to itself as those which, time and again, it requires current and prospective Member States to accept." This is one of the most important arguments on behalf of the accession. The fact that the EU demands its members (quite rightly) to live by certain rules should also mean that it binds itself to these very rules.

One of the most fundamental issues that the A.G. discusses is maintaining the specific characteristics of EU law.¹⁴⁵ The issue of preserving specific characteristics of EU law is closely linked to maintaining the autonomy of EU law which requires that the agreement doesn't affect the competences of the EU and its institutions.¹⁴⁶ In this respect the A.G identifies three potential issues: determining the responsibilities between the EU and its Member States, the necessity of prior-involvement mechanism, the difference in jurisdiction of ECtHR and CJEU regarding Common Foreign and Security Policy (CFSP).¹⁴⁷ These are basically the same issues that the Court had identified in the Opinion.

Concerning the issue of determining the responsibilities, the draft agreement states that as a general rule co-respondents are jointly responsible for violations. However, the ECtHR may decide that one party is solely responsible. This would, as the A.G. points out, require ECtHR to assess matters of EU law in order to determine who is responsible.¹⁴⁸

The A.G. then proceeds to assess the prior-involvement mechanism.¹⁴⁹ The potential problem in her view is who gets to make the call on whether the CJEU has had the chance to rule on the issue. She states that it would be contrary to the principle of autonomy of EU law if the initiation of prior-involvement mechanism was left solely to the ECtHR. The suggestion of the A.G. on how to solve this is that it should be clarified that the ECtHR must always initiate the prior-involvement mechanism unless it is absolutely certain that the issue has been dealt with by the CJEU.

The third and final issue dealing with the autonomy of EU law is the matter of different jurisdiction of the CJEU and the ECtHR on CFSP matters.¹⁵⁰ The discrepancy comes from the fact that the ECtHR would have jurisdiction over claims relating to the Convention from all

¹⁴⁵ *Ibid.* Paras 157-236.

¹⁴⁶ *Ibid.* Para 172.

¹⁴⁷ *Ibid.* Paras 175-195.

¹⁴⁸ *Ibid.* Paras 175-179.

¹⁴⁹ *Ibid.* Paras 180-184.

¹⁵⁰ *Ibid.* Paras 185-195.

areas of EU law, including CFSP, which falls to a great extent outside of the jurisdiction of the CJEU. As the A.G. points out, this kind of issue has never existed before. Possible conflicts in jurisdiction have been dealt with in several cases but never has there been a case where an international court would have wider jurisdiction over acts of the EU than the EU courts. The A.G. however submits that in her view the autonomy of EU law does not prevent EU from delegating jurisdiction to an international court even to a greater extent than what the EU courts have.¹⁵¹ She continues that according to the case law of the Court of Justice the autonomy of EU law requires that when concluding international agreements it should be ensured that any interpretation of an outside court on EU law is not binding on EU. Nevertheless, she claims that because the founding treaties especially excluded CFSP matters from the jurisdiction of the CJEU there isn't a sufficient arrangement within the EU to preserve autonomy of EU law in this particular area so this shouldn't be used as an argument against recognising jurisdiction of an international court.¹⁵² The fact that the treaties at the same time give EU the competence to accede to the ECtHR and restrict CJEU jurisdiction over CFSP matters would seem to further support this view.

The A.G. identified more or less the same potential or actual problems concerning the accession agreement as the Court did in its Opinion. However, unlike the Court the A.G. concludes that the recognition of jurisdiction of the ECtHR would not be incompatible with the treaties. This is subject to the condition that necessary clarifications are made regarding the prior-involvement mechanism and the determination of responsibilities of respondent and co-respondent.¹⁵³ In other words the A.G. felt that the identified problems were such minor ones that they would not prevent the adoption of the agreement and would be satisfied with minor modifications or clarifications.

3.3. Assessment of the Commission and observations submitted to the Court

The Commission's assessment on the substance is divided into six parts. It is not a surprise that the Commission finds that the draft agreement fulfils the requirements set out in these documents regarding the accession. The Commission's assessment regarding Article 1(b) and the first sentence of Article 2 of Protocol No 8 EU (subsection 4) warrants a closer look as it deals with many of the fundamental questions of the accession.¹⁵⁴ Firstly the Commission states

¹⁵¹ *Ibid.* Para 191.

¹⁵² *Ibid.* Paras 193-195.

¹⁵³ *Ibid.* Para 196.

¹⁵⁴ CJEU Opinion 2/13, Paras 87-104.

that the powers of the institutions other than the CJEU are not affected by the accession as they would exercise their powers with regard to the convention in the same way as any other international agreement concluded by the EU. In the question of preserving of specific characteristics of the EU and EU law with regard to judicial protection and EU courts, the Commission identified three issues: exhaustion of domestic remedies, effective judicial protection (especially in the field of CFSP) and the powers of the CJEU under articles 258, 260, and 263 TFEU. The Commission maintains in its assessment that the draft agreement guarantees that the remedies before the EU courts must be exhausted before an application against an act of EU can be brought before the ECtHR.¹⁵⁵

The Commission also addresses the prior-involvement mechanism in the assessment.¹⁵⁶ It states that there could be a situation where in proceedings before a national court a violation of a right guaranteed by the ECHR is linked to secondary EU legislation. If this case were to be submitted to the ECtHR, EU could become a co-respondent. If a reference for a preliminary ruling would not be made (because a national court may not declare a provision of EU law invalid and dis-apply it),¹⁵⁷ the ECtHR might rule on the issue and deliver a judgement which would be binding to the EU institutions. It would also be binding to the CJEU without the EU courts having had a chance to rule on the issue. This is why the prior-involvement is necessary in order to maintain powers of the CJEU. The above mentioned scenario is of course hypothetical but it is still a possibility and naturally should be addressed as such. The Commission argues that the power to initiate prior-involvement procedure should be exercised by the Commission and the MS which is a respondent of the claim. The Commission further states that the Court of Justice should be able to give a ruling on the issue before the EU or the MS has presented their views before the ECtHR.

Regarding the main observations submitted to the Court, it is sufficient to say that all 24 Member States that submitted their observations to the Court, as well as the Council and the Parliament, concluded that the draft agreement is compatible with the treaties. Their observations are mostly aligned with the Commission's assessment and/or the view given by the A.G. or they concern some minor technical issues. Therefore, it is unnecessary to repeat the observations in here. In any case the observations were not enough to convince the Court. As a matter of fact, the Court referred to the observations only twice in the substantive part and

¹⁵⁵ *Ibid.* Para 89.

¹⁵⁶ *Ibid.* Para 90.

¹⁵⁷ CJEU C-314/85, *Foto-Frost*.

merely in order to state that the position of the Court is opposite to those in the submitted observations.¹⁵⁸

3.4. Analysis of the opinion

In the opinion the Court manages to come to a different conclusion on almost all aspects of the accession agreement than for example A.G. Kokott in her view. It should of course be noted that the Court is in no way bound by the view of the A.G. (or by observations of the institutions and the Member States for that matter) but it seems that the Court and the A.G. had a completely different approach towards the accession agreement. After all they both identified more or less the same issues but the A.G. came to the conclusion that either they are compatible with the EU treaties or would be with minor modifications.

In opinion 2/13 the Court effectively put a stop to the EU accession to the ECHR. The Court ruled that the draft accession agreement is incompatible with article 6(2) TEU and Protocol No 8. It further follows from art. 218(11) TFEU that the agreement can't enter into force unless it is amended or the treaties revised. The further conditions for the accession given by the Court could be summarised as follows:

1. The EU and EU Member states should not be required to check each other's observance of fundamental rights as under EU law (and principle of mutual trust) they are not allowed to do so,
2. protocol no. 16 should not be used to circumvent the preliminary ruling procedure of the Court of Justice,
3. jurisdiction of the ECtHR in disputes between EU Member States and between a MS and the EU should be expressly excluded in the agreement,
4. the ECtHR should not be in a position to rule on whether or not to allow the EU or a MS to become co-respondents,
5. the allocation of responsibilities of co-respondents should be determined according to rules of EU law (possibly by the Court of Justice),
6. the determination to initiate prior-involvement of the Court of Justice should be made by "a competent EU institution",¹⁵⁹
7. the EU should be fully and systematically informed of all the cases pending before the

¹⁵⁸ CJEU Opinion 2/13, paras 206 and 251.

¹⁵⁹ The question of what this competent EU institution would be was not answered in the Opinion.

- ECtHR in order to determine whether the prior-involvement is necessary,
8. the Court of Justice should be able to rule on interpretation of secondary EU legislation in the prior-involvement procedure, and
 9. the ECtHR should not have jurisdiction to review matters falling within CFSP where the CJEU lacks such a jurisdiction.

Some of these conditions would only require minor modifications to the agreement (for example number 7) but some of them would require amending the treaties and, for example in the case of condition number 9, in a fundamental way.¹⁶⁰ The objections of the Court to the prior-involvement procedure are a bit unexpected as this is the one part of the agreement that was reached after much influence from the Court itself.¹⁶¹ The criteria for this procedure seems strangely strict considering that it is solely based on a possibility that the issue was not referred to the CJEU, a possibility that should not be possible if national courts follow EU law and the case law of Court of Justice.¹⁶²

Arguments of the Court concerning the CFSP seem strange from a practical point of view. Even without the accession the ECtHR may review these matters in the same way as before, against Member States who implement them without the EU having a chance to defend them before the ECtHR.¹⁶³ The Court's reasoning which is based on "specific characteristics" is illogical because these specific characteristics include the exclusion of CFSP from the jurisdiction of the Court and at the same time demand that the EU should accede to the ECHR.

Some critics claim that the Court did everything in its power to prevent the accession.¹⁶⁴ It is claimed that the objections made by the Court are contradictory to the spirit of article 6(2) TEU because the objections are such that could not have been reconciled by the negotiators. This means that there is no way that the obligation to accede could have been met in a way that was satisfactory to the Court. They even go so far as to say that "the CJEU has interpreted the text of the treaties' *contra legem*" and that it could be argued that it is the interpretations of the Court itself that threaten the autonomy of EU law and not the accession.¹⁶⁵ It should be noted among all the criticism that many of the objections made by the Court are consistent with its earlier case

¹⁶⁰ See Chapter 4.1.

¹⁶¹ L. Besselink et al. (2015). A Constitutional moment: Acceding to the ECHR (or not). *EuConst*, 11, p. 5.

¹⁶² J. Heliskoski (reference 105), pp. 239-240.

¹⁶³ B. De Witte and S. Imamovic. Opinion 2/13 on Accession to the ECHR: Defending the EU legal order against a Foreign Human Rights Court. *EL Rev* 2015 4, pp. 702-703.

¹⁶⁴ *Ibid.* pp. 704-705.

¹⁶⁵ *Ibid.* p. 704.

law on international agreements and shouldn't have come as a surprise.¹⁶⁶

Other writers have also claimed that the Court's concerns for autonomy of EU law are unwarranted and that the Court tries to position EU law as the superior fundamental rights system in Europe.¹⁶⁷ The common theme among the criticisms of the Opinion is the approach the Court took towards the whole question. It seems that the Court went to great lengths to argue its own competences using the specific characteristics of EU law as justification without any regard to the ECHR system or the ECtHR.¹⁶⁸ Storgaard states that the Court disregards the nature of the Strasbourg court by demanding control over major parts of judicial proceedings before the ECtHR and also demanding that a major part, the CFSP, be left out of the jurisdiction of the ECtHR. The editorial comments in the Common Market Law Review (CMLR) also criticises the Court's attitude as being inflexible and aimed at defending its own powers rather than promoting cooperation.¹⁶⁹ Many other writers have made similar claims. For example Lock states that the Court's "aggressive defence of EU legal order and of its own position" and in a way looking down on the ECtHR could have a negative impact on the relationship between the Strasbourg and Luxembourg courts.¹⁷⁰ In the Annual Report of 2014, the president of the ECtHR Dean Spielman voiced out his disappointment in the Opinion 2/13 but also pointed out that it is the ordinary citizens who were deprived of the possibility to bring cases against actions of the EU before the ECtHR.¹⁷¹ This also raises the question of attitude of the ECtHR towards the EU and the CJEU and whether the ECtHR might even go so far as to re-evaluate the *Bosphorus*- doctrine.¹⁷²

It is of course important to remember that the opinion of the Court should not be dismissed straight away simply as "bad". Even though the opinion was certainly formed in a way that makes it very difficult to defend it, it is important to try to understand some problematic issues relating to the constitutional nature of the EU which were raised by the Court.¹⁷³ The Court's arguments regarding the co-respondent mechanism in points 4 and 5 are similar to concerns of

¹⁶⁶ See Chapter 2.1. for analysis of earlier case law.

¹⁶⁷ L. H. Storgaard. EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR, Human Rights Law Review, 2015, 15, 485-521. pp. 485-521.

¹⁶⁸ Ibid., pp. 519-521.

¹⁶⁹ Editorial comments: The EU's Accession to the ECHR – a "NO" from the ECJ!, CMLR 52: 1–16, 2015, pp. 14-15.

¹⁷⁰ T. Lock (reference 12), p. 238.

¹⁷¹ European Court of Human Rights, Annual Report 2014, Strasbourg 2015. Foreword, p.6.

¹⁷² B. De Witte and S. Imamovic (reference 163), p. 704.

¹⁷³ D. Halberstam. "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, German Law Journal, Vol. 16 No. 01, 2015, pp. 105-146.

the A.G.¹⁷⁴ The procedure in the draft agreement may very well be problematic from the point of view of EU law autonomy but any other solutions prove to be problematic as well. An unconditional right to become a party to proceedings would interfere with the procedural autonomy of the ECtHR.¹⁷⁵ The A.G. suggests similar right to intervene as the right to intervene before the CJEU but it should be noted that the position of an intervening party before the CJEU is different from co-respondents before the ECtHR who are actual and equal parties to the case.

It also seems to me that the fundamental rights protection was not a very important consideration in the opinion. It could even be claimed that the Court consciously decided to stray away from effective fundamental rights protection.¹⁷⁶ There was already visible a similar trend in the negotiations. Besselink argues that the negotiations had lost sight of the key issue at stake, improving fundamental rights, and instead focused on game of politics.¹⁷⁷ He also stated that the Court of Justice seems more interested in jealously guarding its own position and “uniqueness” than in anything having to do with protecting anyone's rights. This analysis seems pretty accurate and could also be extended to the opinion of the Court. This is also an argument made by de Witte and Imamovic who state that the Court was more concerned with its own position and gave no consideration to protection of fundamental rights.¹⁷⁸ Similar questions about the Opinion 2/13 were raised by Eva Nanopoulos who says that the opinion "raises serious questions about the nature of EU constitutionalism".¹⁷⁹ While the Court claims to be defending the constitutional characteristics of the EU there is no regard given to the fundamental rights protection (and all regard given to the powers of the Court). The article notes that this is particularly apparent in the CFSP part of the opinion but throughout the opinion the Court gives priority to constitutional principles other than fundamental rights protection. This is rather strange approach by the Court which has over the years developed to be more of a constitutional court of the EU since it is the fundamental rights protection that constitutional courts generally consider their main domain.¹⁸⁰

It is also suggested that there might be an unexpected consequence resulting from this opinion. The supreme and constitutional courts in the Member States might be more willing to defend their own position as guarantors of fundamental rights over the Court of Justice. It is indeed

¹⁷⁴ View of A.G. Kokott relating to opinion 2/13, paras 229-235.

¹⁷⁵ L. H. Storgaard (reference 167), p. 500.

¹⁷⁶ *Ibid.*, pp. 503-511.

¹⁷⁷ L. Besselink (reference 7), pp. 330-331.

¹⁷⁸ B. De Witte and S. Imamovic (reference 163), pp. 704-705.

¹⁷⁹ E. Nanopoulos (2015). Killing two birds with one stone? The Court of Justice's opinion on the EU's accession to the ECHR. *The Cambridge Law Journal*, 74, pp 185-188.

¹⁸⁰ M. Claes and M. deWisser (reference 18).

somewhat contradictory that EU, an organisation created by international treaties, wishes to position itself autonomous from other international law regimes and at the same time forbids Member States to do the same regarding EU law.¹⁸¹ The protectionist attitude of the Court might encourage national courts also to safeguard autonomy of their own legal systems.¹⁸² Although this is merely a speculation, the German Constitutional Court just recently reaffirmed that it reserves the right to conduct a constitutional identity review even in cases that are wholly covered by EU law in the context of protection of fundamental rights.¹⁸³

In conclusion, although some objections made by the Court seem reasonable and some even easy to fix the criticism of the opinion seems overwhelming. It seems to be a common view that the Court attempted to prevent the accession and conjured up all the objections it could think of. Not only did they manage to prevent the accession, for the time being at least, but the opinion might have some negative consequences both within the EU and for the external relations.

3.5. Principle of mutual trust in relation to Opinion 2/13

An issue very closely linked with fundamental rights protection is the principle of mutual trust. The Court's reasoning concerning this seems particularly strange. From fundamental rights perspective the idea that the principle of mutual trust supersedes any human rights considerations seems already questionable but in this case the Court seems to suggest that the specific characteristics of EU law demand that EU should be able to give less protection than what is demanded by the Convention.¹⁸⁴ But it is also possible that the Court goes further than that and the reasoning here is meant as a comment towards the ECtHR regarding its recent case law.¹⁸⁵

Storgaard refers to the cases of *MSS v. Belgium and Greece* and *Tarakhel*. In *M.S.S.* the ECtHR held Belgium responsible for violation of article 3 of the convention.¹⁸⁶ Belgium was found in violation because it had returned the applicant, an asylum seeker, to Greece thus exposing him to ill-treatment. This case demonstrates that though the ECtHR isn't fundamentally opposed to the idea of mutual trust there is a limit on how far it can be stretched. Furthermore, in the

¹⁸¹ Editorial comments, CMLR (reference 169) pp. 14-15.

¹⁸² B. De Witte and S. Imamovic (reference 163), p. 705.

¹⁸³ GFCC Order of 15 December 2015 - 2 BvR 2735/14. English translation from Press Release No. 4/2016 of 26 January 2016.

¹⁸⁴ B. De Witte and S. Imamovic (reference 163), pp. 701-702.

¹⁸⁵ L. H. Storgaard (reference 167), pp. 507-508.

¹⁸⁶ *MSS v. Belgium and Greece*. [GC] Application no. 30696/09. ECHR 2011.

Tarakhel case the ECtHR decided that there would be a violation of article 3 of the convention if Swiss authorities would return the applicants to Italy without obtaining assurances from authorities that they would be sufficiently taken care of.¹⁸⁷ Yet, in Opinion 2/13, the Court insisted on the importance of the principle of mutual trust for the autonomy of EU law. This could be seen as purposefully contradicting the ECtHR and an indication that the Court is not inclined to accept the *Tarakhel* criteria.¹⁸⁸ There further seems to be no practical value for this argument in the Opinion because as these cases demonstrate, the Member States may already be held liable for violations of the ECHR regardless of the principle of mutual trust. Even though this concerns a very particular set of cases, the differences between the two courts are liable to confuse national authorities and courts who could have to choose between two competing requirements.¹⁸⁹

¹⁸⁷ *Tarakhel v. Switzerland*, [GC] Application no. 29217/12. ECHR 2014.

¹⁸⁸ L. H. Storgaard (reference 167), pp. 509-510.

¹⁸⁹ Editorial. ECJ, Strasbourg and National Courts: an exercise in guesswork? EL Rev 2015 4, pp. 641-642.

IV. AFTER THE OPINION – AVAILABLE ROUTES FOR SOLVING THE SITUATION

Article 218(11) TFEU gives two clear possibilities on what to do next; either the agreement or the treaties are to be revised. Naturally there is also the option of not acceding to the convention but this is problematic and closely linked to the treaty revision option due to the explicit requirement to accede in art. 6(2) TEU.¹⁹⁰ It is also important to note that the accession is not depending solely on the EU but also on the contracting parties to the CoE and particularly those of its members that are not members of the EU. This chapter will examine both of these dimensions in order to determine how the issue of accession could be resolved.

4.1. Position of the EU

The first and most obvious option is going back to the negotiating table and to re-negotiate the necessary provisions. This however is easier said than done even within the EU. Re-starting the negotiations would require a unanimous decision in the Council. This decision was difficult to achieve the first time and it might prove even harder this time.¹⁹¹ According to the Editorial comments in CMLR, the matter of CFSP is even more difficult as it is not possible to exclude the entire area of CFSP from the accession.¹⁹² The article states that amending protocol no. 8 would be consistent with the position of the Member States during the Opinion 2/13; that the accession agreement is compatible with the treaties. In any case it would be a strange situation if the treaties on the other hand oblige the EU to accede and on the other hand prevent the accession due to the CFSP provisions. In any case renegotiating the agreement seems to be difficult and it is even doubtful whether all the objections could be solved solely by making amendments to the agreement. Also, as the article in European Constitutional Law Review (EuConst) points out, given the nature of the Opinion 2/13 the renegotiated deal could once again be subject to unpredictable scrutiny by the Court of Justice.¹⁹³ However, it should be noted that seeking the opinion of the Court is not compulsory and it could be speculated whether those entitled to (any MS, the Commission, Parliament or the Council) would be willing to seek the opinion again.¹⁹⁴ But on the other hand it is doubtful that anyone would be willing to bet on the assumption that no-one will seek the opinion of the Court.

¹⁹⁰ L. Besselink et al. (reference 161), pp 2-12.

¹⁹¹ *Ibidem*.

¹⁹² Editorial comments, CMLR (reference 169), pp. 13-14.

¹⁹³ L. Besselink et al. (reference 161), p.5.

¹⁹⁴ TFEU Art. 218 (11).

Second option is revising EU primary legislation meaning the treaties and/or the additional protocols. Editorial comments in the CMLR suggests amending Protocol no. 8 to TEU while the article in EuConst by Besselink et. al. suggests a more comprehensive review of the treaties.¹⁹⁵ Revision of the treaties in this case means eliminating the obstacles found by the Court of Justice. After all, the obstacle identified by the Court of Justice in Opinion 2/94 was fixed with a treaty amendment in the Treaty of Lisbon. It is for example suggested that the issue of jurisdiction in CFSP matters could be resolved by eliminating the treaty provisions that limit the jurisdiction of the Court of Justice.¹⁹⁶ This of course sounds quite simple but given the fact that this area has purposefully been excluded from the Court's jurisdiction throughout all treaty revisions it is doubtful whether the Member States would be willing to make such a revision.¹⁹⁷ The article also suggests amending the mutual recognition instruments (particularly in the field of criminal law, for example the European Arrest Warrant) allowing the review of compatibility with the ECHR. Although the article identifies that this may not be enough, it might solve the problems relating to mutual recognition expressed in the opinion. In any case such amendments to these instruments would improve the fundamental rights protection within the EU even without the accession.

The aforementioned amendments, though seemingly difficult, are however much easier to achieve in practice than the more unsubstantiated objections of the Court. In several cases the Court simply refers to the specific characteristics, the autonomy, or the nature of the EU and EU law. It is quite difficult and probably unwise as well to get rid of autonomy of EU law. Here Besselink et. al. suggest a protocol ("a notwithstanding protocol") that would essentially guarantee the accession "notwithstanding" the objections made in Opinion 2/13.¹⁹⁸ This proposal is further supported by de Witte and Imamovic although they recognise that it is doubtful whether the Member States would want to start amending or revising the treaties in the current political situation in the EU.¹⁹⁹ This does not mean that this should be done blindly without assessing all the aspects of the Opinion. Even though the opinion is formulated in a way that doesn't gather much support there are certain issues raised by the Court that are ultimately agreed by many (including the A.G. Kokott) and disregarding these just to achieve a quick accession could be seen as "throwing out the baby with the bathwater".²⁰⁰

¹⁹⁵ L. Besselink et al. (reference 161), pp. 5-12; Editorial Comments, CMLR (reference 169), p. 14.

¹⁹⁶ L. Besselink et al. (reference 161), p.6.

¹⁹⁷ Editorial Comments, CMLR (reference 169), p. 14.

¹⁹⁸ L. Besselink et al. (reference 161), pp. 7-8.

¹⁹⁹ B. De Witte and S. Imamovic (reference 163), pp. 703-704.

²⁰⁰ D. Halberstam (reference 173), p. 107.

4.2. Position of the CoE and its non EU Member States

There was naturally disappointment in the CoE and the ECtHR due to the rejection of the accession agreement. In addition to the president of the ECtHR (see chapter 3.4.), the disappointment was quite strongly voiced by Jörg Polakiewicz, Director of Legal Advice and Public International Law of CoE, in a speech at the Maastricht University.²⁰¹ He called the *Bosphorus*- doctrine into question and signalled that stronger scrutiny by the ECtHR is needed in the light of the Opinion 2/13.

Even if the EU chooses and is able to pursue the accession, their road to the ECHR is far from easy. This would still need the other contracting parties to the ECHR to also return to the table and once again negotiate with the EU.²⁰² The other contracting parties to the convention have been reluctant in the past to give the EU concessions and they might not be very eager to continue negotiations with these conditions. This is evident for example from the statement made by the Russian Federation during the second negotiation meeting.²⁰³ In the statement the representative of Russian Federation expressed the hesitation of Russian Federation to agree to subsequent amendments and compromises. It is also mentioned that the Russian Federation is not very pleased that the negotiations seem to be between the “EU block” of the ECHR states and the non-EU members, and that it hopes that the future negotiations will be between the individual members of CoE and the European Commission. Taking into account the changes in political climate in Europe since this statement it would be a safe bet that the Russian Federation would now be even less willing to agree to further concessions.

²⁰¹ J. Polakiewicz. The Future of Fundamental Rights Protection without accession. Maastricht University 26.6.2015. On-line: <http://www.coe.int/en/web/dlapil/speeches-of-the-director> (1.5.2016).

²⁰² L. Besselink et al. (reference 161), pp.6-8.

²⁰³ Second negotiation meeting between the CDDH Ad Hoc negotiation group and the European Commission on the Accession of the European Union to the European Convention on Human Rights – Relevant excerpts from the report of the 75th meeting of the CDDH. Strasbourg 4th of July 2012. 47+1(2012)002. Appendix VI: Statement made by the Representative of the Russian Federation. See also Ibid. p. 5.

CONCLUSIONS

EU accession to the ECHR has been a long process starting from the 1970's and culminating to the draft accession agreement and Opinion 2/13. There are strong arguments for the EU accession to the ECHR and the accession would improve and unify the fundamental rights protection in Europe. Firstly, it would close a gap for acts that result purely from the EU and secondly it would increase the level of scrutiny of alleged violations that in the current state of affairs are immune from review by the ECtHR under *Bosphorus*- doctrine. It is also clear that the Member States wanted the EU to accede to the ECHR when drafting the treaty of Lisbon. The draft accession agreement was not easy to reach. The negotiations took a lot longer than expected and it seems that at one point the focus was not on enabling EU, a supranational organisation, to accede to a convention designed for state parties but rather on accommodating EU on preserving its special characteristics. Furthermore, the fundamental rights protection didn't seem to be the main focus of the negotiations. It is safe to assume that so many concessions would not have been afforded to any other party wishing to join the Convention. Remarkably EU in the end got pretty much all that it had wanted and the accession agreement was finally reached and the end for the long process was finally in sight.

Opinion 2/13 put a halt to this long process that was finally reaching its final stretch. Most likely the opinion of the Court will not be the last chapter in this long process and at least the dialogue will continue one way or another. However, it is also certain that after 2/13 the accession will not happen very soon. The Court of Justice adopted a very rigid approach and majority of the Court's opinion seemed to focus on the protection of its own powers and position. Some points that the Court made were surely valid ones and several of the objections were consistent with its previous external relations case law. However, in contrast to the view of A.G. Kokott who, although identified some same problems, concluded that the minor obstacles could be easily overcome and the EU could accede to the convention, the Court adopted a much more protectionist view of the EU law autonomy and found only obstacles and no solutions. It is clear from the treaties and the observations made to the Court that there was a willingness from the side of the Member States to enhance European cooperation in the field of fundamental rights but it seems that the Court didn't see this at all. Nor did it make any references to improving fundamental rights protection which supposedly was the key goal of this agreement. The Opinion of the Court met with overwhelmingly big criticism from academics. Although some points made by Court were understood, the general perception seems to be that the Court jealously attempted to protect its own position and prevent the accession. It is however

important that the underlying important questions are not completely ignored simply because the Court formulated its Opinion this way.

It is without a doubt that one of the most fundamental questions for the EU is its character as an autonomous legal order. As was expected the autonomy of EU law was and remains the biggest issue of the accession. This issue can't be very easily resolved especially because of the rigid approach adopted by the Court of Justice. It seems that while in theory the Court would be open to such an accession, in practice it demands that the accession would not in any way touch the specific characteristics of EU law. It seems that the Court tries to establish a condition where an international agreement is only compatible with EU law as long as it gives priority to EU law.

It must also be kept in mind that the accession is not dependant only on the EU. There are other parties to the negotiations, some of which were already hesitant to giving the EU the concessions it wanted in the negotiations. It is doubtful that the contracting parties to the ECHR who are not members of the EU are as concerned with the autonomy and specific characteristics of EU law as the Court of Justice is. The accession of the EU to the convention is as much a matter of politics as it is of law and it is highly unlikely that there would be enough will from the contracting parties to return to the table and to accommodate the EU. It is also doubtful whether they should accommodate the EU to the extent that the Court of Justice wishes without undermining the ECHR system and powers of the ECtHR.

The future of the accession depends much on which road the EU chooses. The options available to the EU are: non-accession to the convention, re-negotiating the agreement, or amending the treaties. It is difficult to believe the EU would decide definitively to abandon the plan to accede so ultimately the decision would be between the latter two. If there still exists enough political will to complete the long overdue accession process the option of amending the treaties in the form of adopting a new protocol (as suggested in chapter 5.1.) would be the most feasible option. This should however be done sensibly by first evaluating the legal questions raised by the Court. After all several commentators have understood and agreed with the Court at least on certain issues and disregarding these simply because the Opinion was not liked would be unwise. From a legal point of view, the accession is by no means impossible. It would however require concessions from EU in order to preserve also the nature of the Convention. It seems unlikely that all the objections raised by the Court of Justice would be accommodated.

REFERENCES

Bibliography

1. Besselink, L. Should the European Union ratify the European Convention for Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice in Follesdal et al. *Constituting Europe*, Cambridge University Press 2013.
2. Claes M. and de Visser, M. The Court of Justice as a Federal Constitutional Court, in Cloots et al.(eds). *Federalism in the European Union*, Hart Publishing 2012.
3. de Witte, B. A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union, in Cremona and Thies (eds): *The European Court of Justice and External Relations Law*, Hart Publishing 2013
4. Eeckhout, P. *EU External Relations Law*, 2nd edition, Oxford University Press 2013.
5. Gragl, P. *The accession of the European Union to the European Convention on Human Rights*, Hart Publishing 2013.
6. Heliskoski, J. The arrangement Governing the Relationship between the ECtHR and the CJEU in the Draft Treaty on the Accession of the EU to the ECHR in Cremona and Thies (eds): *The European Court of Justice and External Relations Law*, Hart Publishing 2013.
7. Lock, T. *The European Court of Justice and international courts*, Oxford University Press 2015.
8. Rosas A. and Armati L. *EU Constitutional Law – An Introduction*, 2nd edition, Hart Publishing 2012.

Articles

1. Baratta, R. Accession of the EU to the ECHR: The rationale for the ECJ's Prior involvement mechanism. *CMLR* 50, 1305-1332. 2013.
2. Bernaerts, I. Opinion 2/94. *Colum. J. Eur. L.* Vol 2. 1995-1996, pp. 372-381.
3. Besselink L. Claes M. and Reestman J.(2015). A Constitutional moment: Acceding to the ECHR (or not). *EuConst*, 11, pp 2-12.
4. de Búrca, G. The European Court of Justice and the International Legal Order After Kadi. *Harvard International Law Journal*. 2010. Vol. 51, No. 1. pp. 1-49.
5. de Búrca, G. After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2 (2013) pp. 168-184.
6. De Witte, B. and Imamovic, S. Opinion 2/13 on Accession to the ECHR: Defending the EU

- legal order against a Foreign Human Rights Court. *EL Rev* 2015 4, pp. 683-705.
7. Editorial comments: The EU's Accession to the ECHR – a “NO” from the ECJ!, *CMLR* 52: 1–16, 2015.
 8. Editorial. ECJ, Strasbourg and National Courts: an exercise in guesswork? *ELRev* 2015 4, pp. 641-642.
 9. Halberstam, D. “It’s the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, *German Law Journal*, Vol. 16 No. 01, 2015, pp. 105-146.
 10. Lock, T. Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *CMLR* 48: 1025-1054, 2011.
 11. Nanopoulos, E. (2015): Killing two birds with one stone? The Court of Justice's opinion on the EU's accession to the ECHR. *The Cambridge Law Journal*, 74, pp 185-188.
 12. Polakiewicz, J. The Future of Fundamental Rights Protection without accession. Speech, Maastricht University 26.6.2015. On-line: <http://www.coe.int/en/web/dlapil/speeches-of-the-director> (1.5.2016)
 13. Reesman, J.H. and Besselink, L. (2013). Editorial: After Åkerberg Fransson and Melloni, *EuConst*, Vol. 9, Issue 2, pp. 169-175.
 14. Storgaard, L. H. EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR, *Human Rights Law Review*, 2015, 15, 485-521.
 15. Weiss, W.: (2011). Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon. *EuConst*, 7, pp 64-95.

Documents

1. Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Luxembourg 5 May 2010.
2. Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), 9689/10, 11 May 2010.
3. Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR).-Involvement of ECJ regarding the compatibility of legal acts of the Union with fundamental rights (Paragraph 11 of the Negotiating directives). 2 June 2010, 10568/10.

4. Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)08 rev. 2, 10 June 2013.
5. European Court of Human Rights, Annual Report 2014, Strasbourg 2015.
6. Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) final. 2 May 1979.
7. Recommendation for a Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms, Brussels 17.3.2010 SEC(2010) 305 final/3. Partially declassified 25.2.2011, Council document 7668/10.
8. Second negotiation meeting between the CDDH Ad Hoc negotiation group and the European Commission on the Accession of the European Union to the European Convention on Human Rights – Relevant excerpts from the report of the 75th meeting of the CDDH. Strasbourg 4th of July 2012. 47+1(2012)002.

Treaties and Legislation

1. Treaty on European Union and Protocols (OJ C 326, 26.10.2012)
2. Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012)
3. Treaty on European Community
4. Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29.9.2012), as amended on 18 June 2013 (OJ L 173, 26.6.2013).
5. Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950) and the additional protocols

TABLE OF CASES

Court of Justice of European Union:

1. Case 26/62, *van Gend en Loos*.
2. Case 22-70, *Commission of the European Communities v Council of the European Communities* - European Agreement on Road Transport.
3. Case C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.
4. Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*.
5. Opinion 1/91, 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.
6. Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property
7. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms
8. Case C-273/99, *Connolly v. Commission*
9. Opinion 1/00, Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area.
10. Cases C-402/05 and C-415/05, *Kadi and Al Barakaat v. Council and Commission*
11. Opinion 1/09, Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties.
12. Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*
13. Case C-399/11, *Melloni v. Ministerio Fiscal*
14. Case T-331/11, *Besselink v. Council*
15. Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties

European Court of Human Rights:

1. *Kruslin v. France*, 24 April 1990, Series A no. 176-A
2. *Matthews v. United Kingdom* [GC], Application no. 24833/94, ECHR 1999-I
3. *Bosphorus v. Ireland*, [GC], Application. no. 45036/98, ECHR 2005-VI
4. *Connolly c. 15 Etats Membres de L'Union Europeenne*, App. No. 73274/01, ECHR
5. *MSS v. Belgium and Greece*. [GC] Application no. 30696/09. ECHR 2011
6. *Dhahbi v. Italy*, Application no. 17120/09, ECHR 2014

7. *Tarakhel v. Switzerland*, [GC] Application no. 29217/12. ECHR 2014
8. *Schipani et autres c. Italie*, Application No. 38369/09, ECHR 2015

German Federal Constitutional Court:

1. GFCC Order of 15 December 2015 - 2 BvR 2735/14. English translation from Press Release No. 4/2016 of 26 January 2016.

ABBREVIATIONS

A.G.	Advocate General
CDDH	Council of Europe Steering Committee for Human Rights
CFR	Charter of Fundamental Rights
CFSP	Common foreign and security policy
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
CoE	Council of Europe
EEA	European Economic Area
ELRev	European Law Review
EuConst	European Constitutional Law Review
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
GC	General Court
MS	Member State (of the European Union)
TEC	Treaty on European Communities
TEU	Treaty on European Union
TFEU	Treaty on the functioning of European Union

THE AUTONOMY OF EU LAW:

THE ECHR ACCESSION OPINION AND ITS AFTERMATH

ABSTRACT

The accession of the EU to the European Convention on Human Rights (ECHR) has been a subject of a discussion for decades beginning from late 1970's. There was a more serious attempt to accede in the 90's that ended when the Court of Justice declared that the Community did not have competence to accede to the ECHR. The Lisbon Treaty introduced a specific competence as well as an obligation for the EU to accede to the ECHR. After Lisbon, the Commission negotiated an accession agreement. Negotiations took long and were finally completed in 2013. The Commission sought the opinion of the Court of Justice which delivered an unfavourable opinion at the end of 2014. In opinion 2/13 the autonomy of EU law was one of the biggest obstacles to the accession. This is not the first time that preserving the autonomy of EU law has prevented an accession of the EU to an international agreement. The autonomy has been an important part of the external relations case law of the Court of Justice. The autonomy of EU law is also a concept which is at the very core of the EU and sets EU apart from "regular" international organisations. This thesis examines the EU accession to the ECHR particularly from the point of view of autonomy of EU law.

There are several valid reasons why the EU should accede to the ECHR. This thesis covers the reasons and rationale for the EU accession to the Convention as well as examines the relationship of EU and the ECHR (particularly the European Court of Human Rights, ECtHR). The ECHR has traditionally been an important part of the legal system of the EU but it is also argued that this importance has diminished since the EU adopted its own Charter of Fundamental Rights. It has also been argued that the Court of Justice has tried to position the fundamental rights protection of the EU above that of the ECHR. At the same time the ECtHR and the *Bosphorus*- doctrine which it has adopted gives EU member states certain privileges before the Strasbourg court when they are fulfilling obligations under EU law and they had no discretion regarding them. This is based on the presumption that the fundamental rights protection afforded by the Court of Justice is equivalent to that of the ECtHR. This has created a strange situation where there is a gap in the fundamental rights protection in Europe. EU accession could allow the ECtHR to abandon the *Bosphorus*- doctrine and hold EU accountable for potential breaches of the Convention in a similar manner as all the other contracting parties.

The Court of Justice has taken a rather rigid stance on EU law autonomy especially with regards to outside courts and dispute settlement. The outside courts may not, among others, be allowed to interpret EU law or assess the division of competences within the EU. The Court of Justice takes preserving the autonomy very seriously and this has been proven in many Opinions prior to 2/13. This thesis will also provide an overview of the external relations case law of the Court of Justice in order to determine what the issues the Court has identified in earlier agreements. Some of the issues that were seen as an obstacle in the ECHR accession agreement had been identified already in earlier opinions.

The majority of chapter II of this thesis covers the negotiations and the draft accession agreement. The accession negotiations took a long time and were by no means easy. A great portion of the documents concerning the negotiations have since been de-classified. This allows for examining the negotiating goals and the eventual accession agreement. For the most part the EU got what it wanted in the negotiations. What is also noteworthy is that the Court of Justice took part in this process and the documents show that its concerns were very well taken into account when the agreement was drafted.

To the surprise of many, the Court of Justice once again delivered an unfavourable opinion on the accession agreement. The first part of chapter III of this thesis analyses the opinion of the Court as well as relevant parts of the view of the Advocate-General Kokott, who found the agreement to be compatible with the treaties. Although she identified some of the same problems that the Court did, her view was that they could be easily resolved with some clarifications. In the opinion the Court of Justice took a very inflexible approach to the accession agreement. This attracted a lot of criticism from scholars and some of them even argued that the Court went out of its way in order to prevent the accession. The latter part of chapter III combines the post-opinion discussion both in order to identify the main issues as well as to examine the potential solutions that would enable the EU to accede to the convention.

The future of the accession depends much on which road the EU chooses. The options available to the EU are: non-accession to the convention, re-negotiating the agreement, or amending the treaties. It is difficult to believe the EU would decide definitively to abandon the plan to accede so ultimately the decision would be between the latter two. The accession is not dependant only on the EU. The accession agreement needs to be negotiated with the Council of Europe and especially the non-EU member states have been hesitant to give any more concessions to the EU. This also limits the possibilities available to the EU. Also the nature of the ECHR sets its

own limits. Some of the objections of the Court of Justice may simply not be resolved through accession agreement alone. This means that in order to accede, the EU needs to find some internal solutions as well. If there still exists enough political will to complete the long overdue accession process the option of amending the treaties in the form of adopting a new protocol would be the most feasible option. This should however be done sensibly by first evaluating the legal questions raised by the Court. After all several commentators have understood and agreed with the Court at least on certain issues and disregarding these simply because the opinion was not liked would be unwise. The accession is by no means impossible from a legal point of view and the fate of the EU accession to the ECHR is decided on a political level.

