

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

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**What next after Opinion 2/13
of the Court of Justice
on the accession of the EU
to the ECHR?**

STUDY FOR THE AFCO COMMITTEE



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STUDY

Abstract

Opinion 2/13 of the Court of Justice on the accession of the EU to the European Court of Human Rights highlights the requirements of the autonomy of EU law which may be called into question by accession. However not acceding does not truly guarantee this autonomy because Member States may be brought before the Court when they implement EU law. Under these conditions, both Article 6 TEU and the risks linked to the present situation call for a resumption of the negotiation process. Changes may be made to the draft agreement to meet the Court's requirements, the current jurisdictional status of the CFSP being the most problematic factor.

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LIST OF ABBREVIATIONS

ECHR: European Convention on Human Rights

EEC: European Economic Community

ECtHR: The European Court of Human Rights

Court of Justice: Court of Justice of the European Union

CFSP: Personnel Security Clearance

TEU: Treaty on European Union

TFUE: Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Article 6 of the Treaty of Lisbon, which provides for the accession of the European Union, is the result of a long process that began in the 1970s. Accession had two objectives, one political and the other technical. In political terms, accession was intended to bring an end to any double standard in the protection of fundamental rights at a European level. It would show that the EU itself, which required candidate countries to accede to the ECHR, also submitted to the same discipline. In technical terms, it was intended to bring an end to the risk of divergence in case law between the European Court of Human Rights and the Court of Justice of the European Union, which could lead to Member States being ruled against in the ECtHR while respecting fundamental rights as defined by the CJEU.

Protocol No 8 TEU required specific Union characteristics to be preserved in the framework of accession. Therefore the draft accession agreement negotiators came up with mechanisms allowing the autonomy of the EU to be guaranteed and the competence of the Court of Justice to guarantee this. The co-respondent mechanism was designed to prevent the ECtHR from becoming involved in the internal competence division between the Union and Member States. The prior involvement of the Court of Justice was intended to prevent the ECtHR from ruling on a violation of the Convention by the EU before this alleged violation had been examined by the Court of Justice.

In its Opinion 2/13, the Court of Justice held that these mechanisms were insufficient to protect the autonomy of EU law. Over and above any shortcomings in the draft agreement, the Court raised a certain number of other questions that it held had not been sufficiently taken into account during the negotiations and which led it to conclude that the draft agreement was incompatible with the Treaties in its current form. Essentially, the Court raised objections on the functioning of the co-respondent and prior involvement mechanisms. However it also held that the draft agreement did not sufficiently guarantee EU procedures (Article 344 TFEU and preliminary rulings) against the remit of the ECHR and Protocol No 16 to the ECHR. It is also concerned that, by allowing Member States to apply higher standards, Article 53 ECHR and Article 53 of the Charter could call the primacy of EU law into question. It also fears that, on the basis of current ECtHR case law, the EU principle of mutual trust cannot be guaranteed. Finally, and this is an important point, it holds that, in as much as its competence is limited with respect to the CFSP, allowing the ECtHR to hear cases in respect to it would amount to submitting effective control of this policy to a non-EU body.

These findings could lead to the accession process being dropped. Nevertheless, apart from the fact that Article 6 TEU requires the EU to accede, an in-depth examination shows that, as things stand, non-accession does not really guarantee the autonomy of the EU. If an application is made against a Member State at the ECtHR, it may pass judgments that would lead it to interfere in the internal EU legal system. States on which judgment had been passed by the ECtHR for having applied EU law would be forced to choose between violating the Convention or violating EU law, in order to comply with such a judgment. Even though, in fact, the EU, which the ECtHR has no competence over, would not be legally bound by the judgment, there would be a significant impact on the EU's internal functioning, as shown by the *Matthews* case.

Under these circumstances, the accession process must be pursued. An in-depth examination shows that making limited changes to the draft agreement makes it possible to satisfy several of the requirements of the Court of Justice. There are two issues that are however more sensitive. Compliance with the principle of mutual trust would require a dialogue on the convergence in the case law of both Courts. The gap between them seems gradually to be getting narrower and it ought to be possible here to move forward on the basis of a new

provision in the agreement. In terms of the CFSP, the solution would seem to be more problematic. No doubt it will be necessary to wait for the Court to detail exactly what the limits of its competence are in this domain. In addition, a very limited revision of the Treaties will probably be required.

The negotiating mandate should be revised in order to define a position beginning with the issues that are simplest to resolve. At the same time informal contacts could be made within the Council of Europe and between the two Courts and/or their Presidents, as was the case in the past before negotiations began.

Accession to the European Convention on Human Rights following Opinion 2/13 of the Court of Justice of the European Union

1. HISTORY

The question of accession to the European Convention on Human Rights (ECHR) is almost as old as the European Community itself and there has always been discussion on this subject. When the draft for the European Political Community was drawn up in 1953, the Ad Hoc Assembly inserted a provision including the rights guaranteed under the ECHR in an Article 3 of the Statute of this Community¹. Those drawing up the Treaty establishing the European Economic Community (EEC) did not perhaps adopt this provision because they considered that the protection of fundamental rights was not a relevant component of an economic treaty.

This did not prevent the issue from being raised as soon as the EEC developed legislative activity. Initially, when the question of respect for fundamental rights guaranteed under national constitutions was brought before it, the Court of Justice refused to take them into consideration in the framework of the ECSC, citing the fact that it could only apply the law originating in the Treaty². The question of accession to the ECHR first became an issue due to the German Constitutional Court's reaction to the lack of protection of fundamental rights in the EEC. During discussions between the German government and the Commission to try to sort out the situation resulting from the Solange I judgment, the Commission President envisaged accession in order to counter the risks of censure of Community legislation by national constitutional courts. Such a solution would also have countered the development of two competing systems of protection in Europe and would clearly hold high European values for the benefit of prospective candidates. When consulted informally, the Court thought its case law to be sufficiently protective following the *Internationale Handelsgesellschaft*³ judgment and that accession could be an obstacle to the development of this case law. The sole outcome from these efforts was the Commission's publication on 2 May 1979 of a memorandum on accession that was not seriously examined because of opposition from certain Member States, in particular France and the United Kingdom.

The only later initiative of note is contained in the draft Treaty on European Union adopted by the European Parliament on the initiative of Altiero Spinelli, Article 4 of which on fundamental rights provided for a negotiation on accession⁴. This proposal was not followed up on.

¹ 'Article 3 The provisions of Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, together with those of the protocol signed in Paris on 20 March 1952, are an integral part of the present Statute'.

² Judgment of 4 February 1959, *Friedrich Stork & Co vs. the High Authority of the European Coal and Steel Community*, 1/58.

³ Judgment of 17 December 1970, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 11-70.

⁴ Article 4 - Fundamental rights 1. The Union shall protect the dignity of the individual and grant every person coming within its jurisdiction the fundamental rights and freedoms derived in particular from the common principles of the Constitutions of the Member States and from the European Convention for the Protection of Human Rights and Fundamental freedoms. 2. The Union undertakes to maintain and develop, within the limits of its competences, the economic, social and cultural rights derived from the Constitutions of the Member States and from the European Social Charter. 3. Within a period of five years, the Union shall take a decision on its accession to the international instruments referred to above and to the United Nations Covenants on Civil and Political Rights and on Economic,

The debate was truly opened in 1993 at the request of Belgium, which was going to take up presidency on the basis of a Commission working document⁵. In the light of these discussions, the Council decided to bring a request before the Court of Justice that was less to do with accession itself than with the Community's competence to accede. In its Opinion of 28 March 1996⁶, the Court held that due to the institutional impact of accession, it could not take place on the basis of the Treaty establishing the European Community (Rome Treaty). This meant a revision would therefore be required. This opinion had the effect of putting a stop to discussions on the question as the prospect of a revision of the Treaties on this point seemed distant.

Faced with this situation, the choice was made to draw up of a Charter of Fundamental Rights, Article 52(3), which makes a point of stating that while the rights guaranteed under the Charter have the same meaning and weight as those guaranteed under the Convention, the interpretation given in the framework of the Convention holds. Moreover, Article 53 takes exception to the fact that protection in the EU may not be as strong as that guaranteed by the Convention. Nevertheless, the existence of the Charter did not slow down the movement in favour of accession and the question was raised unsuccessfully at each conference on the revision of the Treaties, in particular at the request of Belgium.

Entrusting the preparation of a treaty establishing a constitution for Europe to a convention within which both European and national parliamentarians played an important role was the trigger for accession by helping to bypass the reticence of national parliamentarians. Indeed, the European Parliament had long since been arguing for this and the representatives of the national parliaments had no objection to it. This made it difficult for the representatives of Member States to oppose it, especially as the forthcoming President of the Court, Judge Skouris, had expressed his support during the preparations. The result was that Article I-9(2) required the EU to accede to the Convention. A protocol added by the intergovernmental conference stated in particular that accession should comply with the specific characteristics of EU law. The Lisbon Treaty adopted these provisions in Article 6(2) TEU and Protocol No 8 respectively.

It was possible for negotiations to take place on this basis, particularly as in 2004, Protocol No 14 to the ECHR had opened up the possibility of the European Union becoming party to the Convention. In a 2010 document, the Court of Justice had given certain directions and a joint declaration of the Presidents of the ECtHR and the Court of Justice supplemented these⁷.

The negotiations opened on the basis of a Council mandate of 4 June 2010. They came to an end in April 2013 by agreement between the negotiators. They were suspended at the request of the EU because of objections to the first version of the text by Member States due to difficulties relating to the handling of the Common Foreign and Security Policy. Once these issues were resolved, the accession agreement was submitted by the Commission, which had undertaken to do so, to the Court of Justice for its opinion pursuant to Article 218(11) TFEU.

Social and Cultural Rights. Within the same period, the Union shall adopt its own declaration on fundamental rights in accordance with the procedure for revision laid down in Article 84 of this Treaty. 4. In the event of serious and persistent violation of democratic principles or fundamental rights by a Member State, penalties may be imposed in accordance with the provisions of Article 44 of this Treaty.

⁵ Commission Communication on the accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as to some of its protocols, SEC(90) 2087 final, 19 November 1990 – C3-022/93.

⁶ Opinion (2/94) of 28 March 1996

⁷ European Union Court of Justice discussion document on certain aspects of the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010; Joint Communication from Presidents Costa and Skouris, 24 January 2011

Under Article 218, where an opinion is adverse, an agreement may not enter into force unless it is amended or the Treaties are revised.

2. THE MAIN POINTS OF THE AGREEMENT SUBMITTED TO THE COURT OF JUSTICE

The negotiators had to comply with the framework defined under Protocol No 8. This required that the agreement comply with the specific characteristics of the Union and 'not affect the competences or the powers of its institutions' as well as the situation of Member States in relation to the ECHR. In particular appeals to the ECtHR were required to be correctly brought against Member States and/or the EU⁸.

At the heart of the issue was finding a way of preventing the ECtHR from ruling on the division of powers between the Union and the Member States. The solution to be brought also had to ensure that appeals against Member States and/or the Union be correctly directed. In effect the ECtHR could be faced with an application brought by an individual requiring a ruling to be made on this point in the event that an individual should challenge a Member State whereby the State in question were to claim that the matter fell under the competence of the Union, which should therefore be held responsible. It was also possible that the situation could arise the other way round. In these cases, during its consideration of admissibility, the ECtHR would find itself bound to rule on the question of the division of powers. However, this is an internal EU constitutional question. This situation is specific to the EU. The issue of the division of powers is also relevant to federal states but, in such a hypothesis, federal states are solely responsible before the ECtHR for breaches of the Convention committed by federal states. The external responsibility of federal states is indivisible and the ECtHR is not required to rule on the domestic division of powers within federal states. A specific solution therefore had to be found for the EU to preserve its constitutional order.

2.1. The co-respondent mechanism for the protection of the division of powers

This is why the draft agreement established a system of shared responsibility enabling the EU or Member States to stand as respondent alongside the entity challenged in the event of uncertainty regarding the division of powers. The EU could stand as co-respondent alongside the state or the state and/or Member States challenged when it was alleged that the application 'calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.' In addition, one or several Member States could stand as co-respondent with the EU if it appeared 'that such allegation calls into question the compatibility with the Convention rights at issue of a provision of 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, notably where that violation could have been avoided only by disregarding an obligation under those instruments.' This meant that the ECtHR did not have to examine the division of powers as it would deal jointly and severally with the Union and its Member States. Judgments could then be brought jointly and severally against the parties, with it then being the responsibility of the Union and the Member States to rule within the Union on the issue of the division of responsibilities. The status of co-respondent would not be granted automatically but would be decided on by the ECtHR. In order to prevent any examination of the division of powers between the Union and its Member States, the Court's decision would be founded on a *prima facie* examination of

⁸ See the draft agreement and the explanatory report in the FIFTH 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, Council of Europe document, 47+1(2013)008rev2 of 10 June 2013

the application, namely without an in-depth examination of its merits.

2.2. The prior involvement of the Court of Justice, the protective instrument for the uniform interpretation of EU law

Another important specificity of EU law is constituted by the requirement to comply with and protect the uniformity of EU law, which is guaranteed by the monopoly over interpretation of EU law attributed to the Court of Justice of the European Union. The same problem applies, but to a lesser degree, to states that are not members of the EU but are party to the Convention. Indeed, it is not for the ECtHR to substitute itself for their jurisdictions and interpret national law. In this respect, the ECtHR has declared on several occasions that it is limited to taking national law into consideration as interpreted by the domestic authorities⁹. In a recent judgment, it stated clearly that 'The task of interpreting and applying the provisions of the Brussels I Regulation is incumbent, primarily, on the CJEU, which has jurisdiction to make preliminary rulings and, secondly, national judges in their capacity as EU judges, namely when they apply the regulation as interpreted by the CJUE. The competence of the European Court of Human Rights is limited to monitoring compliance with the requirements of the Convention – through its Article 6(1). Therefore, in the absence of any arbitrary situation itself posing a problem in respect of Article 6(1), it is not up to the Court to pass a judgment on the question of whether the Senate of the Supreme Court of Latvia has correctly applied Article 34(2) of the Brussels I Regulation or any other provision of European Union law'¹⁰.

In respect of the EU, the situation is a particular one. If the application aims at compliance of an EU law with the Convention, which should have been the subject of a direct action for annulment, the rule regarding the exhaustion of domestic remedies consecrated in Article 35 of the Convention shall counter the admissibility thereof. The ECtHR will decide in regard to the interpretation of EU law resulting from the Court of Justice judgment. However the infringement of fundamental rights by Union measures is most often brought before national courts, given that pursuant to Article 263 TFEU, direct appeals by natural and legal persons to the Court of Justice are only possible where these entities are directly and individually concerned. If the national judge has brought a preliminary ruling before the Court of Justice pursuant to Article 267 TFEU (Article 234 of the Treaty establishing the European Community), the Court of Justice will have the opportunity of ruling and the ECtHR will be provided with the Court of Justice interpretation. Where, however, the national judge does not apply the preliminary ruling procedure, in contrast to Treaty requirements, the ECtHR is

⁹ See the origin of this well-established case law in the Judgment of 21 January 1999, *Garcia Ruiz v. Spain*, p28. It is possible however for the Court to pass over the heads of national judges in exceptional cases: 'Where, moreover, the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others*, cited above, paragraph 101) and by finding, contrary to their view, that there was arguably a right recognised by domestic law (see *Fogarty*, cited above, paragraph 120)' Judgment of 25 July 2008, *K.T. v. Norway*. Solution confirmed in the Judgment of 16 June 2015, *Delfi AS v. Estonia*: 'It [the Grand Chamber] considered that it was not its task to take the place of the domestic courts and that it was primarily for the domestic authorities, notably the courts, to resolve problems of interpretation of domestic legislation (see, among others, *Centro Europa 7 S.r.l. and Di Stefano*, cited above, paragraph 140, and *Rekviényi v. Hungary* [GC], No [25390/94](#), paragraph 35, ECHR 1999-III). The Court reiterates that it is primarily for the domestic authorities, notably the courts, to resolve problems of interpretation of domestic legislation, the Court's role being confined to determining whether the effects of that interpretation are compatible with the Convention (*Gorzelik and others v. Poland* [GC], No [44158/98](#), paragraph 67, ECHR 2004-I). Thus it will continue to assess whether the application, made by the national court, of the general provisions of the law on obligations to the applicant's situation was foreseeable under Article 10(2) of the Convention'.

¹⁰ ECtHR, Judgment (Grand Chamber), *Avotins v. Latvia*, 21 May 2016

only provided with the interpretation given by the national judge and shall examine the compatibility of EU law with the Convention on this basis. The Union could be ruled against solely on the basis of interpretation of EU law by a national judge, which would constitute an infringement of the monopoly of the Court of Justice in the interpretation of EU law. To prevent such a situation, the draft agreement contained a provision allowing the Court of Justice of the European Union to make a rapid preliminary ruling in cases where the Union is co-respondent¹¹.

In as much as accession applies to Union activities as a whole, activities led in the framework of the CFSP were subject to the control of the European Court of Human Rights although the Court of Justice of the European Union only has competence in this domain under exceptional circumstances with respect to restrictive measures adopted by the Council against natural and legal persons (Article 275, TFEU). Some states have raised concerns on this situation. In order to prevent the Court of Human Rights from hearing cases regarding CFSP activities for which a prior examination of compliance with the Convention cannot be made as part of the EU or at national level, actions attributable to persons acting during operations carried out on the basis of a decision by the Union shall be attributed to the state that employs them, the EU being free to act as co-respondent¹².

¹¹ Article 3(6): 'In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court'.

¹² Explanatory report: '23. Under EU law, the acts of one or more Member States or of persons acting on their behalf implementing EU law, including decisions taken by the EU institutions under the TEU and the Treaty on the Functioning of the European Union (hereinafter referred to as the 'TFEU'), are attributed to the Member State or Member States concerned. In particular, where persons employed or appointed by a Member State act in the framework of an operation pursuant to a decision of the EU institutions, their acts, measures and omissions are attributed to the Member State concerned. Attribution to a Member State does not preclude the EU from being responsible as a co-respondent. Conversely, under EU law, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf, are attributed to the EU. The foregoing applies to acts, measures or omissions, regardless of the context in which they occur, including with regard to matters relating to the EU's Common Foreign and Security Policy. For the sake of consistency, parallel rules should apply for the purposes of the Convention system as laid down in Article 1, paragraph 4, of the Accession Agreement. 24. More specifically, as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation was there a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members.

2.3. Institutional aspects

The accession negotiations also touched on institutional aspects. Generally speaking, the EU's status was modelled as far as possible on the other contracting parties. There is an EU judge in the Court and the EU participates in the deliberations of the Council of Europe Committee of Ministers on the execution of judgments. A European Parliament delegation participates in the election of all the judges alongside the members of the Parliamentary Assembly of the Council of Europe. The only difficulty in this respect consisted in the concerns of states that are not members of the EU with regard to possible domination by the EU and its members if they vote as a block on the Committee. Appropriate voting solutions were therefore introduced in order to protect the position of states that are not members of the EU using a majority qualified voting system to prevent domination by the Union.

3. OPINION 2/13 OF THE COURT OF JUSTICE.¹³

As is appropriate, the Court carried out a systematic examination of the draft agreement in the light of EU autonomy, not simply limiting itself to the content of the agreement, but by placing it within the framework of a constitutional approach to the European Union. While Advocate General Kokott adopts an open approach, at the same time as highlighting the fact that the agreement is not sufficient as it stands to allow its compatibility with the Treaties to be affirmed, the Court of Justice is much more reserved. On reading of the Advocate General's position, it could be thought that accession were possible subject to a few easily enactable changes.

The Court does not join the Advocate General in this rather favourable view. It finds its arguments on a strict analysis of its jurisdiction and refuses to place its confidence in the possibility of a cooperative attitude between the Member States, national courts and the ECtHR. As far as the Court is concerned, after accession, the Union will be bound by the judgments of the ECtHR and, under these conditions, it is not possible to speculate on the possible attitudes of all those who will be involved in the control process in the future. The protection of the EU's specific characteristics must therefore be expressly guaranteed in the agreement document, which leads it to highlight many omissions in the agreement document submitted to it. It does not allow for the possibility that the ECtHR may adopt a cooperative attitude on the basis of the agreement and take the positions expressed in the opinion into account. The agreement leaves open the possibility of the creation of internal EU mechanisms designed to regulate the implementation of the agreement. Here we can mention, in particular, the co-respondent mechanism and the prior involvement of the Court. Other issues could be dealt with in the same way, in particular with respect to Article 344 TFEU or Protocol No 16 to the ECHR. Directions given by the Court on internal rules could have helped respond to certain objections. After all, it is standard practice in Member State constitutional courts to accept the constitutionality of a measure subject to compliance with certain constraints. However, the Court clearly refuses to follow this route consisting in approving compatibility with the Treaties subject to directions that it could have given. The Court, which has been less bold in the past, justifies this attitude by the fact that it is respecting the powers of the institutions that will be called on to establish these rules and cannot impose constraints on them¹⁴.

3.1. Specific characteristics of the EU

Standard overall analysis of the specific characteristics by the Court. While it is not very original to recall that the Court is not a state, this fact takes on its full importance with regard to accession to a convention that has been designed for Member States, certain components of which need to be adapted to allow the participation of the EU. The specific characteristics mentioned by the Court are principally due to its previous case law, which has contributed to shaping the Union as it exists today.

For the Court, the Union is founded upon a division of powers between Member States sharing

¹³ Opinion of 18 December 2014

¹⁴ Opinion, paragraph 150: 'Moreover, the review which the Court of Justice is called upon to carry out in the context of the Opinion procedure, and which can take place regardless of the future content of the internal rules that will have to be adopted, is closely circumscribed by the Treaties; therefore, if it is not to encroach on the competences of the other institutions responsible for drawing up the internal rules necessary in order to make the accession agreement operational, the Court must confine itself to examining the compatibility of that agreement with the Treaties and satisfy itself not only that it does not infringe any provision of primary law but also that it contains every provision that primary law may require'.

common values. These common values imply the existence of mutual trust between the states, which is the basis for their solidarity but also implies a recognition of the fact that the states all respect the same fundamental rights. The existence of the Union is also founded in the autonomy and primacy of EU law, which alone is competent to ensure the realisation of EU objectives. This means that fundamental rights must be interpreted within the framework of the structure of the EU in accordance with its objectives. Compliance with these principles is ensured by means of a legal system in which preliminary rulings safeguard unity of interpretation and consistency in the Union. This vision does not entail the refusal of all external control regarding compliance with fundamental rights, but it does demand that this control not interfere with the internal functioning of the EU. It is not for the ECtHR to decide on the internal division of competences or to interpret EU law. This task falls solely to the Court of Justice, with the ECtHR confining itself to monitoring EU compliance with the Convention¹⁵.

3.2 The incompatibilities

On these bases, the Court identified seven items which make the draft agreement incompatible with the Treaties: the compatibility between Article 53 of the Charter and Article 53 of the Convention; respect of the principle of mutual trust; the relationship between accession and Protocol No 16 to the Convention; compliance with Article 344 TFEU; co-responsibility; prior involvement; particularities of the Common Foreign and Security Policy.

3.1.1. Article 53 of the Charter and Article 53 of the Convention

First of all, there's a risk that the primacy of EU law be called into question in as far as the agreement opens the way for Member States, by virtue of Article 53 of the Convention, to apply rules that are more protective than those provided for under the Convention. A Member State could use this power to refuse to apply EU law on the basis that its constitutional system is more protective. Article 53 of the European Convention on Human Rights states that none of its provisions limits rights recognised under other instruments. It also recognises the power of States Parties to create and maintain higher protection standards than those provided for in the Convention. This is a standard provision that results from the subsidiary nature of the protection provided under the Convention. There is a similar provision in Article 53 of the Charter of Fundamental Rights, but, in respect of national constitutional guarantees, we know that the Court of Justice ruled, in the *Melloni*¹⁶ judgment, that as long as an EU action complies with the Charter, higher national protection would not be applied if it were an obstacle to the primacy of EU law.

The Court fears that Article 53 of the Convention might call the *Melloni* judgment into question

¹⁵ Opinion paragraph 182 et seq.: 'The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, the Court's assessments of the material field of application of Union law when determining if a Member State should be held to observe the fundamental rights of the Union, should not be questionable by the ECtHR'.

¹⁶ Judgment of 26 February 2013, C-399/11

and therefore imperil the primacy of EU law. It is hard to see how such an eventuality could come about. First of all, Article 53 ECHR does not require the Court to intervene to guarantee the application of national provisions that are more protective but rather prevents the Convention from limiting the effect of such provisions. Even if this wider interpretation were to be retained, it would be necessary, in practice, for an individual to make an application against the Union because the level of protection of fundamental rights offered by it would be inferior to that guaranteed by a national provision which would offer higher protection than the Convention. Even though Article 53 ECHR has sometimes been invoked, the ECtHR body of case law does not offer any example of such a situation because the European Court's role is to monitor compliance of the rights guaranteed by the Convention and not that of a higher level of protection offered by States Parties.

Above all, Article 53 recognises that states have a power that they can only exercise if they have the necessary competence. However, pursuant to Article 53 of the Charter as interpreted in the *Melloni*¹⁷ judgment, there are cases where EU law prevents states from granting higher protection in order to ensure the primacy of EU law. This means that already, prior to accession, Member States have lost the right to invoke any higher protection that would work against said primacy. Accession would not be able to restore a right that Member States no longer have. Under these conditions it is hard to see how higher protection than EU law forbids Member States to grant could be invoked by the ECtHR.

3.1.2. The principle of mutual trust

As the Union is founded on common values, the shared nature of these values creates mutual trust between the Member States and the Court of Justice has worked to highlight the principle of trust, in particular in the *N.S.*¹⁸ judgment. It is possible, from a constitutional point of view, to see in this principle the translation of a horizontal federalism founded on a solidarity built on these shared values. Mutual trust is likely to play the same role that mutual recognition played in the internal market¹⁹.

However, although the protection of fundamental rights is presumed to be equivalent in all Member States, it is not identical, which inevitably strains the relationship between shared

¹⁸ Judgment of 21 December 2011, C-411/10 and 493/10: 'As regards the rest of the questions the Court noted that the CEAS is conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol and on the ECHR, and that the Member States can have confidence in each other in that regard,' paragraph 78

¹⁹ Some authors (see in particular Edouard Dubout, *Une question de confiance: nature juridique de l'Union européenne et adhésion à la Convention européenne des droit de l'homme*, *Revue des droits et libertés fondamentaux*, 2015, chron. N°19, online and Daniel Halberstam, ('It's the Autonomy, Stupid! ') A Modest Defence of Opinion 2/13 on EU Accession to the European Convention on Human Rights, The Social Science Research Network Electronic Paper Collection, University of Michigan, Michigan Law, (<http://SSRN.COM/ABSTRACT=2567591>)) have not hesitated to underline the importance that should be given to this affirmation by the Court of a new European Union constitutional principle that goes beyond its natural field of application, the area of freedom, security and justice, to extend to EU law as a whole¹⁹. Little matter the doubts of a political nature expressed on the reality of the existence of such trust, its affirmation as a constitutional principle helps place it at the heart of the body and enables the furthering of links between Member States. After all, it would not be the first time that the Court of Justice, faced with silence from the Treaties, articulates such principles. The affirmation of the requirement for a community of law, the importance of the democratic principle and fundamental rights arose from the same process, not to mention institutional balance, loyal cooperation between institutions and so on. It is the role of the Court, and of case law, to bring forth the fundamental principles hidden behind technical provisions in the text of treaties drawn up by pragmatic negotiators. After all, the first time that the idea of mutual trust appeared was in the protocol of the Treaty of Amsterdam relative to the inadmissibility of asylum for EU citizens in another Member State. The justification given for accepting this inadmissibility, requested by Spain, was the equivalent level of protection of fundamental rights guaranteed by all Member States.

trust and the protection of human rights, as can be seen in the Melloni judgment. The N.S.²⁰ judgment attempted to resolve this tension by allowing that, while the European asylum system was based on the existence of a presumption of respect for fundamental rights by Member States, this presumption was not irreversible and should be lifted in the event of systemic failure. No doubt part of the reason for the Court's reaction in Opinion 2/13 was the European Court Grand Chamber's *Tarakhel v. Switzerland* judgment in which the criteria used was not that of the existence of systemic failure but rather the individual treatment to which the applicant was exposed²¹. However, this analysis takes exception to the presumption that is at the heart of mutual trust and using it would make the functioning of the area of freedom, security and justice impossible²². While it appears that the Court of Justice has softened its initial position expressed in the N.S. judgment, by substituting the concept of exceptional circumstances with that of systemic failure as the justification for lifting the presumption, its clash with the European Court remains just as real.

Once again, this opposition reflects the difference in functioning of the two Courts. The role of Court of Justice is not to decide on individual cases but rather to interpret EU law with regard to the EU's objectives, allowing Member States to apply this law to individuals in compliance with EU law. The European Court's role is to verify that an applicant's treatment in a specific case is compatible with the Convention. These two roles could be complementary, in particular when EU law allows Member States a measure of discretion. However this complementarity cannot function if the individual examination imposed on the Member State by the Convention leads it to call the fundamental principles of the EU into question, such as, in the present case, mutual trust. Clearly, while the EU does not accede to the Convention, responsibility for breaching the Convention lies solely with the Member State and EU law is not directly questioned. Following accession, in the case of asylum, it is the Dublin II Regulation that will be the direct target. However, whether accession takes place or not, there is only a slight difference in practice. If Member States systematically applied the *Tarakhel* judgment, the Dublin II Regulation would rapidly become a dead letter. Whether accession takes place or not, the conflict is difficult to resolve, without convergence of the case law of the two Courts. This is the issue that arose at the Supreme Court of the United Kingdom and that led it to take a critical stance of the case law of the Court by preferring the *Tarakehl* solution to the *N.S.* solution: 'The removal of a person from a Member State of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR'²³. Equally, in its

²⁰ Altmark judgment, paragraph 75 et seq.

²¹ Judgment of 4 November 2014: 'It follows that, were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention'

²² Opinion paragraphs 192 and 193: 'Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. The approach adopted in the agreement envisaged, which is to treat the EU as a state and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law'.

²³ R (on the application of EM (Eritrea)) (Appellant) v Secretary of State for the Home Department (Respondent), (2014) UKSC 19 February 2014: 'Before examining what CJEU said on this issue, it can be observed that an exclusionary rule based only on systemic failures would be arbitrary both in conception and in practice. There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental

decision of 15 December 2015, the German Constitutional Court follows the road opened by the ECtHR by holding that the European Arrest Warrant cannot be used unless the right to judicial protection is specifically guaranteed²⁴

In any event it will be difficult to find a solution because here the Court does not emphasise the systemic failure of the draft agreement, but instead highlights the incompatibility resulting from a difference in case law.

3.1.3. The difficulties related to Protocol No 16 to the ECHR

Protocol No 16 puts a system into place for requesting Opinions of the ECtHR. Drawing lessons from the cooperation between judges allowed by preliminary rulings in the framework of the EU, the Member States used the same concept, adapting it to the particularities of the Convention's system. Requests for opinions can only be submitted as part of a pending case and grounds for making them must be stated. They may only be made by the highest national courts and be requested for 'questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto'. Opinions shall not be binding. The request must therefore be made on systemic questions or on cases in which the Court has not yet had the opportunity to make a ruling. A panel of five judges shall decide whether to accept the request for an opinion. This is therefore an exceptional procedure. For its part, the EU did not take part in the drawing up of the protocol and has not shown any intention to become party to it. It cannot therefore request an opinion. This is not the case for the Member States and, even though the protocol does not yet have the ten ratifications required to enter into force, three Member States of the Union have ratified it and will be able to make use of it after its entry into force.

The Court's objections do not concern the system itself, but rather its relationship with the EU legal system. The Court foresees therein the risk that a Member State might have recourse to it on a question that would enter into the field of application of EU law or would relate to its interpretation. This would be a way for national supreme courts to circumvent the preliminary ruling obligation. In this event, the ECtHR would give an opinion relating to the compatibility of EU law with the Convention on the basis of a possible interpretation provided by national judges while the Court of Justice would not itself have had the opportunity to make a ruling on it.

Opinions are indeed advisory and addressees are not bound to act on them but would then risk being subject to an individual application that would be likely to see the ECtHR confirm the assessment given in the opinion. If the supreme court of a Member State used this procedure while circumventing the preliminary ruling procedure and if the resultant finding

rights is more grievous or more deserving of protection. And, as a matter of practical experience, gross violations of Article 3 rights can occur without there being any systemic failure whatsoever.'

²⁴ 'The court that decides on an extradition is under the obligation to investigate and establish the facts of the case, an obligation that also falls within the scope of Art. 1 sec. 1 GG. The relevant facts in particular include what kind of treatment the requested person will have to expect in the requesting state. It does not follow from this obligation that the German courts always have to review in detail the reasons for a request for extradition. This holds true in particular in the context of extradition proceedings within Europe, where the principle of mutual trust applies. However, this trust is shaken if there are factual indications that the requirements that are absolutely essential for the protection of human dignity will not be met if the requested person is extradited. The court that decides whether it is permissible to extradite the requested person is in this respect under an obligation to investigate the legal situation and the legal practice of the requesting state if the person concerned has submitted sufficient indications to warrant such investigations. The extent and the intensity of investigations, which the German court must conduct in this regard in order to ensure the respect of the principle of individual guilt, have to be determined in accordance with the nature and the significance of the indications submitted by the convicted person that the procedure falls below the minimum standards'.

was that an EU act did not comply with the Convention, either the EU legislator would alter this act on application by the state concerned, or if the state did not do so, an individual application would be lodged at the ECtHR, thus implicating the EU through the Court's co-responsibility proceedings if the EU were to become party to the Convention. The only way of avoiding this situation would have been to exclude in the accession agreement the application of Protocol No 16 for issues that involve a relationship with EU law.

The real issue is that of the behaviour of national supreme court judges. Might they be tempted to circumvent preliminary rulings using the advisory opinion and for what gain? In as much as the Charter of Fundamental Rights of the European Union is binding on them and where the refusal to apply it exposes states to infringement proceedings, what need would they have to check the compliance of EU law with the Convention before attempting to do so in relation to the Charter? The only plausible hypothesis would be if they held wrongly that the case did not enter into the field of application of EU law and, as a result, was not subject to verification under the Charter but, in this event, nor would it raise the issue of a preliminary ruling by the Court of Justice either.

The issue of conflict between preliminary ruling procedures arose in the *Melki* case in the context of the relationship between preliminary rulings and the priority question of constitutionality for the Court of Justice: 'A national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unconstitutional is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law²⁵. The rule is the same, nothing must prevent the national judge from referring a question for a preliminary ruling and not doing so could constitute an action liable to infringement proceedings. The difference in the situation is however that the *Melki* case concerned an internal situation regulated by EU law, while with Protocol No 16, a Court that was external to the EU could be called on to interpret EU law with regard to the Convention on the basis of a circumvention of the EU's own legal proceedings.

3.1.4. Compliance with Article 344 TFEU

Article 344 TFEU prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. On the other hand, Article 33 of the Convention provides for the possibility of inter-state cases. Article 33 could allow two Member States to circumvent the obligations of Article 344 TFEU by bringing a dispute concerning the interpretation or application of the Treaties before the ECtHR. This issue was identified during the negotiations. It was settled in relation to Article 55 of the Convention which prohibits submitting a dispute relating to the Convention to a means of settlement other than those provided for in the Convention. Article 5 of the draft agreement states that proceedings before the Court of Justice shall not constitute another means of settlement within the meaning of Article 55. The impact of this rule is limited. While it authorises recourse to Article 344 TFEU, it does not

²⁵ Judgment of 22 June 2010, C-188/10 and C-189/10, joined cases, *Melki and Addeli* paragraph 45

prevent its circumvention through bringing a dispute before the ECtHR on the basis of Article 33. In this event, the ECtHR could not decline jurisdiction. The explanatory report acknowledges that the issue is not resolved under the agreement: 'An issue not governed by the Accession Agreement is whether EU law permits inter-Party applications to the Court involving issues of EU law between EU Member States, or between the EU and one of its Member States'. This situation is different to the one provided for in the Convention on the Law of the Sea because Article 282 of the Convention provides for the primacy of the system of internal settlement of disputes within the Community over that of the Convention.

The risk of circumvention did not overly concern Advocate General Kokott, who, although aware of the issue in her view, considered that the rule contained in the agreement conserving the use of Article 344 without prohibiting that of Article 33 of the Convention sufficed to take account of the obligations that EU law imposed on the Member States²⁶. She considered that the existence of infringement proceedings, which, in addition, had already been used in the past against Ireland, guaranteed that Member States would not seek to use the ECtHR to circumvent Brussels²⁷. The issue could be settled by means of internal EU rules because circumvention constituted a failure to fulfil obligations. However the rule has a deterrent function, which in no event could prevent the ECtHR from ruling if a case were presented before it.

The probability that such a situation should be presented is of course very low, because, as at the Court of Justice, inter-state petitions are extremely rare at the ECtHR. Nevertheless, for the Court of Justice, this is a question of principle. The fact that states have this right with regard to the Convention is sufficient to assess the incompatibility of the agreement.

3.1.5. The insufficiencies of the co-respondent system

The co-respondent mechanism as such does not attract the Court's disapproval. It pursues an objective that the Court can only approve of: preventing any involvement by the ECHR in the division of powers between the Union and its Member States. It is rather its means of implementation that it disapproves of. The mechanism can be activated at the request of the ECtHR but such a request is not binding. In this event, it is up to the EU and its Member States to carry out an analysis of competences themselves in order to see if they wish to admit the ECtHR's request. However, when the co-respondent request comes from the EU or its Member States, it is submitted to the approval of the ECtHR. This Court will, it is true, only proceed to a *prima facie* examination of the situation to check if a relationship with EU

²⁶ As she states in her view: 'Further, if the aim in the present case is to lay down an express rule on the inadmissibility of inter-state cases before the ECtHR and on the precedence of Article 344 TFEU as a prerequisite for the compatibility of the proposed accession agreement with EU primary law, this would implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them. In my view, the possibility of conducting infringement proceedings (Articles 258 TFEU to 260 TFEU) against Member States that bring their disputes concerning EU law before international courts other than the Court of Justice of the EU, with the added possibility that interim measures may be prescribed within those proceedings if necessary (Article 279 TFEU), is sufficient to safeguard the practical effectiveness of Article 344 TFEU' (paragraphs 117 and 118).

²⁷ The issue of competition between Article 344 TFEU and another system of dispute settlement was at the heart of the *Commission/Ireland* (Judgment of 30 May 2006, C-459/03) case of failure to fulfil obligations. The Court concluded that circumventing Article 344 TFEU by using another system of settlement would be contrary to the principle of loyal cooperation between the Community and Member States. For its part, the arbitral tribunal established pursuant to Annex VII to the Convention on the Law of the Sea suspended its decision while waiting for the issue of the relationship with Community law to be clarified. It is true that in this matter, in the absence of such a provision, the Court presumes that Article 33 will allow the ECtHR to rule on the dispute notwithstanding Article 344.

law does indeed exist. As the explanatory report explains, the European Court of Human Rights only examines the plausibility of the relationship, avoiding any in-depth examination. The idea was that there would be an almost automatic acceptance, with the European Court's intervention no doubt only being justified by the fact that it had, in principle, to remain in charge of its own proceedings. However this solution allows the possibility, even if exceptional, of involvement of the ECtHR in determining the division of powers.

This is also the case at the final decision stage. If the Court finds in favour of a violation, the co-respondent status implies that there be a joint finding against the co-respondents. However the accession agreement provides that, depending on the arguments presented by the parties, the Court may rule that only one of the co-respondents is liable. In doing so, the ECtHR would also be intervening in respect of the division of powers. It is true that in the event that the EU and the Member State or states concerned agree that only one of the co-respondents is liable, it would not be necessary to proceed to a joint sanction. However, in this event, the ECtHR would be accepting an agreement on the division of powers in a judgment binding on the EU. In doing so, the ECtHR would be substituting itself for the Court of Justice in making a decision on this constitutional question. For the Court of Justice, only a decision taken after a joint sanction by the ECtHR in respect of the EU meets its requirements and conserves its function in allowing it to decide on the validity of this judgment with respect to the EU's own rules relating to the division of powers.

Finally, one of the disadvantages of the system is that a Member State's reservations in respect of the Convention cannot be taken into account in the case of joint responsibility of the EU and a Member State, which goes against Protocol No 8 to the Treaties that provides that accession must not have any impact on the position of Member States in respect of the Convention and in particular to reservations in its respect.²⁸

In summary, the agreement leaves open the possibility for the ECtHR to intrude on the division of powers and, in this respect, it cannot be denied that the Court of Justice has acted in a reasonable manner by finding incompatibility on this point.

3.1.6. Difficulties relating to prior involvement

The procedure for the prior involvement of the Court of Justice as put into place by the draft agreement provides that, when an issue before the ECtHR has not previously been examined by the Court of Justice, the CJEU may be called to decide on its 'compatibility' with EU law. The idea is to prevent judgments being made on the basis of an assessment of EU law carried out solely by national judges. This solution enables both the subsidiarity of the ECtHR's involvement and the monopoly of jurisdiction of the Court of Justice to be respected. The ECtHR shall only intervene as an ultimate authority when the validity or the interpretation of EU law have been established by the Court of Justice.

The Court's first objection is material. It may only know if prior involvement can be exercised if it has been informed of the case under examination. However, the draft agreement does

²⁸ The logic of this position is contested by G. Polakiewicz in his evidence to the Constitutional Affairs Committee during the hearing of 20 April 2016 in the following terms: 'It would seem that there are only two options:

- The EU law modifies the national law to which reference is made in the reservation; in this case, the reservation would be obsolete because the law to which reference was made in the reservation is no longer the "*law in force in its territory*" (article 57 (1) ECHR).

- The EU law does not modify the national legislation to which reference is made in the reservation; in this case, the reservation made by the EU Member State would not be the "*subject of the dispute*" and should not be considered in the co-respondent mechanism. It seems therefore unnecessary to foresee any additional provision in the DAA safeguarding Member States' reservation.'

not provide for any obligation on the part of the ECtHR to inform the EU of cases underway, such that, if the validity of the interpretation of EU law is in question, the Court will not know if it should invoke the prior involvement requirement or renounce it in the event that it has already ruled on the question. In truth, in as much as prior involvement only comes into play in cases where the co-respondent mechanism has been implemented, it may be considered that the EU be fully informed of cases in which it is a party. The lack of information is not an obstacle to prior involvement but could be to co-responsibility.

The second objection is based on the interpretation of the provisions of the draft agreement²⁹. According to the draft agreement, recourse to prior involvement is related to verification of the compatibility of EU law with the Convention. According to the explanatory report³⁰, this verification of compatibility should only take place to verify the validity of a secondary legislation measure in relation to the Treaties or to interpret the Treaties, which would exclude the interpretation of secondary legislation of EU law. Therefore the Court of Justice deduces that only cases concerning secondary legislation which pose an issue of legality and not interpretation may be brought before it, which would mean that in these cases, the ECtHR would be interpreting EU law or at least relying on the interpretation made by the national judge at the court of last instance. The Court's reasoning proceeds from an a contrario interpretation of the explanatory report. In any event, any examination of validity is based on an interpretation of the acts in question. If possible, the judge will initially try to confirm validity on the basis of the interpretation, with annulment only taking place as a last resort³¹. While it is true that the explanatory report is not well worded, this would not prevent the judge from proceeding according to his/her intended role and carrying out an interpretation as part of an assessment of validity. When a referral is made to the ECtHR on an EU act, it will not be a question of its interpretation but rather its compatibility with the Convention, which should trigger the prior involvement procedure if the EU is a co-respondent and the question has not previously been submitted to the Court for a preliminary ruling. Whether it then resolves the issue at its level by an interpretation or a finding of invalidity is its sole concern.

²⁹ Article 3(4) of the draft agreement: 'In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court'.

³⁰ Paragraph 66 of the report; 'Assessing the compatibility with the Convention shall mean to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments'.

³¹ This was the Court's interpretation in its previous case law as Advocate General Wathelet recalls in his conclusions in the Rosneft case (C-72/15, EU :C :2016 :381): 'However, in a similar legal context, in which Article 41 of the ECSC Treaty enabled the Court to 'give preliminary rulings on the *validity* of acts of the High Authority and the Council' ..., the Court held that 'appraisal of the validity of a measure necessarily presupposes its interpretation'. (Bussen, C-221/88, EU: EC: 1990: 84). On this basis it judged that '[it] would [...] be contrary to the objectives and the coherence of the Treaties if the determination of the meaning and scope of rules deriving from the EEC and EAEC Treaties were ultimately a matter for the Court of Justice, as is provided in identical terms by Article 177 of the EEC Treaty [now Article 267 TFEU] and Article 150 of the EAEC Treaty [now abrogated], thereby enabling those rules to be applied in a uniform manner, but such jurisdiction in respect of rules deriving from the ECSC Treaty were to be retained exclusively by the various national courts, whose interpretations might differ, and the Court of Justice were to have no power to ensure that such rules were given a uniform interpretation'. For those reasons, I take the view that, if the European Union Courts can perform the broader task, that is to say, review the legality of decisions providing for measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty, then they can certainly perform the narrower task, which is to interpret the terms of such decisions, in particular so that they can avoid annulling or declaring invalid an act relating to the CFSP which they could otherwise have preserved by giving it a different interpretation'.

3.1.7. Issues relating to the Common Foreign and Security Policy (CFSP)

When the Treaty of Lisbon was signed, Member States were aware that the EU's accession to the Convention would also cover the CFSP even though, with the exception of individual restrictive measures, the Court of Justice did not have jurisdiction in this area. Perhaps they had not all envisaged the consequences of their choice because they thought that most acts adopted in the framework of the CFSP were not legally binding. However the Convention does not only apply to legal acts but also to material actions carried out, in particular, in respect of the CFSP, as part of foreign operations. This realisation led several states to oppose the first draft accession agreement and led to the negotiations being reopened. The compromise found satisfied the Member States as it allowed the EU a measure of discretion. As recalled above, pursuant to Article 1(4) of the draft agreement, a state's acts are attributed to the state when it implements EU law and it is up to the EU to bring the co-respondent mechanism to bear where applicable. The explanatory report states that this rule applies in particular to the CFSP, which was an elegant way of resolving the issue because almost all action taken is in practice carried out by persons acting primarily under the responsibility of national command. In other words, an individual would have to make an application against the state whose representatives had violated the Convention, the EU being responsible for naming itself as co-respondent where it considered that the domestic authorities had acted on its behalf and under its control. In this way the ECtHR would not interfere in the division of powers between the EU and its Member States. However the application would have to be made against the Union itself if it were a question of an act adopted by EU institutions.

This wording was not accepted by the Court of Justice. While the Court allows that these acts do not fall under its jurisdiction, it highlights the fact that 'such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR'³². The Court refers to its Opinion 1/09 relative to the European and Community Patents Court³³. For the Court of Justice, even if CFSP acts are subject to a specific regime, they are part of the EU legal order and, for constitutional reasons, it cannot accept that part of EU law be subject to external scrutiny even if this is only with respect to fundamental rights. This does not mean that there is no judicial supervision in this area but that decentralised supervision is replaced by centralised supervision. Pursuant to Article 19(1), second paragraph TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' It will therefore be the responsibility of Member States to guarantee this supervision and ensure compliance with the ECHR. Of course, national judges will not be able to cancel CFSP acts but, at best, to impede their implementation by the Member State within whose jurisdiction they fall, if they consider them to be invalid.

On a practical level, the main issue is no doubt less the possibility of the EU making binding decisions that go against fundamental rights than the violation of human rights on the ground as part of operations put into place by the EU. The Court of Justice's attitude is consistent with that adopted under prior involvement. The ECtHR can only have the final word with respect to fundamental rights if the Court of Justice has had the opportunity of ruling beforehand. As, with regard to the CFSP, the Treaties deprive the Court of Justice from having

³² Opinion, para. 255.

³³ Opinion of 8 March 2011. However the situation was not identical to the one that arises in the case of accession. The Patents Court, created by agreement between Member States, replaced the national courts and it alone could refer to the Court of Justice for a preliminary ruling, thus depriving national courts of this right. Here the ECtHR is only involved secondarily, as the litigation falls under the jurisdiction of Member States. The draft agreement does not deprive them of the possibility of making a reference for a preliminary ruling. The existence of any right of referral depends on the Treaties, which it falls to the Court of Justice to interpret.

this opportunity, the ECtHR should not be able to have the final word.

4. IS THE EU'S AUTONOMY BETTER PROTECTED BY NOT ACCEDING?

Following Opinion 2/13 of the Court of Justice, resumption of the accession process clearly seems to be faced with some complicated issues. There is a great temptation to make do with the status quo, especially as, as the Court's case law on the Charter of Fundamental Rights shows, the protection of fundamental rights is not under threat in the EU and, on the contrary, refusal to accede under the conditions provided for in the draft agreement could lead the Court of Justice to increase vigilance. However this consideration does not mean that any prospect of accession should be abandoned. The legal difficulties due to the existence of several systems of protection of human rights in Europe and the risks of discordant case law subsist along with the practical difficulties that may result from this. Moreover, in political terms, it is difficult to explain why the EU requires candidate countries to accede to a Convention that it is not party to itself. In any event, Article 6(2) of the Treaty on European Union requires the Union to accede to the European Convention on Human Rights whilst respecting the specific characteristics of the EU described in Protocol No 8. This obligation, called for by the authors of the Treaties, must be respected. Following on from this, generally speaking, long experience has shown that having independent external supervision, accepted by all Member States, helps improve the protection of fundamental rights. Moreover, it is difficult to accept that measures taken by Member States under their own jurisdiction be submitted to external scrutiny but that this disappears once this jurisdiction is transferred to the EU. The EU's development should not go hand in hand with a weakening of the protection afforded to individuals.

Furthermore, in particular, the draft accession agreement protected certain specific characteristics of the EU. Even though the Court of Justice considered that this protection was not sufficient, it offered more of a guarantee for the autonomy of European Union law than the situation due to non-accession. It is paradoxical that the opinion pursuant to which the draft agreement is incompatible with the Treaties leaves the EU in a worse situation than the one in which it would have found itself if the agreement had entered into force.

4.1. The EU before the ECtHR through its Member States

While it is true that as long as the EU is not party to the Convention, it cannot be the subject of individual applications, and the judgments handed down by the European Court of Human Rights will not be binding on it. This does not mean nevertheless that EU law is entirely free from sanction by the ECtHR. Under what is well-established practice, individuals may bring issues of non-compliance of national implementation of EU law with the Convention before the European Court of Human Rights. EU acts and behaviours that are not implemented by states could enjoy immunity because the EU is not party to the Convention³⁴, but for the rest, which represents the great majority, the *Bosphorus* judgment will continue to apply. This implies that an application brought against a Member State due to the implementation of a binding decision of EU law may be declared inadmissible where the protection of fundamental rights in the EU is not manifestly insufficient³⁵.

The *Bosphorus* judgment does not give the European Union a free hand. The condition of a serious breach of protection which leads the European Court to disregard the presumption of

³⁴ This immunity could moreover be disregarded as in the *Matthews* case of the ECtHR (judgment of 18 February 1999) which allows states to be judged liable for certain EU acts where they are not subject to judicial scrutiny within the EU

³⁵ *Bosphorus v. Ireland*, Judgment of 30 June 2005

equivalence is assessed on a case by case basis and nothing prevents the ECtHR from showing itself to be more demanding on this point than it has been in the past. In a speech made at the start of the new legal year 2015, the President of the Court reaffirmed that, in spite of Opinion 2/13, the Court would continue to exercise its supervision: 'What I feel is important is that, whether the violation is made by a state or a supranational institution, there should be no legal vacuum in the protection of human rights in the area of application of the Convention. Our Court will therefore continue to assess compliance of states' acts with the Convention, whatever their origin, and states are and shall remain responsible for their obligations under the Convention'.

Moreover, the *Bosphorus* judgment is of limited scope. In effect, this judgment shall only apply where a state acts 'strictly' within the obligations deriving from EU law, namely where there is no measure of discretion. This limitation is clearly mentioned in the *Michaud* judgment in which the ECtHR disregarded the application of *Bosphorus* because the EU law implemented was a directive which left a measure of discretion to states and above all because the Council of State did not refer the matter to the Court of Justice for a preliminary ruling, which deprived the applicant of the equivalent effective legal protection that EU law should afford. As the Court later confirmed, application of the *Bosphorus* judgement is subject to two conditions: the absence of any margin for discretion and the existence of full legal protection within the EU³⁶. Moreover, even in this case, the presumption of equivalent protection may be disregarded in the event of a serious breach in protection.

In spite of the protection offered by *Bosphorus*, the ECtHR was required to examine EU law with respect to the requirements of the Convention and it cannot really be stated that the specific characteristics of the EU are protected on the basis of the current case law of the European Court of Human Rights.

4.2. The ECtHR and the division of powers between the EU and its Member States

In order to apply the criteria identified in *Bosphorus*, the European Court of Human Rights is inevitably called on to decide on the division of powers between the Union and its Member States and on the field of application of EU law. In effect, it must determine if the action attributed to the Member State results from an obligation deriving from EU law because, if this is not the case, the exception relating to equivalent protection will not apply. Satisfaction has often been expressed regarding the lack of contradiction in the *M.S.S*³⁷, and *N.S.*³⁸, judgments with respect to the application of the Dublin Regulation, but this ignores the fact that the bases on which the two courts carry out their analyses are radically opposed. The ECtHR analyses the Dublin Regulation as giving Member States discretionary powers on whether or not to examine a request for asylum themselves while the Court of Justice places this article in the framework of mutual trust and requires them to use this article in the event of systemic risks in another Member State. The European Court of Human Rights carried out an assessment of the wording of the regulation that does not take account of the system in which the article is inserted and disregards the application of *Bosphorus*. Equally, in *Michaud*³⁹, on the basis that the Council of State did not refer for a preliminary ruling, the

³⁶ In the Grand Chamber judgment, *Avotins v. Latvia*, cited above: 'The Court reiterates that the application of the presumption of equivalent protection in the legal system of the European Union is subject to two conditions, which it set forth in the *Michaud* judgment, cited above. These are the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by European Union law'.

³⁷ *MSS v. Belgium and Greece*, judgment of 21 January 2011

³⁸ Judgment of 21 December 2011, *N.S.*, case C-411/10.

³⁹ Judgment of 6 December 2012, *Michaud v. France*: 'The Court is therefore obliged to note that because of the decision of the Conseil d'Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even

Court assesses the compatibility of a transposition measure of a directive with the Convention on a point for which the state did not really have a measure of discretion.

In all these situations, the European Court of Human Rights freely assesses the scope of application of EU law in order to determine whether or not it will assess the compatibility of national implementing measures. The advantage that the application of co-responsibility may have given in order to preserve EU autonomy can be measured in terms of the EU's capacity to determine itself what falls under its jurisdiction and what falls under that of its Member States.

4.3. Lack of prior involvement leads the ECtHR to make a decision without the Court of Justice making any interpretation of EU law

The Michaud judgment clearly shows how the absence of prior involvement by the Court of Justice in a case not only prevents the European Court from ruling but, even more importantly, risks leading it to rule on the substance of the case on the basis of a possibly erroneous interpretation of EU law by a national judge.

The ECtHR does not deny the importance of the preliminary ruling procedure. On the contrary, its case law highlights the importance of the preliminary ruling procedure and considers the fact of not warranting the refusal of making a preliminary ruling and not making a referral when EU law requires it to be a violation of the Convention⁴⁰. However, outside of cases in which the application is based on lack of referral, this will not prevent the European Court of Human Rights from basing its ruling, when it rules on the substance of the case, on the interpretation of EU law as it results from the national court's judgment. As we know, it is not for the Court, which is not a court of third instance, to interpret national law itself or indeed national interpretation of EU law, but to take such law or interpretations thereof as its stands as a fact. Exceptional circumstances would be required for the Court to disregard the interpretation given by a national judge. In a recent judgment the European Court of Human Rights interpreted the Directive on audiovisual services and the Brussels I Regulation although the domestic courts had not made a referral for a preliminary ruling. While it does refer to Court of Justice case law, it gives its own interpretation⁴¹.

Therefore while the system of prior involvement protected the Court's monopoly of interpretation, in the absence of accession and except where there is an obvious error, the interpretation given by the national judge shall be taken into consideration. While the Court

though that court had never examined the Convention rights in issue, the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply.', paragraph 115

⁴⁰ *Ullens de Schooten and Rezabeck v. Belgium* (judgment of 20 September 2011), see also *Dhahbi v. Italy* (Judgment of 8 April 2014): 'National courts whose decisions were not amenable to appeal under domestic law were required to provide reasons based on the exceptions laid down in the case-law of the CJEU for their refusal to refer a preliminary question to that court on the interpretation of EU law. They should therefore set out their reasons for considering that the question was not relevant, or that the provision of EU law in question had already been interpreted by the CJEU, or that the correct application of EU law was so obvious as to leave no room for reasonable doubt'.

⁴¹ *Arlewin v. Sweden*, judgment of 1 March 2016: 'The Court is thus not convinced by the Government's argument that the AV Directive determines, even for the purposes of EU law, the country of jurisdiction when an individual brings a defamation claim and wishes to sue a journalist or a broadcasting company for damages. Rather, jurisdiction under EU law is regulated by the Brussels I Regulation. According to Articles 2 and 5 of that Regulation, both the United Kingdom and Sweden appear to have jurisdiction over the present matter... Thus, while leaving open the question – in effect raised by the Government – whether a binding provision of EU law would have affected their responsibility under Article 1 of the Convention, the Court finds that the Government have not shown that Swedish jurisdiction was barred in the case due to the existence of such a provision.'

of Justice could wash its hands of the matter because the judgment handed down by the ECtHR shall not be enforceable against the EU, which is not party to the procedure, but it shall be against Member States and their courts, which is likely to create difficulties of the sort that were seen in the execution of the *Matthews*⁴² judgment.

4.4. The risks of circumvention of the Court of Justice's jurisdiction due to non-accession

In Opinion 2/13, the Court of Justice considered that, in not excluding inter-state applications relating to EU law and in not prohibiting Member States from using the advisory opinion procedure provided for in Protocol No 16 ECHR to obtain opinions on issues relating to EU law from the competence of the ECtHR, the draft agreement did not protect its jurisdiction.

Such a circumvention goes against Article 344 TFEU with regard to inter-state cases and the preliminary ruling obligation with regard to Protocol No 16. The Court of Justice's concern is that in the absence of a prohibition in the accession agreement, the ECtHR may accept to rule in such a case. While the solutions adopted by the ECtHR would not be binding on the EU as long as it is not party to the Convention in as far as inter-state cases are concerned, because the opinions given in Protocol No 16 are not binding, judgments handed down in inter-state cases would be binding on Member States. The situation is practically identical whether accession were to take place on the basis of the draft agreement or not at all. Non-accession does not therefore change the situation and the solution is in the hands of the Commission, which has the power to refer infringement proceedings against the Member States involved to the Court.

More particularly the conflict between the preliminary ruling obligation and the application of Protocol No 16 presents certain similarities with cases in which, at national level, a case can be simultaneously processed by a constitutional court and, because it is within the scope of application of EU law, be subject to referral for preliminary ruling. The Court of Justice has succeeded in reconciling the two possibilities by stating that appeal to a constitutional court shall in no event deprive national judges of their right to make a referral to the Court of Justice at any time and if necessary to adapt interim measures⁴³. More particularly, the Court of Justice was called on to decide on the specific situation of Austria where the Charter of Fundamental Rights has constitutional validity. In this case, there is competition between referral to the constitutional court and referral the Court of Justice regarding the same instrument and the Court ruled, under the same conditions, that the proceedings of both courts were compatible⁴⁴.

⁴² Judgment of 18 February 1999, *Matthews v. United Kingdom*. Condemned by the ECtHR as a result of the Act concerning the elections of the members of the European Parliament by direct universal suffrage, the United Kingdom tried in vain to get this act changed in order to allow the residents of Gibraltar to take part in the European elections. Faced with the failure of these attempts, it preferred to run the risk of breaching Community law rather than that of the ECHR. A very indulgent interpretation of EU law was required to absolve the United Kingdom of its sin (CJEU (Grand Chamber), 12 September 2006, *Spain v. United Kingdom*, C-145/04).

⁴³ Melki and Abdeli, Judgment of 26 June 2010, C-188/10 and C_189/10

⁴⁴ A v. B, Judgment of 13 September 2014, C-112/13: 'EU law and, in particular, Article 267 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which ordinary courts hearing an appeal or adjudicating at final instance are under a duty, if they consider a national statute to be contrary to Article 47 of the Charter, to apply, in the course of the proceedings, to the constitutional court for that statute to be generally struck down, and may not simply refrain from applying that statute in the case before them, to the extent that the priority nature of that procedure prevents — both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question — all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, EU law and, in particular, Article 267 TFEU must be interpreted as not precluding such national legislation to the extent that those ordinary courts remain free: – to make a referral to the Court at whatever stage of the

4.5. The question of more protective national norms

Article 53 ECHR recognises the capacity of Member States to apply more protective norms than those contained in the Convention. The Court of Justice fears that such a provision might go against its case law tending to preserve the primacy of EU law. A Member State could conceivably use the power recognised under Article 53 to refuse to apply EU law on the basis that its own constitutional system is more protective. This would therefore call into question the *Melloni* case according to which a state may not invoke a stronger domestic guarantee than one offered by the Charter to justify not applying EU law. Once again, the situation is the same whether accession takes place on the basis of the draft agreement or not. To the extent that states cannot, pursuant to EU law, claim a higher protection if this calls primacy into question, accession would only recreate a power that they no longer have, pursuant to EU law, if they have the power to offer such a protection. In spite of everything, if there is a risk, non-accession leaves this risk intact.

4.6. Non-accession and the protection of mutual trust between Member States

Non-accession leaves the issue intact in as much as the difficulty lies less with structural questions than divergences between the case law of the Court of Justice and the ECtHR. According to the Court of Justice, the principle of mutual trust is an EU constitutional principle, which in particular applies in the framework of the area of freedom, security and justice. Founded on the postulate according to which the protection of fundamental rights is satisfactory in all Member States, it implies that Member States satisfy the requests of other Member States without additional verification except in the event of systemic failure or, according to Opinion 2/13, exceptional circumstances. The return of asylum seekers to the country of first entry under the Dublin Regulation, for example, must be carried out without additional verification except in the case of systemic failure of reception in this country. According to the European Court of Human Rights, under certain circumstances, a case by case examination should be carried out, which, according to the Court of Justice, would make the system inoperable. Non-accession allows the issue to remain open and puts states in a difficult situation. A solution can only be found through cooperation between the Courts translating to changes in case law.

4.7. The delicate issue of the CSFP

Here again non-accession leaves the issue open. If the EU had acceded, according to the draft agreement, most applications would have been directed against Member States when they implemented CSFP provisions and it would have been up to the EU to decide if it wanted to effect the sharing of responsibility. With the Union acceding to the Convention in respect of all its policies, the European Court would have to hear applications relating to its Common Foreign and Security Policy (CFSP). However, the competence of the Court of Justice is limited by the Treaties to restrictive measures taken with respect to natural and legal persons in this domain. In the other cases, the only possible recourse for an individual is to apply to the domestic court and then potentially submit the case to the ECtHR. On a practical level, the main issue is no doubt less one of the possibility of the EU making binding decisions that go against fundamental rights but rather the violation of human rights on the ground as part of

proceedings they consider appropriate, and even at the end of the interlocutory procedure for the review of constitutionality, in respect of any question which they consider necessary, - to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order, and - to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

operations put into place by the EU. However, in this case, violations would be materially committed by employees made available by Member States. It is therefore likely that the ECtHR would claim jurisdiction. In effect, although applicable to United Nations Security Council resolutions, the *Al-Dlimi and Montana Management Inc.*⁴⁵ judgment is transposable to the case of implementation of the CFSP by Member States. Moreover, as decisions are taken unanimously and legal scrutiny cannot take place within the EU, the responsibility of states could be established on the basis of the ECtHR *Matthews judgment*⁴⁶.

4.8. Conclusions

In conclusion, the current situation is not of much benefit to the EU and moreover if it had been would the accession obligation have been inserted into the Treaties? It is not beneficial for the EU because Member States can be called before the Court for the application of EU law without the Union recognising itself as being party to the Convention. It is only authorised to give its observations, even though in practice, when the respondent so desires, these observations are agreed with it. Without the prior involvement of the Court of Justice, the European Court may only interpret EU law as it results from judgments handed down by national judges. Moreover, in the absence of a preliminary ruling, the Court will not apply the *Bosphorus* judgment if the Court of Justice has not already been called to give a finding in the same case. In the absence of the co-respondent mechanism, when not a case involving a regulation, it is up to the Court itself to assess the measure of discretion left to Member States under EU law in terms of its implementation or to decide on the division of powers. Thus, in refusing the guarantees offered on these points by the draft agreement, the Court has placed the EU in a more vulnerable position than it would have been in in the event of accession. Of course, the response to this criticism is that the judgment handed down by the European Court of Human Rights only applies to Member States and is unenforceable on the Union. However, in doing so, in the event of sanction, Member States are placed in an inextricable situation because they must either execute the judgment and violate EU law, or comply with Union law and violate the Convention. The experience of the *Matthews* judgment was significant in this respect because after trying to have EU law changed, the United Kingdom was forced to act unilaterally in a move that the Court ended up validating through a circumstantial argument. Finally, the position of individuals was facilitated under the accession agreement because conditions of admissibility were simplified by the application of co-responsibility, which relieved them of having to enter into complex analysis to determine if it were best to bring a case against both the EU and a Member State. Failing accession, they will have to carry out an in-depth study of the situation to find out if, with respect to the *Bosphorus* judgment, their case will be declared admissible. After all, the function of the system is first and foremost the efficiency of legal protection and it is difficult to argue that maintaining the current situation will make the defendant's life easier.

⁴⁵ Judgment of 26 November 2013, the case is pending before the Grand Chamber

⁴⁶ Judgment of 6 February 1999

5. POSSIBLE SOLUTIONS

Article 6 requires that the Union ratify the Convention, therefore there seems to be no other choice but to continue the negotiations after a necessary period of reflection. The political arguments in favour of accession are still timely. The absence of accession will give rise to a double standard between the European States that are or are not members of the EU and the EU itself. Membership of a community in which all members are bound by the common rules of the ECHR will strengthen the position of the EU in discussions on the rule of law. Particularly at a time when certain common values are being challenged more than ever before. From a legal standpoint, accession would dissolve tensions between the obligations of Member States regarding the Convention and those regarding the EU. Tensions which could give rise to potential conflicts would weaken the implementation of EU law.

To solve the situation caused by the Opinion, it has been suggested that the Treaties be revised and namely that Protocol 8 be repealed. This suggestion is encountering significant obstacles. Other than the opposition of Member States to begin a revision process, and the fact that the strength of convictions regarding accession differs depending on the state, repealing the protocol would not solve the problem; its content only reiterates the principles of the Treaties and of previous Court of Justice case law. It would be wiser to address the objections of the Court of Justice individually and to find a suitable solution for each. However, it should be remembered that this situation is a delicate one. Some solutions are possible on some points, provided that they be accepted by the Parties to the Convention who are not members of the European Union, which is not obvious. Additionally, the general reservations to the Convention are not possible. The solution should consist of a phased approach which addresses the easiest issues first and which leaves it up to time and to any judicial developments to make them work.

It therefore seems necessary to provide specific responses to each of the issues raised by the Court of Justice. There is not always one single response for each of them but a certain number of options, the feasibility of which would depend on the analysis of the Court of Justice, but also on the position of the Parties to the Convention who are not members of the Council of Europe. The negotiations will undoubtedly be challenging, since some member states of the Council of Europe were reluctant to acknowledge the specificities of the European Union during the negotiations for the draft agreement. Any change should be justified and it should be stated that its only purpose is to allow unfettered monitoring of the acts and actions of the EU for compliance with the Convention, without changing the situation of these States regarding the Convention and the EU.

Lastly, if the new agreement were to be the subject of a review by the Court of Justice again, it would be important for it to be accompanied by the internal arrangements regarding shared responsibility and prior involvement so that the Court can have a comprehensive view of the EU regarding the Convention.

5.1. Sharing of responsibility

The Court of Justice's criticism refers to the fact that accepting a request for a sharing of responsibility depends on the ECtHR, and that this Court can bring the effect of shared responsibility to an end in a Court of Review should it decide to rule only against the Member State or the EU. Under these assumptions, the ECtHR is the one to judge the allocation of powers between the EU and its Member States.

The draft agreement could be modified on this point to remove the disputed elements as a response to the criticism from the Court. It is in fact possible to remove the right to objection

of the ECtHR regarding the sharing of responsibility. Implementing this would become automatic upon request from the EU or a Member State. Intervention by the Court was restricted to a *prima facie* verification of the existence of a link with EU law therefore it is also to be assumed that if the states or the EU activate shared responsibility, it would be because they believed such a link existed following an internal debate. Equally, the power of the European Court to decide, when shared responsibility is in play, its outcome in a trial court could disappear without great difficulty. Such a solution would evidently require the agreement of all the Parties to the Convention but, if they value accession, this change should be acceptable as it will have no consequence for them.

In short, if the ECtHR believes that a case has a link to EU law, it could propose invoking shared responsibility; but it would be up to the EU and the Member State to decide. If the Union and a Member State should decide to invoke a sharing of responsibility, it will be automatic. In the case of a violation of the Convention, the co-respondents will be sentenced together and it would be up to the EU alone to decide, according to its internal procedures, the implementation of the judgment under supervision of the Court of Justice. It could also be provided that if the Court of Justice does not detect a link when considering an application, through prior involvement or in another way, between the disputed national measure and EU law, the sharing of responsibility can come to an end.

As a response to another objection from the Court, it should be noted that if a Member State has made a reservation compatible with the Convention, the request should be deemed inadmissible in regard to the state⁴⁷

5.2. Prior involvement

The Court had two main objections. The first concerned the absence of an information system on applications. It is easy to provide the information from the EU in the future agreement. The second concerned the restriction by the explanatory report of prior involvement to only cases on the assessment of validity of EU law, thereby excluding the interpretation of this law. It is not difficult to change the report on that point. Lastly, it would undoubtedly be useful to specify in the future agreement that the solution could be even simpler. Since the obstacle stems from the wording of the explanatory report which does not mention prior involvement when it is an issue of interpretation, it should be easy to change the report. Lastly, it would be useful to specify that only the Court of Justice is able to rule on the point of knowing if an issue has been previously judged and to take a decision on the implementation of prior involvement.

5.3. As for Protocol 16 and compliance with TFEU Article 344

In both cases, the problem is of the same nature. It is a question of preventing Member States from circumventing the channels intended by the Treaties by approaching the ECtHR rather than the Court of Justice.

5.4. Protocol 16

With regard to Protocol 16 which establishes the procedure for the advisory opinion, could a declaration not be prepared for the states brought together in the European Council, consisting of a simplified agreement between Member States, in which they would commit to not invoking the use of said protocol for any issue relating to EU law. As the EU is not party

⁴⁷ See reservations, ECtHR, Decision of 23 October 1991, Oksana Kozlova and Tatjana Smirnova v. Latvia, application No 57381/00

to the protocol, it is logical that the issue be decided by the Member States themselves. Prior involvement of the Court of Justice should also be excluded from the advisory procedure, as it could also circumvent the requirement for a preliminary ruling.

Such a solution may not be acceptable for the Court of Justice because it would not stop the ECtHR from ruling despite all this as the protocol contains no provisions in this regard. In that case, it would be appropriate to add a provision to the draft agreement which excludes using the advisory opinion procedure for issues linked to the substantive EU law. In order to avoid the ECtHR needing to rule on the scope of EU law, a procedure should be established which would rely on notifying the EU of requests from Member States for an opinion; It would then be up to the EU to check if these requests are linked to EU law and, if they are, the inform the ECtHR which could then decline to rule.

5.5. TFEU Article 344 and ECHR Article 33

The reservations relate to the risk of circumventing Article 344 of the TFEU by using Article 33 of the ECHR (inter-state appeals). But accession complicates the matter. The risk not only relates to appeals between Member States but also, following accession, to cases in which a Member State lodges an appeal against the EU based on Article 33 of the ECHR.

Once again a declaration from the Member States appended to the agreement, which would restate the requirements of Article 344 of the TFEU and exclude any appeal by a Member State against the EU is worth considering in this case. However, it is possible for the Court to think that the system is not airtight. Under these circumstances, the solution would be to opt for a solution similar to that considered for Protocol 16. The new agreement should exclude all appeals between Member States relating to EU substantive law. In a case in which an inter-state claim between Member States is brought, the EU should be informed and should decide whether this claim is linked to EU law, in accordance with its internal procedures. If that is the case, the ECtHR should declare the claim inadmissible. In situations where the case would lead to infringement proceedings within the EU, the ECtHR should wait for the result of the proceedings before ruling. Lastly, the claims put forward by a Member State against the EU should be excluded since they will automatically be linked to EU law. As Protocol 16 of the ECHR is optional and as the prohibition of inter-state claims would not apply to third countries when they wish to act against EU Member States or against the Union itself, they will probably not see any drawbacks to this.

5.6. As for the possibility of applying more protective national norms

This is about safeguarding the primacy of EU law, whilst ensuring that the European Court of Human Rights does not recognise the possibility of questioning it under Article 53 of the ECHR. Therefore it should be ensured that the ECtHR does not sanction the EU for having prevented a Member State from applying a more protective national norm than the Charter in a case like *Melloni*. As has been seen, the problem had no real substance since, in applying EU law as interpreted by the Court of Justice, Member States are unable to hold more protective norms which challenge primacy within the scope of EU law. Should a specific provision be inserted on this point in the draft agreement or might it be better to append a declaration from the EU and its Member States to the agreement, which would state that Article 33 of the ECHR should only be applied in accordance with EU law? The last solution is probably the safest. It would specify that Article 53 can only be applied in the relationships between the EU and its Member States if the higher norms cited by the Member States comply with EU law, and Article 53 of the Charter as interpreted by the Court of Justice. It should be

noted that the Court of Justice only insists on the establishment of coordination between Article 53 of the Charter and the Convention in its Opinion.

5.7. Safeguarding mutual trust

This is most likely one of the most sensitive issues as it relates not to structural or institutional aspects, but to a divergence in case law. As has been seen, this divergence arose, but it arose from the differences between the missions of the two Courts; the ECtHR is meant to essentially assess a complaint lodged by a victim whereas the Court of Justice is not called upon to rule on the facts of a case, but to interpret EU law as regards the fundamental rights for a national jurisdiction. The ECtHR in Strasbourg gives a concrete response to a precise case whereas the Court of Justice in Luxembourg gives an abstract response to an issue of interpretation during a case being dealt with by a national judge. Additionally, it mainly concerns a situation relating to asylum or the European Arrest Warrant. It is not unreasonable to hope that the dialogue between these two Courts should lead to a reconciliation of their positions. As part of judicial cooperation, the ECtHR did not see any barriers to the recognition and application by one state of a ruling handed down in another Member State, so long as the applicant had received all of the judicial guarantees in that state⁴⁸. Regarding asylum, the problem arises from the fact that the two Courts addressed the issue from different perspectives. Furthermore, the situation has changed since case *N.S.* Whereas the Court of Justice would blame the existence of a systemic failure for the lack of mutual trust, it now only mentions exceptional cases in opinion 2/13. In a recent judgment handed down concerning the execution of a European Arrest Warrant, the Court of Justice referred to its case law on exceptional circumstances, but it emphasised that in the presence of information proving the existence of national failures in the protection of fundamental rights, the national jurisdiction should check if a concrete risk of violation of Article 4 of the Charter (inhuman and degrading treatment) exists for the person concerned⁴⁹. For its part, in the *Tarakhel* case, the European Court of Human Rights emphasised the specific situation of the applicants, who were particularly vulnerable people, whose needs the national system could not meet. In its recent judgment for case *Avotins v. Latvia*, the ECtHR unambiguously recognises the importance of mutual recognition as a method of ensuring the effective functioning of the area of freedom, security and justice, and confirms that the Court strives to adhere to the requirements of international cooperation in this sector. But it also believes that there is not total automaticity in the recognition and that when the national judge has received serious allegations of violation of the Convention, they should exercise a level of control proportionate

⁴⁸ See Povse, Decision of 18 June 2013.

⁴⁹ Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU: CE:C:2016:198: 'Articles 1(3), 5 and 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his/her detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his/her surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end'.

to the importance of these allegations. The duty of the national judge is however limited to avoiding a serious breach in the protection of the rights guaranteed by the Convention⁵⁰. The gulf between the two Courts is not as wide as could have been thought in the wake of opinion 2/13 and a reconciliation, albeit limited, has taken place. Under these circumstances, a declaration from the EU and its Member States appended to the agreement, clarifying the nature and the importance of the principle and inviting the European Court to take it into account, may form an adequate solution. More so if the Court of Justice can be brought to rule on such cases through prior involvement.

Another suggestion would be to invoke a reservation to the Convention. Invoking reservations is nonetheless limited and general reservations are prohibited. It is up to the ECtHR to evaluate the validity of the reservations with regards to the cases submitted to it. Depending on case law, a reservation is acceptable if some of the conditions are met⁵¹. Other than the fact that the reservation cannot be general, it should be formulated at the time of ratification of the accession, it should concern a legislation in force at the time of ratification, and contain a short presentation of this legislation. Under these conditions, invoking the reservation is difficult as it should concern all articles of the Convention in which mutual trust is involved. Furthermore, the legislation mentioned in the reservation cannot be changed,

⁵⁰ 'The Court is mindful of the importance of the mutual recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. As stated in Articles 81(1) and 82(1) of the TFEU, the mutual recognition of judgments is designed, in particular, to facilitate effective judicial cooperation in civil and criminal matters. ... Hence, it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention. ... Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67(1) of the TFEU. However, it is apparent that the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited. Hence the CJEU stated recently in its Opinion [2/13](#) that 'when implementing EU law, Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that ..., save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU' (see paragraph 49 above). Limiting to exceptional cases the power of the state in which recognition is sought to review the observance of fundamental rights by the state of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the state addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the state of origin, in order to ensure that the protection of those rights is not manifestly deficient. Moreover, the Court observes that where the domestic authorities give effect to European Union law and have no discretion in that regard, the presumption of equivalent protection set forth in the *Bosphorus* judgment is applicable. This is the case where the mutual recognition mechanisms require the court to presume that the observance of fundamental rights by another Member State has been sufficient. The domestic court is thus deprived of its discretion in the matter, leading to automatic application of the *Bosphorus* presumption of equivalence. The Court emphasises that this results, paradoxically, in a twofold limitation of the domestic court's review of the observance of fundamental rights, due to the combined effect of the presumption on which mutual recognition is founded and the *Bosphorus* presumption of equivalent protection. In the *Bosphorus* judgment, the Court reiterated that the Convention is a 'constitutional instrument of European public order'. Accordingly, the Court must satisfy itself, where the conditions for application of the presumption of equivalent protection are met, that the mutual recognition mechanisms do not leave any gap or particular situation which would render the protection of the human rights guaranteed by the Convention manifestly deficient. In doing so it takes into account, in a spirit of complementarity, the manner in which these mechanisms operate and in particular the aim of effectiveness which they pursue. Nevertheless, it must verify that the principle of mutual recognition is not applied automatically and mechanically... to the detriment of fundamental rights - which, the CJEU has also stressed, must be observed in this context (see, for instance, its judgment in *Alpha Bank Cyprus Ltd* ... <reference added by the author, case C - [519/13](#), 16 September 2015 judgment>). In this spirit, where the courts of a state which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole grounds that they are applying EU law.

⁵¹ *Belilos v. Switzerland*, judgment of 29 April 1988, paragraphs 55 and 59

which risks making the reservation unenforceable after a certain period of time. Moreover, Advocate General Kokott believed that reservations were not possible⁵² in her position statement.

Is it possible to amend the agreement to guarantee the enforcement of the principle of mutual trust? It has been suggested that an article be inserted in the agreement to confirm the existing situation, and making it opposable to the ECtHR. The article would read as follows: '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 recognized in the Convention or the protocols'.⁵³

This last solution could be kept if appending a statement to the Final Act is thought not be safe enough.

5.8. The CFSP, an unsolvable issue?

It would certainly be conceivable to exclude the CFSP from the scope covered by the agreement through a reservation, but the non-member States Parties may not accept this exceptional situation. Furthermore, it is unclear whether such a reservation would be considered in line with the Convention by the Court of Justice.

It is not politically conceivable currently for states to accept to modify the Treaties in such a way as to extend the Court of Justice's jurisdiction to include the CFSP. This point could potentially block the accession process for a long time. However, a simpler more acceptable solution could be considered. Instead of submitting all CFSP actions to the Court of Justice, the Court of Justice jurisdiction could be extended to include only monitoring the compliance of CFSP actions with the fundamental rights. It would therefore be enough to add to Article 275, second subparagraph, a simple clause which would read as follows 'and to monitor the compliance of these actions with the fundamental rights'. The drafting of this subparagraph would therefore read as follows:

'However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union and to monitor the compliance of these actions with the fundamental rights'.

This addition could take place during the ratification of the accession agreement and its limited reach could potentially ensure its acceptability. On this basis, the objections stated by the Court of Justice in Opinion 2/13 would serve no further purpose.

If such a solution does not work, it will be necessary to wait for the Court of Justice to clarify its competences on the matter, which it declined to do in Opinion 2/13 despite requests from the Commission, be it by appealing to their responsibility or to anything else. The Court did not, however, exclude all reviews by alluding to only 'certain' actions being excluded from its

⁵² Position statement of 13 June 2014, points 83 and following

⁵³ Meijers Committee, Standing committee of experts on international immigration, refugee and criminal law, CM1604, Note on Mutual trust and Opinion 2/13 on accession of the European Union to the European Convention on Human Rights

supervision, reserving its future case law⁵⁴. The Court is currently involved in this issue in the *Rosneft*⁵⁵ case. Would the Court decline to respond to an issue pertaining to the interpretation of the Charter in relation to a national measure to implement a CFSP act. In this context, finding more imaginative solutions, an answer will only be found if the position or case law of the Court changes.

5.9. Summary of the options considered

- shared responsibility: make the effect of shared responsibility automatic upon request of the EU or a Member State and let the effect extend up until a judgment is delivered unless the parties agree otherwise. Also specify that if a case relates to an issue which is the subject of a reservation by a Member State, the application should be deemed inadmissible as regards that state.
- Prior involvement: implementation of an information system by the ECtHR on the cases in progress and modification of the explanatory report to emphasise that involvement relates to the issues of validity and interpretation. Specify that prior involvement can take place on the initiative of the Court of Justice.
- Protocol 16: either a statement from Member States indicating that the opinion procedure, provided for by Protocol 16, will not be used in cases linked to EU law, or add a provision to this end in the accession agreement
- Article 344 TFEU reads as follows: identical solutions could be considered: a statement or addition of a special provision.
- More protective national norms: add a provision in the agreement which indicates that this option can only be invoked by a Member State if the norm in question can be so invoked in accordance with EU law
- Mutual trust: either enter a statement from the EU and its Member States in the Final Act of the accession agreement which highlights the importance of mutual trust and indicates that the agreement is reached by taking into account the fact that the ECtHR will seriously take this element into consideration, or enter this element into the agreement itself as a new provision

⁵⁴ points 251 and 252 'Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion - with which some of the Member States that submitted observations to the Court have taken issue - essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice'.

⁵⁵ Conclusions of 21 May 2016, C-72/15, EU: C: 2016: 381

- CFSP: either minimally revise the Treaty to give the Court of Justice the power to oversee compliance of CFSP acts with fundamental rights, or extend the period of reflection while waiting for the Court to specify its oversight arrangements in this area.

6. OVERALL CONCLUSION

Careful consideration of the consequences of Opinion 2/13 is being undertaken within the EU; it should not take too long. Even if this study definitely does leave room for other solutions, there is not an indefinite number of them. However, with the absence of accession at the current time, the situation of the EU with regard to the Convention is, through the responsibility of its Member States, unfortunately objectively less sound than it would have been following accession on the basis of a draft agreement imperfect in the eyes of the Court. The talks started in the Council should be brought to an end quickly. The challenge is twofold. It is a question of managing to find legally correct solutions, which are also politically acceptable for the non-EU member States Parties to the Convention; Overall the proposed solutions do not change the situation of these parties with regards to the Convention, and only adapt the existing mechanisms specific to the EU. None of them leads to the impunity of the EU regarding the Convention. The main concern which motivates them is, to respect the EU's autonomy, leaving its institutions, first and foremost the Court of Justice, to adjudicate first on compliance with the Convention, without questioning the fact that ultimately the ECtHR will be the one to determine the compliance of the acts and actions of the EU and its Member States with the Convention.

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ANNEX I: EXTRACTS OF OPINION 2/13

B- Substance

1. Preliminary considerations

153. Before any analysis of the Commission's request can be undertaken, it must be noted as a preliminary point that, unlike the position under Community law in force when the Court delivered Opinion 2/94 (EU:C:1996:140), the accession of the EU to the ECHR has, since the entry into force of the Treaty of Lisbon, had a specific legal basis in the form of Article 6 TEU.
154. That accession would, however, still be characterised by significant distinctive features.
155. Ever since the adoption of the ECHR, it has only been possible for State entities to be parties to it, which explains why, to date, it has been binding only on States. This is also confirmed by the fact that, to enable the accession of the EU to proceed, not only has Article 59 of the ECHR been amended, but the agreement envisaged itself contains a series of amendments of the ECHR that are to make accession operational within the system established by the ECHR itself.
156. Those amendments are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State.
157. As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65).
158. The fact 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, has consequences as regards the procedure for and conditions of accession to the ECHR.
159. It is precisely in order to ensure that that situation is taken into account that the Treaties make accession subject to compliance with various conditions.
160. Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'.
161. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU.
162. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law.
163. In performing the task conferred on it by the first subparagraph of Article 19(1) TEU,

- the Court of Justice must review, in the light, in particular, of those provisions, whether the legal arrangements proposed in respect of the EU's accession to the ECHR are in conformity with the requirements laid down and, more generally, with the basic constitutional charter, the Treaties (judgment in *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23).
164. For the purposes of that review, it must be noted that, as is apparent from paragraphs 160 to 162 above, the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law.
165. It should be borne in mind that these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU.
166. To these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, 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 (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21; and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65).
167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected. This premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and that EU law that implements them will be respected (point 168).
169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73, as well as *Kadi and Al Barakaat International Foundation/Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).
170. 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 (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114,

paragraph 4, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).
 172. The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself. the completion of the integration process which is why the EU itself was formed.
 173. Similarly, the Member States are obliged, by reason, *inter alia*, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).
 174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.
 175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).
 176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).
 177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above.
2. The compatibility of the agreement envisaged with EU primary law
178. In order to take a position on the Commission's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasised, the autonomy of EU law in the interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with.

a) The specific characteristics and the autonomy of EU law

179. It must be borne in mind that, in accordance with Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU (see, to that effect, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 60, and *Åkerberg Fransson*, EU:C:2013:105, paragraph 44).
180. By contrast, as a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law (judgment in *Haegeman*, 181/73, EU:C:1974:41, paragraph 5; Opinion 1/91, EU:C:1991:490, paragraph 37; judgments *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 36, and *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 73).
181. Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR.
182. The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions (see Opinions 1/91, EU:C:1991:490, paragraphs 40 and 70, and 1/09, EU:C:2011:123, paragraph 74).
183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order (see Opinions 1/00, EU:C:2002:231, paragraphs 21, 23 and 26, and 1/09, EU:C:2011:123, paragraph 76; see also, to that effect, judgment in *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).
184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, 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 (see Opinions 1/91, EU:C:1991:490, paragraphs 30 to 35, and 1/00, EU:C:2002:231, paragraph 13).
185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.

186. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.
187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.
188. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in *Melloni*, EU:C:2013:107, paragraph 60).
189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.
190. However, there is no provision in the agreement envisaged to ensure such coordination.
191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 78 to 80, and *Melloni*, EU:C:2013:107, paragraphs 37 and 63).
192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.
193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.
194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not

Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

195. However, the agreement envisaged contains no provision to prevent such a development.
196. In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.
197. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.
198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.
199. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.
200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

b) Article 344 TFEU

201. The Court 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 (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282).
202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law — and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system — must be

understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU (see, to that effect, judgment in *Commission v Ireland*, EU:C:2006:345, paragraph 169), it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.

203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.
204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.
205. Unlike the international convention at issue in the case giving rise to the judgment in *Commission v Ireland* (EU:C:2006:345, paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in EU law must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.
206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.
207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.
208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.
209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute.
210. Contrary to the provisions of the Treaties governing the EU's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFEU is specifically intended to preserve the exclusive nature of the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.
211. Moreover, Article 1(b) of Protocol No 8 EU itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by non-Member States are correctly addressed to Member States and/or to the EU as appropriate.
212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.

213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU.
214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFEU.
- c) The co-respondent mechanism
215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR.
216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.
217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of EU law are preserved, as required by Article 1 of that protocol.
218. Yet, first, Article 3(5) of the draft agreement 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.
219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.
220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.
221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.
222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.
223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.
224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be

required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.

225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.
226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.
227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.
228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.
229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.
230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.
231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.
232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.
233. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.
234. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.
235. Having regard to the foregoing, it must be held that the arrangements for the operation

of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved.

d) The procedure for the prior involvement of the Court of Justice

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the Court of Justice to be able to rule on whether that law is consistent with the EU's commitments resulting from its accession to the ECHR, it should be possible for secondary law to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible

options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.
248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved.
- e) The specific characteristics of EU law as regards judicial review in CFSP matters
249. It is evident from the second subparagraph of Article 24(1) TEU that, as regards the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction only to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.
250. According to the latter provision, the Court of Justice is to have jurisdiction, in particular, to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty.
251. Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion — with which some of the Member States that submitted observations to the Court have taken issue — essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.
252. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.
253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.
254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.
255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.
256. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89).
257. Therefore, although that is a consequence of the way in which the Court's powers are

structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

- it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
- it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body,

is not compatible with Article 6(2) TEU, nor with EU Protocol 8.

Consequently, the Court (Full Court) gives the following Opinion:

The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with 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.

Signatures.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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