CONTRIBUTION

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The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward

Public Hearing on “Accession to the European Convention on Human Rights (ECHR): Stocktaking after the ECJ's Opinion and way forward”

European Parliament’s Committee on Constitutional Affairs

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List of abbreviations

AFSJ – Area of Freedom, Security and Justice
AG – Advocate General
CFSP – Common Foreign and Security Policy
Charter – Charter of Fundamental Rights of the European Union
CJEU – Court of Justice of the European Union (also referred to as the ‘Luxembourg Court’)
CoE – Council of Europe
DAA – Draft Accession Agreement
ECHR – European Convention on Human Rights and Fundamental Freedoms
ECtHR – European Court of Human Rights (also referred to as the ‘Strasbourg Court’)
EEA – European Economic Area
EU – European Union
MS – Member State
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
I – Introduction

Ms. Danuta HÜBNER, Ladies and Gentlemen,

1. It is a great honour to be invited to speak before this Committee about the EU Accession to the ECHR and the way forward. We will not repeat the basics or talk about well-established case law. Instead, we will focus directly on the issues at stake.

2. We, as a team (Dr Stelios Andreadakis, Ms Lucia Brieskova, Ms Jen Higgins and I) have worked on an ongoing study based on an internally and externally funded project¹ aiming to evaluate the impact of the Treaty of Lisbon on the area of fundamental rights within the EU. Already during our interviews and during the hearing of the Court of Justice as part of proceeding for the Opinion on the Accession to the ECHR,² it was clear that the Court of Justice of the European Union (CJEU) would not take the legal implications of the Accession lightly and intended to engage in an in-depth examination of the Draft Accession Agreement³ (DAA). However, it is true that we did not anticipate such an outcome. With its elaborate points, Opinion 2/13 sent shockwaves through both the EU and the Council of Europe (CoE) as well as legal and academic communities

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¹ British Academy, Small Research Grants scheme, SG 2011 Round, Reference number: SG110947. There are also a number of university grants that were awarded to the research team from 2010 to 2016 to carry on this topical research.
² Opinion 2/13 of the Court (Full Court) of 18 December 2014 ECLI:EU:C:2014:2454.
³ Draft revised Agreement on the Accession of the European Union to the Convention on Human Rights and Fundamental Freedoms, in Final Report to the CDDH, 47+1 (2013) 008rev2, 10 June 2013, 4-12.
around the world.

3. It is notable that the Union negotiator, the Legal Services of the Council and the European Parliament, as well as 24 of the 28 Member States that intervened in the procedure, all supported the conclusion that the Draft Accession Agreement was in fact compatible with EU law.

4. In a similar vein, the Advocate General Kokott in her view\(^4\) delivered on 13 June 2014 concluded, albeit with some substantive qualifications, that the Draft Accession Agreement was compatible with EU law.

5. We would like to address our main conclusions engaging first in a discussion of the EU pre-requisites and principles of Accession, then highlighting some issues that arise as a consequence of the Opinion. Finally, we offer some solutions and recommendations in relation to the way forward towards achieving accession.

II – Pre-requisites and principles for Accession

6. From the outset it was considered important to keep the procedural and substantive features of the current ECHR system the same to the greatest extent possible. This was one of the guiding principles throughout the

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The EU is to submit to the substantive obligations of the Convention and the control machinery it establishes, and to participate in that control machinery on an equal footing with the other Contracting Parties. Therefore, the Draft Accession Agreement confines itself to making only the amendments that are strictly necessary to allow for the Accession of the EU.

7. The Council of Europe highlighted that Accession should not alter the existing obligations of State Parties under the ECHR and the existing ECHR monitoring mechanism is to remain intact. Also, the EU should be treated as far as possible in the same way as any other party to the Convention. In para 28 of the draft Explanatory Report to the Agreement, various terms that explicitly refer to States as High Contracting Parties to the Convention (that is, State, States or States Parties) are, after the Accession, be understood as referring also to the EU as a High Contracting Party.⁵

8. From the perspective of the EU there are clear pre-requisites and principles deriving from EU primary law, as set out in Article 6(2) TEU and in Protocol No 8 of the Lisbon Treaty relating to Article 6(2), which had to be followed throughout the negotiations.

⁵ See Draft Explanatory Report available at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf>
9. Firstly, the EU’s Accession to the Convention is not to affect the EU’s competences (Article 6(2) TEU, second sentence, and Article 2 of Protocol No 8 of the Lisbon Treaty, first sentence). In essence, this means that the EU should be held liable for violations of the ECHR only to the extent that its system of competences would have allowed for the adoption of the act or measure at issue.

10. Secondly, the EU Accession to the Convention is not to affect the powers of the EU’s institutions (Article 2 of Protocol No 8 of the Lisbon Treaty, first sentence). No new powers should be conferred on the institutions and bodies of the EU as a result of the Accession.

11. Thirdly, the Accession Agreement must reflect the need to preserve the specific characteristics of the EU and EU law, in particular with regard to the specific arrangements for the EU’s possible participation in the control bodies of the ECHR (Article 1(a) of Protocol No 8 of the Lisbon Treaty) and to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate (Article 1(b) of Protocol No 8 of the Lisbon Treaty).

12. Fourthly, the EU Accession is not to affect the situation of Member States in relation to the Convention (Article 2 of Protocol No 8 of the Lisbon Treaty, second sentence). This refers to Member States’
reservations and derogations as well as participation in different Protocols.

13. Fifthly, the Accession Agreement is not to affect Article 344 TFEU (Article 3 of Protocol No 8 of the Lisbon Treaty). Under EU law only the CJEU is competent to ensure compliance in the application and interpretation of the Treaties and also to resolve disputes in this area.

Therefore, as it becomes apparent, the EU entered the negotiations having to make allowance for these clear pre-requisites and negotiate an agreement that would be in line with its primary law.

14. After lengthy and troublesome negotiations, on 5th April 2013 the two sides declared the successful end of the process and presented a draft agreement on how the EU could accede to the ECHR and integrate within the Strasbourg system. On 18th December 2013 the Court sitting as a Full Court issued Opinion 2/13 on the compatibility of the draft Agreement with the requirements of EU law.

III – Main legal issues raised in the Opinion 2/13

15. Opinion 2/13 can be unpacked into 5 areas indicating where the Draft Accession Agreement falls short of the requirements of EU law.
16. The first area is related to the special nature of the European Union and EU law. While assessing the Draft Accession Agreement from the perspective of the specific characteristics and the autonomy of EU law, the CJEU found fault in three points.

17. Firstly, it considered that Article 53 ECHR needs to be coordinated with Article 53 of the Charter of Fundamental Rights of the European Union (Charter).

The CJEU has interpreted Article 53 ECHR as giving Contracting Parties the power to lay down higher standards of protection than those guaranteed by the ECHR and therefore as potentially compromising EU law. Although Article 53 of the Charter appears to stipulate something very similar to Article 53 ECHR, in the case of Melloni\(^6\) in 2013, the CJEU held that Member States could not have higher standards than the EU Charter in cases where the EU has fully harmonised the relevant law. Thus, the Luxembourg Court asserted that the ECHR should be coordinated with the Court’s interpretation of the Charter, and found that there was no provision in the DAA to ensure such coordination.

18. Secondly, it highlighted the principle of mutual trust between the EU Member States and considered that in so far as the ECHR would require one Member State to check whether another Member State has observed

fundamental rights, the Accession would be liable to upset the underlying balance of the EU and undermine the autonomy of EU law. The Court was concerned that the principle of mutual trust under EU law, which is highly relevant in the context of the EU’s Area of Freedom, Security, and Justice (AFSJ), could be undermined. Much of the EU legal co-operation within the AFSJ, such as the execution of European Arrest Warrants, is based on the presumption of human rights compliance across the EU. In contrast to the EU obligation of mutual trust, the ECHR would require each Member State to check that other Member States had actually observed fundamental rights.

Since the DAA contains no provision to prevent such a conflict of obligations arising, the Court of Justice believes that the Accession is liable to infringe upon the autonomy of EU law.

19. Thirdly, the Court noted that Protocol 16 ECHR (only signed on 2 October 2013 and ratified by 6 States at the time of writing\(^7\)) allows the highest courts of the ECHR Member States to seek advisory opinions from the ECtHR regarding the interpretation and/or application of rights contained in the ECHR. Although the EU will not accede to this Protocol, the CJEU perceives it as a threat to the autonomy of EU law, because national courts might prefer to ask for an advisory opinion to Strasbourg on the compatibility of EU law with ECHR rights rather than a

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\(^7\) Albania, Finland, Georgia, Lithuania, San Marino and Slovenia.
preliminary ruling to Luxembourg. This *sui generis* forum-shopping would clearly threaten the autonomy of EU law.

More specifically, by failing to make any provision regarding the relationship between the mechanism established by the new Protocol 16 of the ECHR and the preliminary ruling procedure provided for in Article 267 TFEU, the Draft Accession Agreement is likely to adversely affect the autonomy and effectiveness of the preliminary reference procedure.

20. The second area is related to Article 344 TFEU and the exclusive jurisdiction of CJEU. The Court of Justice has consistently held that an international agreement cannot affect the allocation of powers as established by the Treaties and, consequently, the autonomy of the EU legal order. This principle is enshrined in Article 344 TFEU, pursuant to which the EU Member States may not submit a dispute concerning the interpretation or application of EU law to any method of settlement other than those provided for by the Treaties.

Given that the DAA did not exclude the possible use of the ECtHR to settle such disputes, the CJEU found that this omission undermines the special characteristics of EU law.

21. The third point that the CJEU raised was in relation to the co-respondent mechanism. A large part of EU law is implemented by Member States, and, therefore, in bringing a case before the Strasbourg
Court, it seems logical for an applicant to proceed against the State. Yet, Member States often have no discretion as to whether, or how, an action emanating from the EU is implemented. In such cases, the root of the problem lies with the EU measure per se, rather than the Member State’s implementation of the measure. Therefore, the Accession poses the challenging question as to how responsibility between the Member States and the EU should be split.

In order to address this issue, Article 3 of the DAA makes provision for a co-respondent mechanism to be established. It provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party. However, carrying out such a review would require the ECtHR to assess the rules of EU law governing the division of powers between the EU and its Member States.

The Court of Justice held that permitting the ECtHR to make such an assessment would risk adversely affecting the division of powers between the EU and its Member States.

22. The fourth point is the prior involvement of the CJEU. Respect for the autonomy of EU law requires that the CJEU must have had the opportunity to interpret and rule on an issue of EU law before it reaches the ECtHR. The Luxembourg Court had repeatedly requested the
introduction of a prior involvement procedure so that it is always involved in a case (described as the ‘first word’) before Strasbourg decides on the violation of human rights (the ‘last word’). This mechanism was introduced as a guarantee for the CJEU to have the opportunity to review the compatibility of EU Law with the ECHR.

The real problem emerges in relation to indirect actions, i.e. legal actions concerning EU law brought before Member States’ courts. This is because the power to refer a question on the interpretation of EU law stands with the national court at stake. The domestic court is not always under an obligation to refer a question to the CJEU. In situation where referral is not mandatory, the CJEU is denied the ability to provide authoritative guidance on the Treaties and a case, after exhausting all internal remedies, can be heard by the ECtHR for a compatibility assessment on human rights, without having given the CJEU the opportunity to interpret EU law.

A solution to this problem was offered by Presidents Costa and Skouris, who suggested that, as part of the Accession Agreement, an internal procedure for indirect actions should be introduced, so that the CJEU should have a chance to make a ruling in such cases.8

This mechanism was introduced through Article 3(6) of the DAA to

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ensure that the Union would be kept thoroughly informed at all times, so that its institutions would be able to determine whether the Court of Justice has already given a ruling on the issue at question.

However, the CJEU was not convinced that the prior involvement mechanism as devised by the DAA would be sufficient.

23. The fifth area concerns the CJEU’s limited jurisdiction in the area of Common Foreign and Security Policy (CFSP). Under Article 275(1) TFEU, the CJEU does not have full jurisdiction with respect to the provisions relating to the CFSP. The CJEU jurisdiction is limited, pursuant to Art 275(2) TFEU, to the review of the legality of the decisions providing for restrictive measures against natural and legal persons adopted by the Council.

After Accession, the ECtHR will have jurisdiction to examine the compatibility of a CFSP-related measure with the ECHR. Considering the CJEU’s limited jurisdiction, it is possible that the ECtHR will be called upon to interpret EU law without the CJEU having had the chance to do so. For instance, if, as a consequence of an EU military action, a human rights violation was pleaded, an action against the EU in the Strasbourg Court is a feasible possibility. Such a situation would effectively entrust the exclusive judicial review of the EU’s compliance with the ECHR within the CFSP domain to a non-EU body.
This was seen as jeopardising the autonomy of Union law, and also the CJEU’s interpretative monopoly under Article 344 TFEU. Therefore, the CJEU held that the DAA fails to safeguard the specific characteristics of EU law with regard to the judicial review of acts in the CFSP area.

The next section will provide an evaluation of the issues raised by the CJEU in the Opinion, before focusing on solutions and the way forward.

IV – Opinion 2/13 under the Spotlight

A. The various facets of autonomy

24. The main issue, which is at the core of the whole Opinion, is the autonomy of the EU legal system. The CJEU has emphasised in strong terms that the EU is a unique legal order with its own constitutional framework, founding principles, institutional structure and a full set of legal rules. This peculiarity thus has consequences for the procedure and conditions of Accession to the ECHR. The EU is one of the oldest and most successful projects of economic integration at a regional level and it is also a system traditionally perceived as largely autonomous, as confirmed by early CJEU case law. The CJEU Opinion took a very strict

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9 Opinion 2/13 (n.2) paras 157-8.
approach to the Accession pre-requisites laid down in the Treaties and in Protocol 8, especially in relation to the notion of autonomy.

The origins of the EU concept of autonomy can be traced back to the case of *Costa v ENEL*, the seminal decision through which the Court finished the job it had started in *Van Gend & Loos*, where it had proclaimed that primary law could have direct effect in Member States’ legal orders. The CJEU reasoned that direct effect meant little if national norms could later set aside integrated European law. Therefore, the need for a rule that ensured the primacy of European law over national law was also established. It was for this purpose that the concept of autonomy was developed.

After *Costa*, the concept of autonomy disappeared from the radar for a long time and it was not until the beginning of 1990s when it came back to the surface through Opinion 1/91. However, after Opinion 1/91 it was thought that the concept of autonomy was limited to the category of treaties which contained rules that were almost identical to Community (now Union) provisions (Opinion 1/00 and Opinion 1/09).

25. What is the exact meaning and scope of the notion of autonomy?

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10 C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585.
Different aspects of autonomy can be envisaged in Opinion 2/13.

The one such aspect is based on an intrinsic connection between internal and external autonomy. Opinion 2/13 at para 166 states that “…as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from:

1. an independent source of law, the Treaties, by its primacy over the laws of the Member States\textsuperscript{14}
2. and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.”\textsuperscript{15}

In Costa, the primacy rule was deemed applicable if Community law arose out of ‘an independent source of law’ in the English version or, in the original French version, ‘une source autonome’ or in German ‘autonomen’. This ensured that the primacy of EU law, and subsequently the uniform application of EU law across the Member States and the operation of the common market that relies upon this, could not be compromised by national constitutional considerations.\textsuperscript{16}

While placing the fundamental rights recognised by the Charter at the heart of the EU legal structure, the CJEU emphasised that the autonomy


\textsuperscript{15} Van Gend & Loos (n. 11) 12, and Opinion 1/09, para 65

\textsuperscript{16} van Rossem, (n. 12), 15.
enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of fundamental rights has to be ensured within the framework of the structure and objectives of the EU.

26. Another aspect relates to the EU autonomy in relation to national law and international law. At para 170 of the Opinion 2/13, the CJEU states that “The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU.” From this paragraph it is clear that any action taken by the bodies given decision-making powers by the ECHR (this primarily means the Committee of Ministers and the ECtHR) must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law.

It then follows at para 169 that the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties) are at the heart of that legal structure. As respect for these rights is a condition of the lawfulness of EU acts, measures that are incompatible

with them are not acceptable in the EU.\textsuperscript{18}

In \textit{Kadi},\textsuperscript{19} the concept of autonomy was triggered in relation to the Court’s jurisdiction to review the legality of Council Regulation 881/2002.\textsuperscript{20} The CJEU states “the question … arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.”\textsuperscript{21} In referring to “the community [as] based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement,”\textsuperscript{22} the Court seems to have come full circle as regards the claims it had made half a century before in \textit{Van Gend} and \textit{Costa}.\textsuperscript{23}

The following discussion examines the CJEU’s findings of incompatibility between the DAA and EU law that pertain to the principle of autonomy. These concern Article 53 ECHR, the principle of mutual trust, the ECtHR advisory jurisdiction and the exclusive jurisdiction of the


\textsuperscript{19} \textit{Kadi} (n.17) paras 318–326.

\textsuperscript{20} Council Regulation 881/2002, which provides, inter alia, for the freezing of the funds and other economic resources of those individuals and entities, which also appear in a list annexed to the regulation and are regularly updated on the basis of successive UN resolutions.

\textsuperscript{21} \textit{Kadi} (n. 17) para 317.

\textsuperscript{22} Ibid para 316.

\textsuperscript{23} For further discussion on this see van Rossem, (n.12) 17.
27. Article 53 ECHR and 53 Charter have both been the subject of considerable criticism by commentators for being misleading and confusing. This confusion stems from a) the extent to which they make a promise that cannot be kept and b) whether or not they confer powers upon Member States to provide higher standards of fundamental rights protection. The first issue presents a general critique of the wording used in both Articles, but it is not directly relevant to the objection raised in Opinion 2/13; the second issue, however, is crucial.

The CJEU’s finding of incompatibility is premised on an interpretation of Article 53 ECHR whereby it “essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR.” Subsequently, it is argued in Opinion 2/13 that the Article empowers Contracting Parties to apply higher standards without due regard to the primacy of EU law.

Article 53 Charter, on the other hand, has not been ascribed such broad powers. In Melloni, the CJEU ruled that the Article could not be interpreted in a way that would compromise the primacy, unity and

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25 Opinion 2/13 (n. 2), para 189
effectiveness of EU law.\textsuperscript{26} The Opinion of Advocate General Bot on this case provides further elucidation on how the Article should be understood. Here, it was established that Article 53 Charter “expresses the idea that the adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of application of national law.”\textsuperscript{27} The Article is thus interpreted as limiting the application of the Charter by Member States to lower rights protections, rather than granting them permission to apply higher protections; the article “has neither the objective nor the effect of giving priority to the more protective rule.”\textsuperscript{28}

As the wording of Article 53 ECHR and Article 53 Charter are, in all relevant aspects, commensurate, it might be expected that a similar interpretation would be afforded to Article 53 ECHR. Indeed, this Article is widely interpreted by scholars as establishing that the ECHR provides a minimum and not a maximum standard of protection, and as in no way authorising Contracting Parties to derogate from their national or international duties so long as the minimum standard of protection is met.

\textbf{28.} The principle of mutual trust between Member States, particularly with regard to the area of freedom, security and justice, allows each

\textsuperscript{26} Melloni (n. 6), para 60.
\textsuperscript{27} Opinion of AG Bot in Melloni, ECLI:EU:C:2012:600, para 134
\textsuperscript{28} Ibid, para 99.
Member State, save in ‘exceptional circumstances’,\textsuperscript{29} to consider all the other Member States to be complying with EU law and particularly with EU fundamental rights. As laid down in \textit{Gözütok and Brügge},\textsuperscript{30} mutual trust does not require equal protection, but rather equivalent protection, even if the outcome of the same case might be different in two Member States. Although a presumption exists that all Member States act in compliance with EU law and EU fundamental rights, it can be rebutted on grounds of public policy or in certain breaches of fundamental rights. The CJEU has acknowledged the necessity of allowing exceptions to mutual trust between EU Member States when the (absolute) protection from refoulement under Article 4 of the Charter is at stake. It set a high threshold to ‘rebut trust’ by establishing the criterion of ‘systemic deficiencies’.\textsuperscript{31}

Drawing on the cases of \textit{N.S.}\textsuperscript{32} and \textit{Melloni},\textsuperscript{33} the CJEU affirms in Opinion 2/13 that the “principle requires, particularly with regard to the [AFSJ], each of those States, save in exceptional circumstances, to consider all other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.”\textsuperscript{34}

\textsuperscript{29} Opinión 2/13 (n. 2) para 191.
\textsuperscript{32} Ibíd, paras 78-80.
\textsuperscript{33} \textit{Melloni} (n. 6) paras 37 and 63.
\textsuperscript{34} Opinión 2/13 (n.2) para 191.
In a recent judgment on the European Arrest Warrant, the CJEU reaffirmed the importance of the principle of mutual trust between Member States for the creation and maintenance of an area without frontiers.\(^{35}\) Then, in the same paragraph, referring to the ECHR and ECtHR case law, the Court stated “…. the absolute prohibition of inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law. Accordingly, where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned. Where such a risk derives from the general detention conditions in the Member State concerned, the identification of that risk cannot, in itself, lead to the execution of the warrant being refused. It is necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that he/she will be detained. In order to be able to assess the existence of that risk in relation to the individual concerned, the authority responsible for the execution of the warrant must ask the issuing authority to provide, as a matter of urgency, all the information necessary on the conditions of detention. If, in the light of the information provided or any other information available to it, the authority responsible for the

execution of the warrant finds that there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until there has been obtained additional information on the basis of which that risk can be discounted. If the existence of that risk cannot be discounted within a reasonable period, that authority must decide whether the surrender procedure should be brought to an end.”

The CJEU clearly attaches great importance to the notion of mutual trust, as it is one of the common values on which the Union is founded pursuant to Art 2 TEU; although the principle may at times come second to measures necessary to ensure that actions taken on the basis of mutual trust will not lead to the violation of non-derogable fundamental rights.

The Opinion reveals some concern as to the potential of the Accession to undermine mutual recognition between Member States, especially in light of the fact that no provision was included in the DAA that would protect the principle of mutual trust by preventing Member States from being requested to check another Member State’s observance of fundamental rights.

29. A procedural innovation designed to bring closer and strengthen the interaction between the Strasbourg Court and the judicial authorities of

36 Ibid.
the Contracting Parties is the ECtHR advisory jurisdiction under Protocol 16, which is initiated upon the request of a national court. Dean Spielmann, then President of the ECtHR and now judge of the General Court, referred to this new procedure as one that opens a formal and direct channel for dialogue between national and European judges. The Strasbourg Court obtains a more constitutional role and the dialogue with the national courts becomes more formal and institutionalised. The rationale behind the introduction of this advisory procedure was to reinforce the cooperation between Strasbourg and the domestic courts, while contributing to a more effective implementation of the ECHR and, as a result, a reduced workload for the ECtHR. It was clearly anticipated that, through the principle of subsidiarity, national courts would be encouraged to become more efficient in interpreting and applying the provisions of the Convention and that this in turn would result in significantly fewer applications to the ECtHR.

As a concept, it bears great resemblance to the preliminary reference procedure under Article 267 TFEU, which allows dialogue and the development of a spirit of cooperation between the Court of Justice and the national courts. The preliminary reference procedure has also played a key role in the uniform interpretation and harmonious application of EU law in the Member States. The main difference between these two

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procedures results from the unique structural features of the EU’s supranational order.\(^{38}\) Other differences involve the fact that judicial dialogue is more voluntary and optional in Strasbourg than in the EU legal order, where there are also different legal effects: the CJEU rulings are binding for the supreme courts, whist ECtHR advisory opinions are non-binding and serve the purpose of providing guidance on issues of compatibility with the ECHR. A significant part of the academic debates compares the two procedures. However, scepticism has been raised about the functionality of the new advisory procedure and as to whether it will achieve its aims and objectives without further overburdening the Court.\(^{39}\)

Opinion 2/13 makes specific reference to Protocol 16. Notably this Protocol was introduced after the DAA was finalised and thus neither the draft Agreement nor the Explanatory Report make any reference to it. The CJEU’s main concern is the fact that the mechanism established by Protocol 16 could potentially affect the specific characteristics of EU law and the autonomy of the preliminary reference procedure under Art 267 TFEU. More specifically, a request for an advisory opinion made pursuant to Protocol 16 by a court of a Member State that has acceded to the


Protocol could trigger the procedure for the prior involvement of the Court of Justice under Art 267 TFEU, thus creating the risk that the preliminary ruling procedure might be circumvented.  

Since the DAA contains no specific provision on the relationship between the European Union’s preliminary reference procedure and the ECtHR’s proposed advisory jurisdiction, the Luxemburg Court declared that the Agreement is liable to adversely affect the autonomy of the EU legal order and undermine the effectiveness of one of its cornerstones.

30. The Court of Justice has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

The CJEU confirmed this arrangement in Opinion 1/91, in relation to the question of whether the Council could bind the then Community to an international treaty, the EEA Agreement, which adapted some aspects of the Community model on an international scale and created a tribunal to

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40 Opinion 2/13 (n. 2), paras 196-200
41 See to that effect, Opinions 1/91, (n.13) para 35, and 1/00, paras 11 and 12. See also C-459/03, Commission v Ireland (Mox Plant) [2006] ECR I-4635, paras 123 and 136, and Kadi (n. 17), para 282.
oversee this. Initially, the CJEU rejected this scheme due to the jurisdiction of the tribunal envisaged by the draft treaty. According to the Court, this tribunal based on the EEA Agreement, which was a mixed treaty, was “likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order” and therefore the exclusive jurisdiction of the CJEU.\(^{42}\) Furthermore, the CJEU explained that the concept of autonomy was also implicated because concluding the proposed EEA Agreement would have “the effect of introducing in the Community legal order a body of legal rules which is juxtaposed with a corpus of identically-worded Community rules.”\(^{43}\) As the EEA tribunal was additionally charged with guaranteeing the homogeneous application of these rules, this would, according to the CJEU, have been tantamount to handing over the keys to the interpretation of Community law, which, in turn, was contrary to the (now) Article 19 TEU.

In *Mox Plant* the question of the erosion of the Court’s exclusive power of judicial review as a result of competition by an international tribunal was also raised. In this case, the CJEU invoked the notion of autonomy in relation to the UN Convention on the Law of the Sea (UNCLOS), a global multilateral agreement on the law of the sea that had already been concluded by the Union (as a mixed agreement). The Court concluded

\(^{42}\) Opinion 1/91 (n.13), para 35.  
\(^{43}\) Ibid para 42.
that the submission of instruments of Community law to the Arbitral Tribunal established by this agreement created an unacceptable “manifest risk that the jurisdictional order laid down in the Treaties” would be affected.  

In relation to the DAA, the CJEU thereby requires the inadmissibility of all state complaints lodged before the ECtHR as far as the relevant provisions of the ECHR also fall within the scope of EU law. Such a request is in line with Art 344 TFEU, but a blanket exclusion could have a knock on effect on a number of agreements already concluded by the EU that do not contain such exception provisions and thus already contradict Art 344 TFEU. In addition, EU Member States would be obliged under Art 351(2) TFEU to amend a number of existing agreements, which, as in the case of Mox Plant, provide for a dispute settlement mechanism and provisions overlapping in substance with EU law.

B. The Co-Respondent Mechanism: Strength in Unity

31. The co-respondent mechanism was put forward as the most practical solution for the problem of determining the division of competences between the EU and the Member States, so that an application is addressed to the party actually responsible for an alleged violation of the

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44 Mox Plant (n. 41) para 154.
45 View of AG Kokott (n.4) para 117.
Convention. This mechanism basically allows the EU to join a case and defend itself when EU law is at stake before the ECtHR based on the principle of shared responsibility. It also allows a Contracting Party to intervene either following an invitation from the Court or by a decision of the ECtHR upon request of the Party. The co-respondent not only joins the proceedings, but is also bound by the judgement, and if a violation is found the respondent and co-respondent(s) would normally be jointly responsible. Such a mechanism ensures accountability, upholds fairness and takes into consideration the character of the Union as a non-state entity with an autonomous legal system.

When the EU or any State makes a request to be allowed to intervene as co-respondents in a case before the Strasbourg Court, they need to establish that they have fulfilled the relevant conditions for participating in the proceedings. Although the obvious adjudicator for determining the distribution of competences and thus the responsible party in cases of ECHR violation is the Strasbourg Court, such determination would significantly undermine the autonomy of the EU legal order and the specific characteristics of the Union and EU law. This happens because such a review entails testing the EU rules on the division of powers between the Union and the Member States, as well as the criteria for the attribution of their acts or omissions. Furthermore, such decisions would

46 Article 3(5) DAA.
have a binding effect on both the EU and Member States.

Although the DAA represents a clear attempt to use the co-respondent mechanism to prevent the Strasbourg Court from making internally binding decisions on the division of competences between the Union and the Member States, the CJEU was not satisfied with this arrangement. In relation to this point, the view of AG Kokott was also in line with the CJEU’s concerns expressed in the Opinion. More specifically, there was consensus that the decision as to whether the Union or a State becomes a co-respondent cannot be made by the Strasbourg Court based on a plausibility check on its part, as this goes far beyond the ECtHR’s jurisdiction.\(^\text{47}\)

Another point of convergence between the Opinion and the AG’s view is the Article 3(7) DAA exception from the joint responsibility of the co-respondents according to which the ECtHR could decide that only one of them was responsible. It was argued that to allow the ECtHR to make final decisions on the internal division of responsibility between the EU and its Member States goes against the aim of preserving the autonomy of EU law; such determination should be made pursuant to the provisions of the EU Treaties only.\(^\text{48}\)

Art 3(7) also raises the issue of responsibility in the event that the Member

\(^{47}\) Opinion 2/13 (n. 3) paras 175-9 and 260-265.

\(^{48}\) Opinion 2/13 ibid, paras 229-235. See also View of AG Kokott (n.4), paras 175-179
State has made a reservation, as the DAA does not account for such situations. If a Member State has made a reservation to the ECHR article that has allegedly been violated, then it cannot be a respondent and its position is not compromised. However, the Agreement does not offer any guidance as to the effect of reservations on the co-respondent and it is not surprising that both the Court and the Advocate General identified and raised this issue as another problem in relation to the co-respondent mechanism.

C. Prior involvement of the CJEU: The “first word” vs the “last word”

32. On the issue of prior involvement, the Opinion indicates that the CJEU was not convinced that the prior involvement mechanism in its current form would deal with the problem effectively for two reasons: firstly, the DAA does not exclusively reserve to the CJEU the power to rule on whether it has already dealt with an issue (i.e. it does not exclude the ECtHR from doing this); and secondly, it only permits the CJEU to rule on the validity, not the interpretation, of EU law.49

Pursuant to Article 3(6), the Strasbourg Court is not required to perform a thorough review, but rather only a superficial examination as to whether an applicant has exhausted domestic remedies. In practice, the ECtHR

49 Opinion 2/13, (n.3) paras 238 and 242-7.
accepts that as a matter of procedure the Court in Luxemburg must be given sufficient time to perform the assessment of the compatibility of the EU law provision at issue.

The prior involvement procedure cannot be effective unless the EU is ‘fully and systematically informed’\(^{50}\) of any relevant proceedings so that the competent institution can decide whether a prior involvement should be initiated or not. Similarly, if potential co-respondents are not informed in a full and timely manner about applications with EU law elements that are pending before the ECtHR, then they may not be able to operationalise the co-respondent mechanism. The Advocate General, building on the requirement under Protocol No 8 that all “individual applications are correctly addressed to Member States and/or the Union as appropriate,” demanded that the DAA should contain a requirement that full information of relevance to a potential co-respondent is systematically made available to them.

D. (De)Limiting Jurisdiction on Common Foreign and Security Policy

33. Although Article 275 TFEU is clear in its content, the area of CFSP remains problematic when autonomy of EU law is added to the equation. As mentioned earlier, legal acts and measures enacted within the

\(^{50}\) Ibid para 241.
framework of CFSP are beyond the judicial reach of the Luxembourg Court. This means that, potentially, there is nothing preventing proceedings in the area of CFSP from being brought before an international court, such as the International Court of Justice or the ECtHR. Since the CJEU does not have jurisdiction in this area of EU Law, there is no clash with the Court’s exclusive jurisdiction as dispute adjudicator. In addition, since the CFSP is considered to be intergovernmental in nature the specific characteristics of EU law do not apply.

Having said that, allowing an international court to decide on CFSP-related disputes would be a step towards achieving more inclusive and extensive human rights protection in Europe, but at the same time this would disperse the power of interpreting EU law beyond the CJEU. A careful reading of Arts 344 and 275 TFEU reveals the intention of the EU legislator to exclude the area of CFSP from any court proceedings rather than to ensure the uniform interpretation of CFSP by the Court of Justice. Additionally, many Member States remain sceptical of the EU adopting a more integrationist interpretation of CFSP measures, as this would


threaten their sovereign powers. In other words, the exclusion of the CFSP is primarily a political and strategic decision of the Union.

From the perspective of fundamental rights protection, excluding the area of CFSP from the scrutiny of the ECtHR is counter-productive and non-justifiable, as it would prevent some potential violations of the ECHR found in EU primary law from being remedied. This is why the DAA did not rule out that the Strasbourg Court would be able to rule on issues of CFSP. However, the Opinion requires that the ECtHR would have no jurisdiction over CFSP measures, as the autonomy of the EU legal order would otherwise be undermined.

V- Proposed Solutions

34. To further the EU Accession to the ECHR, the five main requirements mentioned in the Opinion 2/13 need to be met. We believe that the question of autonomy can be resolved through measures that can be taken to address each of the five areas. However, before proposing some solutions we wish to stress how important the question of the autonomy of EU law is for the CJEU.

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The Luxembourg Judges, who were interviewed during our project, felt strongly about the need to preserve the autonomy of EU law. They stated that they would only allow Accession if this could be reconciled with the EU’s legal autonomy. “Article 6(2) TEU and Protocol 8 talks about Accession and an eventual participation of the Union to the ECHR, but here we ask the specificity of the EU law to be taken into account ... we don’t deal only with civil and political rights but also with social and economic rights. ...”54

They also affirmed that the Luxembourg Court will still be the Supreme Court of the EU, with the mandate to interpret EU law and decide on the validity of secondary legislation. The ECtHR will maintain its role of external specialised Court in the area of human rights.55 As one of the judges stated, “we have to be the arbiter of Union law and they have to be the arbiter of whether that conforms with the Convention. [...this is] very important because there is always a danger that they would ended up interpreting our law rather than testing its conformity.”56

For the establishment of a harmonious relationship between the two Courts, most Judges agreed that the “last word” on human rights’ compliance was a matter to be dealt with by the ECtHR, however they

54 Interview No 12 (CJEU, Luxembourg 15 December 2010).
56 Interview No 9 (CJEU, Luxembourg 15 December 2010)
stressed the importance that the CJEU be heard first. “There is no rivalry....this Court needs to have the ‘first word’ not the ‘last word.””57

“If the Court of Strasbourg will recognise the European law as not conform to the Convention, this decision should have direct impact for the European law system. For this reason it is extremely important to find a mechanism of cooperation between the two courts that can avoid open conflicts, if not it might be quite dangerous for the coherence of the legal system in Europe.”58

After all, “Judges are responsible people and, for obvious reasons, they want to avoid conflicts or create chaos. Judicial appreciation is more appropriate in the area of human rights...The Union must accede to the ECHR and this means that the last word belongs to the ECtHR. This is the logical response, not as compromise but as a realistic outcome.”59

Other Judges were more realistic ahead of the future, stating that “it is not a disaster if the ECtHR finds a violation. If that happens, the EU legislator or this Court would change [the status quo]. It is sharp. There is cooperation through discussion when you have opposite interests and views.”60

Whatever the implications of ECtHR’s external scrutiny for the EU’s

57 Interview No 4 (CJEU, Luxembourg 14 December 2010)
58 Interview No 17 (CJEU, Luxembourg 16 December 2010).
59 Interview No 6 (CJEU, Luxembourg 14 December 2010).
60 Interview No 15 (CJEU, Luxembourg 15 December 2010).
legal autonomy may be, they are inherent and inextricably linked to the concept of the EU’s Accession to the ECHR. “If the Court of Strasbourg will recognise the European law as not conforming to the Convention, this decision should have direct impact for the European law system. For this reason it is extremely important to find a mechanism of cooperation between the two courts that can avoid open conflicts, if not it might be quite dangerous for the coherence of the legal system in Europe.”

Accession will be actualised through an agreement, a common consensus of the EU and ECHR Contracting Parties, which has required negotiations between all. Thus, the Court needs to be satisfied that the Accession Treaty will preserve EU autonomy.

In the following paragraphs we will put forward relevant legal suggestions. One main consideration at this stage is the fact that the power is in the politics. The law is effective only when political will is on its side. Changes occur when the politicians decide so. Thus, the politics strengthen the law. A lack of real commitment makes legal provisions “paper tigers, fierce in appearance but missing in tooth and claw.”

A. Incompatibility between Article 53 ECHR and Article 53 Charter

35. Three possible solutions are proposed for resolving the finding of

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61 Interview No 17 (CJEU, Luxembourg 16 December 2010).
incompatibility between Art 53 Charter and Art 53 ECHR:

1. To adopt an interpretive declaration

The first solution that is proposed is perhaps the most feasible, as it would not require either the amendment of existing Treaties or for the CJEU to backtrack; however, it would still require negotiations according to the specifications of the Accession process. This solution is for a clarification of the interpretation of the articles to be added to the Accession package, as a separate memorandum of understanding. This should affirm that Art 53 of the ECHR does not grant a licence to the Contracting Parties to apply higher standards of fundamental rights protection in such a way that would compromise the protection established in the Charter or the primacy, unity or effectiveness of EU law, and thereby satisfy the CJEU’s objection. This solution would have the additional benefit of resolving the confusion and criticism that has plagued these articles since their inception.

2. To amend the DAA in the form of an additional article

The second solution that we propose is to include an additional provision in the DAA which would clarify the relationship between Arts 53 ECHR and 53 Charter in setting the standards of fundamental rights protection.
Based on our empirical findings\textsuperscript{63} and art 52 (3) of the Charter the relationship between the Charter and the Convention is one of maximum standard and minimum standard respectively.

3. To amend Arts 53

A third solution would be to amend Art 53 of the Charter, and possibly Art 53 of the ECHR as well. Both articles could potentially be amended so that their text aligns more closely with and more clearly expresses the meaning that they have been interpreted as expressing. However, although this would be the most satisfactory solution from a legal perspective as it would serve to clarify the scope of the articles, we believe it would incur a considerable delay to the Accession process as it would require participation and approval from numerous bodies and States.\textsuperscript{64}

Both the first and the second solutions are possible; however, we recommend the second solution to fully satisfy the CJEU’s objections.

B. Resolving the Art 344 TFEU tension.

36. This tension can only be resolved by means of two alternative

\textsuperscript{63} Morano-Foadi and Andreadakis (n. 55) 24 ff.
\textsuperscript{64} To this end, inspiration could be taken from the wording Article 32 of the European Social Charter 1961, which reads as follows: ‘The provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected’.
solutions:

1. A provision in the DAA expressly excluding the competence of the ECtHR under Art 33 ECHR from disputes between EU Member States or between them and the EU in issues concerning the application of the ECHR within the scope _ratione materiae_ of EU law;

2. A binding declaration under international law, adopted by the Member States prior to the Accession, stating that they will not initiate or engage in proceedings under Art 33 ECHR when the object of the dispute falls within the material scope of EU law. This solution was also suggested by AG Kokott in her view.⁶⁵

We recommend the first solution as the CJEU might not be satisfied by the second suggestion.

C. Protocol 16 and the advisory jurisdiction of the ECtHR

37. To satisfy the CJEU’s requirement that its autonomy is preserved and the preliminary reference procedure is not undermined, it needs to be ensured that the highest courts of the Member States cannot refer questions regarding the interpretation of the ECHR provisions that

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⁶⁵ View of AG Kokott (n.4), para 120
overlap with EU law to Strasbourg instead of Luxembourg. However, it needs to be highlighted that such a possibility would exist irrespective of the Accession, as Member States which have ratified Protocol 16 could ask for an advisory opinion from the ECtHR on issues related to the interpretation of the ECHR provisions which correspond to those of the Charter. This was also confirmed by AG Kokott in her View on the DAA.66

It is notable that the advisory opinion of the ECtHR is not binding for the national courts and, pursuant to Article 267(3) TFEU, Member States’ courts of last instance remain obliged to request a preliminary ruling from the Court of Justice when they are in doubt as to the right interpretation and application of EU law.

However, since the CJEU requires a shield of protection against Protocol 16, it might not be satisfied by a (unilateral) commitment from the Member States that they will not sign and ratify Protocol 16.67 Therefore, the following solutions are possible:

1. **A provision in the DAA**, according to which, when dealing with cases dealing with the interpretation, application and validity of EU law, the courts of the Member States abstain from requesting an advisory opinion from the ECtHR and refer the question to the

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66 View of AG Kokott (n.4), para 140.
67 At the time of writing this Protocol has already been ratified by one Member State (Slovenia).
CJEU through the preliminary ruling procedure. This option is suggested to overcome any issues in relation to EU autonomy and the role of the CJEU within the EU legal order.

2. An express undertaking on the part of the EU Member States that they are not going to sign or ratify Protocol 16.

We recommend the first solution as we believe the second solution might not be acceptable from the Council of Europe’s side.

D. Involvement and allocation of responsibility for the co-respondent

38. In relation to the co-respondent mechanism, there are two main issues: the procedure for the involvement of the co-respondent and the allocation of responsibility between the EU and the Member State involved.

We propose a solution to each of these problems.

1. In relation to involvement, the proposed solution hypothesises a revision of the DAA allowing the EU or a Member State to be granted automatic status of co-respondent upon their request without any form of review from the Strasbourg Court. The actual text of Art 3(5) DAA stipulates that this will happen either by invitation from the ECtHR or following a request from the co-
respondent himself. In the case of the request, the Strasbourg Court will be required to perform a plausibility review of such a request; in other words, the Court will have to determine whether there is a question of compatibility between a provision of EU law and the ECHR rights. Such review involves the EU law rules governing the division of powers between the Union and the Member States and thus constitutes an interference with the division of power between the EU and Member State.

2. In relation to the allocation of responsibility between the respondent and the co-respondent, a revision of Article 3(7) DAA is proposed. As the article reads now, the ECtHR can decide, as an exception to the joint responsibility rule, that only one of them is held responsible. This decision concerns the internal division of responsibility between the EU and the Member States and it interferes with the autonomy of EU law.

3. In relation to reservations made by a Member State, a further clarification is needed in the same article, Art 3(7) DAA. Since Article 2 of Protocol No 8 provides that the Accession must not affect the situation of Member States in relation to the Convention, the recommended solution is to amend the DAA in such way that

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68 See Opinion 2/13 (n. 2), paras 229-235. See also View of AG Kokott (n. 4), paras 175-179.
69 See Opinion 2/13 paras 226-228. See also View of AG Kokott, paras 265.
clearly mentions that a Member State cannot be held responsible either as a respondent or as a co-respondent in so far as it has made a reservation.

E. Prior involvement of the CJEU

39. Meeting the requirement imposed by the CJEU in their Opinion 2/13 in relation to the issue of prior involvement would once again require amendments to the DAA:

1. A first amendment would include a specific and clear rule that the ECtHR “must suspend proceedings if the EU as a co-respondent informs it that the CJEU would be involved”.

2. An addition/clarification in the DAA to eliminate the risk that the ECtHR decides on the admissibility of a prior involvement would also be required, clarifying that in cases where the CJEU has not yet interpreted the EU law at issue, a prior involvement needs to take place.

3. As inspired by the view of AG Kokott, a provision in the DAA could be added requiring the ECtHR to fully and systematically inform the EU in relation to any case pending before Strasbourg, in which the EU could potentially be a co-respondent. In this way, an informed decision can be made as to whether a prior involvement is
The above three options are not mutually exclusive and can be combined during the process of revising the DAA, with a view to ensuring that the Court of Justice will be given the opportunity to have the “first word” and fulfil its role as Court of the Union.

F. The preservation of autonomy in respect of the CFSP and the principle of mutual trust in the AFSJ

40. There are several legal solutions to these issues:

1. The EU could make a reservation to the ECHR excluding the CFSP and the AFSJ from the ECtHR’s jurisdiction, when signing or expressing its consent to be bound by the provisions of the Treaty of Accession Agreement in accordance with Article 10, without the need to amend it. However, AG Kokott in her View on the CJEU Opinion 2/13 concluded that a reservation excluding the area of CFSP from the ECtHR’s jurisdiction would not be possible, although she did not engage in a discussion on the principle of mutual trust in relation to the area of freedom, security and justice.

The Draft Accession Agreement and its Explanatory Report do not

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70 View of AG Kokott (n.4) paras 222, 225 and 235.
71 View of AG Kokott (n.4) para 83.
prevent reservations by the EU to the ECHR in relation to EU primary law, such as the relevant Treaty Articles in relation to the CFSP, as well as in relation to EU secondary law in the AFSJ, such as the Framework Decision of the European Arrest Warrant.

More specifically, Article 2(1) of the Draft Accession Agreement, entitled ‘Reservations to the Convention and its protocols’, states: “The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 10, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.”

In this respect, para 34 of the Explanatory Report to the Draft Accession Agreement explained that the term “law of the European Union” is meant to cover the Treaty on European Union, the Treaty on the Functioning of the European Union, or any other provision having the same legal value pursuant to those instruments (the EU primary law) as well as legal provisions contained in acts of the EU institutions (the EU secondary law).

Reservations to the ECHR by the EU in respect of the CFSP and AFSJ would be legally possible, if they were drafted in line with the requirements set out by the ECtHR in its case law on reservations to the
ECHR. The ECtHR in the case of *Grande Stevens and Others v. Italy*\(^72\) stated that “in order to be valid, a reservation must satisfy the following conditions:

1. it must be made at the time the Convention is signed or ratified;
2. it must relate to specific laws in force at the time of ratification;
3. it must not be a reservation of a general character;
4. it must contain a brief statement of the law concerned.”\(^73\)

The Court had the opportunity to specify that Article 57(1) of the ECHR, allowing for reservations to the ECHR, required “precision and clarity” from the Contracting States, and that in requiring that a reservation was to contain a brief statement of the law concerned, this provision was not a “purely formal requirement” but set out “a condition of substance, which constituted an evidential factor and contributed to legal certainty”. The Court affirmed that by “reservation of a general character” in Article 57 ECHR was meant, in particular, a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope.\(^74\)

In this case, possible reservations would have to be made in respect of a


\(^{73}\) Ibid para 207.

number of ECHR rights referring to a considerable amount of EU legislation. Provided that this does not automatically make them fall into the trap of being too general to be acceptable, it has to be reminded that they cannot be updated, which would be an issue in a constantly-changing area such as the AFSJ.

Consequently, provided the EU’s reservations to the ECHR are drafted in line with the above-mentioned criteria, in our opinion they would be legally acceptable.

2. To amend the Draft Accession Agreement to include a provision which excludes this area from the ECtHR’s jurisdiction, and to add a provision clarifying the scope of the principle of mutual trust.

The provision in question might take the following form: “When implementing European Union law, the Member States may, under European Union law, be required to presume that fundamental rights have been observed by the other Member States. The Member States remain obliged to refuse cooperation with another Member State if there are substantial grounds for believing that such cooperation results in a serious breach of human rights and fundamental freedoms as recognised in the Convention or the protocols.”75

The downside of this is that the renegotiated Draft Accession Agreement would have to be agreed not only by the 28 EU Member States, but also by all 47 Member States of the Council of Europe. Therefore, this solution would be politically difficult, given the notable unwillingness of some negotiating partners, such as Switzerland or Russia, to cooperate in this direction.

In relation to the ASFJ, the provision to be added to the DAA should state that EU Member States cannot be held liable under the Convention for failing to carry out a review of another Member State’s compliance with ECHR rights. In this way, the ECtHR would not need to engage in an interpretation of EU law, but just to confirm that the case before it involves two Member States. Such ‘review’ would not be considered a violation of the autonomy of EU law. This addition to the DAA, apart from the fact that it would also cover non-EU related cases, would prove to be a workable solution.

3. To amend EU primary law (EU Treaties) in order to extend the CJEU’s jurisdiction over CFSP and clarify the scope of the principle of mutual trust in relation to the AFSJ.

This solution does not seem to be politically acceptable at the present time. Although it is legally possible, it appears impracticable in view of the present challenges. Such an amendment would need to tackle a
number of different issues and be ratified by all Member States.

We recommend the second solution, which seems the most feasible solution.

VI – Conclusion

41. The publication of the Opinion 2/13 shook the ground under the feet of everybody who was under the impression that the CJEU would find the DAA compatible with EU law, especially after the positive, in principle, view of AG Kokott. The Luxembourg Court provided a list of concerns and action points that need to be taken into account before the Accession could be completed.

42. The initial reactions by both academics\(^76\) and judiciary\(^77\) reflected the shock and distress and an atmosphere of disappointment and pessimism was created across the European continent. Today, 16 months later, things look more stable as disappointment has been replaced by reflection and distress has become pragmatism. Accession remains an extremely significant step towards strengthening human rights protection and


achieving uniformity across the European continent. Opinion 2/13 has been a setback, but instead of treating it as a ‘bombshell’\textsuperscript{78} or an ‘unmitigated disaster’,\textsuperscript{79} it is better to consider the Opinion as a reality check. Skouris and Costa in 2011 talked about gradual convergence between the standard of protection afforded by the two regimes, so that normative clarity and consistency is achieved.\textsuperscript{80}

43. The Opinion did not specify that such convergence is not possible or that such a vision for European human rights protection is too idealised; it just underlined the complexities of this venture and the need for further calibration. To paraphrase AG Kokott, the devil can be in the detail\textsuperscript{81} and it is up to both sides to use this period of time to reflect on what went wrong, what can be improved and what is the most appropriate way forward. Article 6(2) TFEU still provides for Accession, while nobody can overlook the benefits of a more pluralistic and inter-institutional framework of fundamental rights protection.

44. Our analysis provides an overview of the current status quo after the CJEU Opinion and offers some recommendations and potential solutions on the basis of the requirements set out by the Court of Justice. Further


\textsuperscript{79} Peers (n.67).

\textsuperscript{80} Joint Communication (n.8) 3.

\textsuperscript{81} View of AG Kokott (n.4) para 4.
negotiations need to take place and all parties involved will have to adopt a different - more pragmatic - approach, with view to tick all the boxes, fill in all the gaps and come up with a workable Accession Agreement. Once this happens, it will be a matter of commitment and political will, because, as mentioned earlier, politics is always the driving force for changes and changes in the law happen only when supported by political will.

45. Our analysis indicates that the Accession is still possible, but it will require a considerable amount of time and effort before it becomes reality. Amendments to the DAA are inevitable if Accession is to progress and be achieved, and this brings challenges related to reopening the DAA to negotiation.

Ms. Chair, Ladies and Gentlemen, thank you for your attention and we remain at your disposal for further questions.