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Opinion 2/13 and Accession to the ECHR

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I. Introduction

Opinion 2/13, handed down just before Christmas 2014, is a landmark decision in both European Union (EU) human rights law and EU external relations law.[1] It showed that the EU's rhetorical commitment to international human rights protection is not necessarily matched by action: *Opinion 2/13* was the second time the Court of Justice put the brakes on the EU's ambition to become a party to the European Convention on Human Rights (ECHR) for reasons rooted in the EU's constitutional set-up. Having comprehensively assessed the fairly elaborate ECHR Draft Accession Agreement (DAA), the CJEU provided the yardstick for any future attempt at accession: the constitutional hurdles identified will have to be taken for any reworked DAA to pass muster. The Opinion is also a landmark judgment in the wider field of EU external relations. By clarifying and strengthening the principle of the autonomy of the EU legal order, the Court reiterated the legal limits governing the EU's ability to integrate into the wider international order at a time when EU external relations and EU treaty-making are becoming increasingly important.

II. Historical and Doctrinal Context

A. The History of EU Accession to the ECHR

Opinion 2/13 was not the first time the Court of Justice was asked to rule on the compatibility of EU accession to the ECHR with the Treaties. In *Opinion 2/94* the Council sought the Court's view on whether accession of the (then) European Communities to the ECHR would be compatible with the EC Treaty.[2] As is the case with all EU action, EU external action is governed by the principle of conferred powers. At the time of

[1] *Opinion 2/13 (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms)* EU:C:2014:2454.

[2] *Opinion 2/94 (Accession to the ECHR)* EU:C:1996:140.

Opinion 2/94 the Treaties did not contain an express competence clause empowering the EU to become a party to the ECHR. There was also no implied power that could be derived from an express legislative competence, so that the argument revolved around whether the gap-filling competence laid down in what is now Article 352 TFEU (then Article 235 TEC) could be employed. The Court's (literally) short answer was that it could not. In a first step the Court reiterated that the EU Treaties – including the gap-filling competence – did not confer *Kompetenz-Kompetenz*, that is, a power for the EU to extend its own competences. In the Court's words 'Article [352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.'[3] In a second step the Court concluded that accession to the ECHR 'would be of constitutional significance' as it would result in a substantial change in how human rights are protected in the EU by entering the EU into a distinct international institutional system and by integrating all of the provisions of the ECHR into EU law.[4]

The Lisbon Treaty brought the necessary Treaty change. Article 6(2) TEU – enacted alongside the Charter of Fundamental Rights as part of a 'fundamental rights package' – contains an express competence: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.' It is complemented by Protocol No 8 to the Lisbon Treaty, which provides further detail on the EU's constitutional constraints. Any accession treaty must preserve the 'special characteristics of the Union and Union law'[5] with particular regard to the participation of the EU in the control bodies of the ECHR, viz the European Court of Human Rights (ECtHR) first and foremost, and 'the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate', which hints at the need for an arrangement like the co-respondent mechanism discussed below. Furthermore, the Protocol reiterates the principle of conferred powers and stipulates in essence that the Member States' responsibilities under the ECHR should not be extended due to accession. Finally, the Protocol reiterates the Court's exclusive jurisdiction over matters of Union law in disputes between Member States enshrined in Article 344 TFEU.

In addition to Treaty change at EU level, the ECHR needed to become open to EU membership, which happened with the entry into force of Protocol 14 in 2011. It added Article 59(2) ECHR, which says that the 'European Union may accede to this Convention.'[6]

B. Why Accession?

Three broad arguments are typically advanced in favour of the EU's accession to the ECHR.

[3] ibid para 30.
[4] ibid paras 34–35.
[5] This concern is also reflected in Declaration No 2 to the Lisbon Treaty.
[6] Quoted in n 1.

First, an external scrutiny argument emphasises the need for any legal system that protects fundamental rights to be open to independent external review applying international human rights standards. Apart from the symbolic value of accession, it ensures that the minimum human rights standards defined in the Convention are guaranteed and any systemic biases counteracted,[7] for example, in the EU's case, a potential bias towards market integration.

Second, a consistency argument voices the concern that in the absence of accession it would be difficult to avoid inconsistencies between ECtHR and CJEU case law.[8] Given that the substance of EU fundamental rights protection has its origin in the ECHR[9] and the EU Charter of Fundamental Rights builds on it,[10] consistency is a desirable outcome. This goes hand in hand with an integrationist rationale, which maintains that there is a collective responsibility for protecting fundamental rights in Europe shared between the EU and the Council of Europe, which in the absence of accession might unravel.[11]

Third, an attribution argument holds that accession would close existing gaps in the protection against EU acts and, even where no gap exists, it would lead to a more appropriate allocation of responsibility for ECHR violations rooted in EU law.[12] This argument alludes to the ECtHR's case law on Member State responsibility for such violations, which goes back to the *Matthews* case.[13] The ECtHR held that in the absence of EU membership of the ECHR,

> [EU] acts as such cannot be challenged before the Court because the [EU] is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer.[14]

This means that in the event that a violation of the ECHR is shown, a Member State is found to have been in breach of the ECHR. The problem with this is that the Member State concerned is typically not in a position to unilaterally remedy the violation as the violation is found in EU law. Accession would change this as the EU could then be a respondent[15] before the ECtHR and be held responsible for its own failings.

The rule in *Matthews* has been subject to two modifications. The first came with the *Bosphorus* case, where the ECtHR introduced a rebuttable presumption of Convention

[7] See, eg, E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 35, 38; Editorial Comments, 'The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) 52 *Common Market Law Review* 1, 4.

[8] See, eg, in relation to EU competition law, A Andreangeli, 'Competition Law and the Opinion 2.13 on the Accession of the EU to the European Convention on Human Rights: Back to Square one?' (2015) 6 *Journal of European Competition Law and Practice* 583, 585.

[9] Starting with Case 4/73 *Nold* EU:C:1974:51 and extended to the ECtHR's case law since Case C-13/94 *P v S and Cornwall County Council* EU:C:1996:170.

[10] See notably Art 52(3) CFR, which stipulates that ECHR standards are minimum requirements where CFR rights correspond to rights found in the ECHR.

[11] See, eg, J Callewaert, 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences' (2018) 55 *Common Market Law Review* 1685, 1688.

[12] Spaventa (n 6) 41–42; Editorial Comments (n 6) 4.

[13] *Matthews v United Kingdom* (1999) 28 EHRR 361.

[14] ibid para 32.

[15] Or co-respondent, on which see below.

compliance for member states of international organisations that provide equivalent protection of fundamental rights to what the Convention requires, something the EU does.[16] The presumption is premised on the further condition that the Member State 'does no more than implement legal obligations flowing from its membership of the organisation', that is, if it has no discretion and is acting on the basis of secondary EU law.[17] The presumption can only be rebutted if 'in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'.[18] The second exception can be found in the *Connolly* case – arising from a dispute between an EU civil servant and the EU – where the ECtHR held that the conduct of an EU institution could not be attributed to any Member State because there had been no Member State involvement in the matter at any point.[19] Accession by the EU to the ECHR would certainly close the *Connolly* gap in accountability and would call into the question the maintenance of the *Bosphorus* presumption.

C. How Accession would Unfold

Article 218(6) TFEU presupposes that EU accession to the ECHR happens by way of an international agreement, whereas ordinarily parties wishing to sign up to the ECHR simply ratify it. This shows that EU accession to the ECHR is less straightforward in that it will require specific arrangements for the EU. These specific arrangements are necessary because – unlike federations like Belgium, Austria or Germany, where powers are shared between different levels of government – the EU will be a party alongside the Member States. This necessitates rules on the attribution of conduct and on the division of responsibility between the two, notably where an EU Member State acts on the basis of EU law and where it is therefore not evident whether an ECHR infringement is the fault of the EU or the Member State or both and which entity is best able to provide a remedy for the breach.

The constitutional difficulty with this lies in the autonomy of the EU legal order. Long-established as far as the internal relationship between Member States and the EU is concerned – the 'independent source of law' in *Costa v ENEL* is '*une source autonome*' in the French language version[20] – the autonomy of the EU legal order came to prominence in EU external relations law with *Opinion 1/91*.[21] That Opinion was concerned with the powers given to the EEA court, which the Court of Justice considered to violate the autonomy of the EU legal order and its own exclusive jurisdiction concerning the interpretation and validity of EU law found in what is now Article 19(1) TEU and Article 344 TFEU. The Court held in essence that no international court must be given jurisdiction to decide on the distribution of competences between the EU and its Member States.[22] It further held that no international court must be given jurisdiction

[16] *Bosphorus v Ireland* (2005) 42 EHRR 1, para 155.
[17] ibid paras 156–57.
[18] ibid; this has happened only once so far in *Bivolaru et Moldovan v France* App nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).
[19] *Connolly v 15 Member States of the EU* App no 73274/01 (ECtHR, 9 December 2009).
[20] Case 6/64 *Costa v ENEL* EU:C:1964:66.
[21] *Opinion 1/91 (Agreement on the European Economic Area)* EU:C:1991:490.
[22] ibid paras 34–36.

to interpret the substantive rules of EU law in a manner that is binding on the EU or its Member States.[23] And finally, that no EU agreement may give new powers to the EU instructions – including the Court itself – which would otherwise require a treaty amendment.[24]

III. Background and Decision of the CJEU

A. Key Features of the Draft Accession Agreement

The Court of Justice examined the compatibility of the DAA with the Treaties following a request by the European Commission according to Article 218(11) TFEU. The Court identified several reasons why the DAA was not compatible with the Treaties, all of which centred on the autonomy principle. In a first step, this section therefore presents the key features of the DAA before outlining the Court of Justice's view in a second step.

Apart from numerous technical issues – such as budget contributions, procedure before the Committee of Ministers – the DAA pursued the overall aim of accommodating the EU – a supranational organisation, all of whose members would individually remain parties to the ECHR – as a party to the ECHR.

The central question confronting the negotiators was how to ensure that an individual application brought before the ECtHR alleging a violation of the ECHR by an EU institution or by EU law is addressed to the correct party – that is the EU or the Member States, depending on who is capable of providing an effective remedy against the violation – whilst respecting the autonomy of the EU legal order and whilst avoiding 'gaps in the participation, accountability and enforceability in the [ECHR] system'.[25]

The negotiators appeared to have two basic scenarios in mind when drafting the relevant Article 3 DAA. The first is based on a scenario like in *Bosphorus*, where an EU regulation is applied by a Member State, and is allegedly in violation of the ECHR. While from the perspective of the victim of the violation the Member State has acted, only the EU can remedy the violation. The second consists of a situation where an EU institution allegedly violates the Convention, but the violation is rooted in EU primary law, which only the Member States can amend.

The DAA therefore featured a rule of attribution in Article 1(4), which says that

> an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union ….

Hence whenever a Member State acts, the conduct is attributed to it. In rare cases where only an EU institution is involved – such as staffing disputes like *Connolly* or competition proceedings – the conduct is attributed to the EU.

[23] ibid paras 39–46.
[24] ibid paras 58–61.
[25] Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (47+1(2013)008rev2), para 39.

This rule of attribution was then coupled with the so-called co-respondent mechanism, which would operate in two situations. First, where the conduct is initially attributed to a Member State,

> the [EU] may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention … notably where that violation could have been avoided only by disregarding an obligation under European Union law.[26]

Second, where the conduct is initially attributed to the EU, the Member States

> may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] 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.[27]

Article 3(5) DAA set out two procedures by which a party may become co-respondent: either by accepting an invitation from the ECtHR or upon its request. In the latter case, the ECtHR would seek the views of all parties and on that basis assess whether 'in light of the reasons given … it is plausible that the conditions … are met'.

According to Article 3(7) DAA, the general rule would then be that the co-respondents would be jointly responsible, that is, in each situation the conundrum faced by the negotiators would be resolved in a way that both the party that had committed the violation vis-à-vis the applicant and the party that is actually in a position to remedy the violation would be jointly held responsible. How precisely that joint responsibility would be managed – including the question of who would have to pay just compensation if so ordered by the ECtHR – would be the subject of EU internal rules. Article 3(7) DAA contained an important exception, however, for situations where the ECtHR, 'on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible'.

The first variety of the co-respondent mechanism – where conduct is attributed to a Member State and the EU becomes co-respondent – results in a further issue: what if the Court of Justice was never involved in the case, notably because the national court dealing with the matter in the respondent Member State did not refer any questions as to the validity or interpretation of EU law to the CJEU according to Article 267 TFEU? If the ECtHR were to decide on a violation of the Convention rooted in EU law without the CJEU's involvement, this would arguably be contrary to the subsidiary character proceedings before the ECtHR are supposed to have.[28] The solution in the DAA is the prior involvement mechanism found in Article 3(6) DAA:

> In proceedings to which the [EU] is a co-respondent, if the [CJEU] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] of the provision of [EU] law as

[26] Article 3(2) DAA.
[27] Article 3(3) DAA.
[28] See the Joint Communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, available at curia.europa.eu/jcms/jcms/P_72317.

> 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 precise procedure for prior involvement would be subject to internal EU rules.

B. The Opinion of the Court

In *Opinion 2/13* the Court held that the DAA was not compatible with the Treaties. The Court identified a number of flaws in the DAA. These mostly related to the DAA not respecting the specific characteristics, viz the autonomy of the EU legal order and in particular the constitutional role of the Court of Justice itself.

In a first step, the Court of Justice found that the DAA lacked a number of coordinating provisions. The first of these concerned the relationship between Article 53 ECHR and Article 53 of the EU Charter of Fundamental Rights (CFR) as construed by the Court of Justice. Article 53 ECHR says that the Convention does not limit or derogate from the human rights in the laws of the parties to the ECHR or under any other agreement to which they are parties. This clause therefore provides that the ECHR requires a minimum of human rights protection, but does not stand in the way of better protection.[29] On the face of it Article 53 CFR says much the same, that is, that nothing in the 'Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law'. The crucial difference for the Court, however, was that it had held in *Melloni* that Member States may not provide higher standards of fundamental rights protection when acting within the scope of EU law if 'the primacy, unity and effectiveness of EU law' are compromised.[30] Thus in *Opinion 2/13* the Court required that the DAA should include a coordinating provision making it clear that the power of the Member States to provide a higher level of protection reserved by Article 53 ECHR is restricted by EU law requirements where Member States are acting in the scope of EU law.[31]

The second missing coordinating provision related to the principle of mutual trust, which governs the area of freedom, security and justice (AFSJ), and which the Court – for the first time – expressly considered to be of fundamental importance in EU law.[32] The principle of mutual trust requires that Member States 'consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[33] Hence an argument before a national court that, for example, a European arrest warrant was adopted by another Member State in a way that is contrary to the Charter, cannot be accepted on the basis of mutual trust. Instead, the EU system of fundamental rights protection requires that a challenge to such a Member State measure must be brought in the issuing Member State.

[29] *National Union of Rail, Maritime and Transport Workers v the United Kingdom* [2014] ECHR 366, Opinion of Judge Wojtyczek, para 3.
[30] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107, para 60.
[31] *Opinion 2/13* (n 1) paras 187–90.
[32] ibid para 191.
[33] ibid para 191.

This is based on the premise that all Member States share the values of the EU – laid down in Article 2 TEU – and therefore protect fundamental rights sufficiently well for this not to be detrimental to the individual concerned. According to the Court of Justice, EU accession to the ECHR would imperil the operation of the principle of mutual trust if it enabled precisely such challenges to be brought on the basis of the ECHR because this would mean that a Member State could be held responsible under the ECHR for not having reviewed the compatibility with the Convention of an AFSJ measure – such as a European arrest warrant – issued by another Member State. Hence the CJEU held that in the absence of a provision in the DAA preventing this from happening, the DAA would 'upset the underlying balance of the EU and undermine the autonomy of EU law'.[34]

The final missing coordinating provision concerned Protocol No 16 to the ECHR, which had entered into force since the DAA had been finalised. Protocol No 16 contains a mechanism by which highest courts of the parties to the ECHR can request an advisory opinion from the ECtHR 'on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention'. The Protocol – which is optional and has been opted into by nine EU Member States thus far[35] – is evidently modelled on the preliminary reference procedure found in Article 267 TFEU, from which it differs in two key respects: first, it is limited to highest courts; and, second, advisory opinions by the ECtHR are not binding. The Court of Justice's concern in respect of Protocol No 16 – to which the EU was not going to accede – was a perceived danger that it could be used to undermine the preliminary reference procedure. The Court was concerned that a highest court of a Member State might choose to refer a case to the ECtHR instead of the CJEU, where a question of the interpretation of an ECHR right that corresponds to a right in the CFR is concerned. Such a move – if the case was in the scope of EU law – would evidently be contrary to the duty of highest national courts to refer such matters to the CJEU, spelled out in Article 267(3) TFEU. Hence the Court held that in the absence of a provision coordinating the relationship between Protocol No 16 and Article 267 TFEU, the DAA was liable 'adversely to affect the autonomy and effectiveness of the latter procedure' and thus the Treaties.

The Court went on to hold that the DAA also infringed its own exclusive jurisdiction protected by Article 344 TFEU because Article 33 ECHR would continue to allow the EU and Member States to bring inter-party applications against each other. However, where such an inter-party case came within the scope of EU law, this would be contrary to Article 344 TFEU, which grants the Court of Justice an exclusive jurisdiction over the interpretation and validity of EU law. Hence the 'very existence of such a possibility undermines' Article 344 TFEU, so that such scenarios would need to be expressly excluded from the ECtHR's jurisdiction under Article 33 ECHR.[36]

The Court subsequently examined the co-respondent mechanism, which it considered to suffer from three flaws. First, the procedure for designating the co-respondent contained in Article 3(5) DAA gave the ECtHR the option of rejecting a request of a Member State or the EU to become co-respondent where the reasons given for such

[34] ibid para 194.
[35] Estonia, Finland, France, Greece, Lithuania, Luxembourg, Netherlands, Slovakia, Slovenia.
[36] *Opinion 2/13* (n 1) paras 201–14.

a request did not meet a plausibility threshold. This would – according to the CJEU – raise questions of the division of competences between the EU and its Member States, which the ECtHR would be given jurisdiction to determine. This, however, would be contrary to the autonomy of the EU legal order as such matters are the exclusive domain of the CJEU.[37] The second and third flaws are found in Article 3(7) DAA. It is recalled that that provision contains the rule that co-respondents are jointly responsible for a violation of the Convention. The CJEU took issue with the fact that the DAA did not expressly account for a situation where a Member State may have made a reservation to the ECHR and could not normally be held responsible. Given that Article 2 of Protocol No 8 expressly required that Member State reservations be respected, it held that the lack of an express provision to that effect would not be compatible with the Treaties. The third flaw is closely connected to the first. Article 3(7) DAA provided that exceptionally the ECtHR can find that the co-respondents should not be found jointly responsible 'on the basis of reasons given by the respondent and he co-respondent'. According to the CJEU, this would grant the ECtHR jurisdiction to decide on the division of competences between the EU and its Member States, which was contrary to the exclusive jurisdiction of the CJEU on this matter.[38]

The Court then examined the prior involvement mechanism, which was – again – not fully compatible with the demands of the Treaties. It identified two issues in this regard: first, it took issue with the requirement in Article 3(6) DAA that the prior involvement of the CJEU should only happen where the CJEU had not yet assessed the fundamental rights compatibility of the act or omission that is the subject of the complaint. In the eyes of the CJEU this would require the ECtHR to interpret the case law of the CJEU, which would be incompatible with the Treaties.[39] Second, the CJEU considered the prior involvement mechanism to be tailored too narrowly as it was confined to questions of the compatibility of EU law with Convention rights, but did not extend to questions of interpretation of EU law. According to the CJEU, this would circumvent the CJEU's exclusive jurisdiction to interpret EU primary and secondary law, so that the DAA would need to be amended in this regard to be compatible with the Treaties.[40]

The final deficiency in the DAA concerned the ECtHR's potential jurisdiction over matters concerning the Common Foreign and Security Policy (CFSP), which the DAA did not engage with at all. The issue lay in the CJEU's own limited jurisdiction over CFSP matters, which results from Article 24(1) TEU and Article 275(1) TFEU. These provisions exclude the CJEU's jurisdiction over CFSP matters with the exception of cases concerning the delineation of CFSP competences from 'ordinary' external relations competences – Article 40 TEU – as well as annulment proceedings concerning restrictive measures, viz sanctions. The DAA did not contain a provision mirroring this restriction. This would have resulted in the ECtHR potentially being competent to decide CFSP cases, over which the CJEU would not have had jurisdiction. A potential example would be cases concerning EU missions under the Common Security and Defence Policy. According to the CJEU, 'Such a situation would effectively entrust the

[37] ibid paras 223–25.
[38] ibid paras 231–35.
[39] ibid para 239.
[40] ibid para 247.

judicial review of those acts, actions or omissions on part of the EU exclusively to a non-EU body',[41] even though the Court admitted that any such review would be limited to compliance with the ECHR. The Court then pointed out that such jurisdiction cannot exclusively be conferred on a non-EU court and was thus contrary to the Treaties.[42]

Opinion 2/13 thus had the practical implication that the EU could not accede to the ECHR on the basis of the DAA.

IV. The Advocate General's Contrasting View and Academic Reception

The academic reaction to *Opinion 2/13* was on the whole negative,[43] although some authors expressed some sympathy for the Court's reasoning.[44] Before addressing the main lines of criticism expressed in academic commentary, it is worth pointing out that Advocate General Kokott had expressed a more accession-friendly view.[45] While she too concluded that the DAA could not be ratified unamended, her objections were confined to a number of technical issues, notably the 'plausibility' assessment as part of the co-respondent mechanism; the need to ensure that a prior involvement of the CJEU would also happen in cases raising questions over the interpretation of EU law as well as stricter conditions for the ECtHR to dispense with a prior involvement; the question of Member State reservations and the deviation from the rule of joint responsibility of the co-respondents. By contrast, the Advocate General did not share the CJEU's other concerns, including the most fundamental ones relating to the CFSP and mutual trust. As for the former, the Advocate General concluded that accession could be effected without first granting the CJEU powers to review all CFSP measures given that individuals already enjoy effective legal protection from national courts in such cases.[46]

[41] ibid para 255.

[42] ibid para 256.

[43] See, eg, B de Witte and Š Imamović, 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court' (2015) 40 *European Law Review* 683; Spaventa (n 6); S Lambrecht, 'The sting is in the tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights' [2015] *European Human Rights Law Review* 185; Andreangeli (n 7); J Odermatt, 'A Giant Step Backwards – Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) 47 *New York University Journal of International Law and Politics* 783; B Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 168; T Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?' (2015) 11 *European Constitutional Law Review* 239; G Butler, 'The Ultimate Stumbling Block: The Common Foreign and Security Policy, and Accession of the European Union to the European Convention on Human Rights' (2016) 39 *Dublin University Law Journal* 229; SØ Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) 16 *German Law Journal* 169; RA Wessel and A Łazowski, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 *German Law Journal* 179.

[44] D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the European Convention on Human Rights' (2015) 16 *German Law Journal* 105; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) 16 *German Law Journal* 147.

[45] *Opinion 2/13 (View of Advocate General Kokott)* EU:C:2014:2475.

[46] ibid paras 82–103.

The latter issue the Advocate General did not mention. Furthermore, she did not share the CJEU's concerns regarding its exclusive jurisdiction laid down in Article 344 TFEU by rightly noting that a clause in the accession agreement divesting the ECtHR of jurisdiction in such cases would not only be highly uncommon in international law practice, but would also not be strictly necessary given the option for the Commission to initiate infringement proceedings in such cases.[47] Finally, the Advocate General considered there to be no issue arising from Protocol No 16 either as Article 267(3) TFEU contains a clear duty on courts of last instance to refer cases to the CJEU.[48] The Advocate General did not mention the Article 53 problem identified by the Court.

The academic criticism of *Opinion 2/13* can be divided into three categories: a doctrinal criticism concerning both the CJEU's understanding and application of EU law and the law of the ECHR; a criticism that the CJEU has shifted the goalposts by tightening its own standards of review; and a criticism that the Opinion was bad judicial politics.

As far as the various issues identified by the CJEU are concerned, academic commentary oscillated between puzzlement – notably where the need to coordinate the two Articles 53 is concerned – and some degree of sympathy – mostly in relation to the technicalities of the co-respondent and prior involvement mechanisms – and allegations of selfishness – notably concerning the CFSP and mutual trust issues.

As far as the need to coordinate Article 53 CFR and Article 53 ECHR is at issue, commentators almost unanimously expressed their puzzlement. This is chiefly due to a doctrinal misunderstanding on part of the CJEU of the import of Article 53 ECHR,[49] which merely aims to assert the subsidiary character of the ECHR as requiring only a basic standard of protection, which the Member State and EU are free to exceed. In a similar vein, it was argued the perceived difficulties with Protocol No 16 should not have been raised at all given that it is an issue that arises independently of accession.[50] Given the national courts' discretion whether to refer a case or not under Protocol No 16 ECHR, the issue would appear to be moot.[51] Others, however, argue that the CJEU was not wrong to raise this issue given that after accession the ECHR would have been an 'integral part of EU law'[52] so that an interpretation by the ECtHR of the ECHR would amount to an interpretation of EU law,[53] at least so far as the case was in the scope of EU law. This latter argument, however, ignores the fact that an interpretation by the ECtHR under Protocol No 16 would, first, not absolve a national court from its duty to refer the case to the CJEU; and, second, would not be binding on the national court.

The CJEU's issues with the technicalities of the co-respondent and prior involvement mechanisms were on the whole considered to be more persuasive,[54] even though some commentators accuse the CJEU of being overly stringent here,[55] and of adopting

[47] ibid paras 115–18.
[48] ibid para 141.
[49] Lambrecht (n 39) 186.
[50] de Witte and Imamović (n 39) 696; Lambrecht (n 39) 188.
[51] Spaventa (n 6) 47.
[52] Case 181/73 *Haegeman v Belgium* EU:C:1974:41.
[53] Halberstam (n 40) 121.
[54] eg de Witte and Imamović (n 39) 694.
[55] Lambrecht (n 39) 190–91.

a methodologically flawed understanding of the autonomy of the EU legal order.[56] It should be recalled that according to the CJEU's case law up until *Opinion 2/13*, the autonomy of EU law required that no other court but the CJEU be given jurisdiction to rule on the interpretation of EU law, including the division of competences between EU and Member States, in a way that would be binding on the EU or its Member States. Before this background the CJEU's argument about the 'plausibility' test which the ECtHR was to carry out if a co-respondent request would have been made makes some sense. However, the Opinion ignores the fact that the negotiators deliberately included a plausibility review as a very low standard of review, which one could argue does not go much further than allowing the ECtHR to sift out abuses of the co-respondent mechanism, which is a power any court – national or international – typically has.

The ECtHR's power to allocate responsibility to only one co-respondent was more problematic and the CJEU rightly did not accept this; the same goes for the questions around prior involvement, notably the power of the ECtHR to review whether a prior involvement has happened or not. However, as far as respect for Member State reservations is concerned, the CJEU was again overly strict. After all, the co-respondent can never be forced to join proceedings so that reservations would have been highly unlikely to ever have any import in practice.[57] The CJEU's defence of its exclusive jurisdiction laid down in Article 344 TFEU was more controversial. While some have defended the CJEU,[58] others have accused it of over-reacting by essentially requiring that the DAA itself excludes the ECtHR's jurisdiction over such cases when this is neither reflective of international practice,[59] including the EU's own treaty practice, nor strictly necessary as Member States are already prohibited from bringing such cases before the ECtHR. Moreover, the decision in respect of Article 344 TFEU represents a considerable tightening of the autonomy doctrine compared to its previous iterations, most recently in the *Mox Plant* case,[60] where the CJEU accepted a clause that allowed an international court to declare a case concerning EU law inadmissible, but which fell short of automatically resulting in inadmissibility.[61] Hence the CJEU's insistence on watertight rules in the DAA, which would reduce the scope of the ECtHR's jurisdiction, were rightly seen as an over-reaction.

When it comes to practicalities, however, these issues would matter little as they can be resolved relatively easily by redrafting the DAA.[62] The same cannot be said of the mutual trust and CFSP issues, which were also the focus of much academic criticism. In doctrinal terms, many commentators remarked upon the CJEU's elevation of the principle of mutual trust to the status of 'fundamental importance in EU law'.[63] It was rightly pointed out that mutual trust is a legal fiction rather than grounded in reality, so that its being considered a supreme interest was problematic.[64] More scathingly, perhaps,

[56] K Ziegler, 'The Second Attempt at EU Accession to the ECHR: Opinion 2/13' in G Butler and RA Wessel (eds), *EU External Relations Law – the Cases in Context* (Hart Publishing, 2022) 755, 766.
[57] Lambrecht (n 39).
[58] Notably Halberstam (n 40) 118–19.
[59] Pirker and Reitemeyer (n 39) 179.
[60] *Commission v Ireland (Mox Plant)* EU:C:2006:345.
[61] Johansen (n 39) 174–75.
[62] For suggestions, see Lock (n 43).
[63] *Opinion 2/13* (n 1) para 191.
[64] Spaventa (n 6) 52.

the CJEU was accused of seeking to preserve the possibility of EU law providing 'less protection' than what would normally be required by the ECHR.[65] Interestingly, the mutual trust issue had not been considered by the negotiators at all and, as the case law of the ECtHR in this area shows, it is an issue that arises independently of accession.[66] Negotiators of a revised DAA will thus find it difficult to draft a clause accommodating the CJEU's concerns while at the same time securing the possibility of external scrutiny by the ECtHR that the EU and its Member States have lived up to the minimum standards required by the ECHR.[67]

Most problematic, perhaps, was the CJEU's demand that accession could not happen if the ECtHR was given jurisdiction to rule on CFSP matters over which the CJEU currently does not have jurisdiction. This objection has variously been described as 'pointless' given that the ECtHR in *Matthews* had already asserted jurisdiction over matters outwith the CJEU's jurisdiction;[68] as the court being 'selfish';[69] as ignoring the wishes of the Member States given that the reference to the 'specific characteristics' of EU law appears to ignore the fact that the Member States as masters of the Treaties expressly decided not to give the CJEU jurisdiction over some CFSP matters;[70] and as the 'creation of locks'[71] where there supposedly were none before, all of which imply that the CJEU was playing judicial politics rather than applying the law.

That the Opinion would go down badly in Strasbourg was therefore not surprising and a reaction followed swiftly. The then President of the ECtHR, Dean Spielmann, remarked in a speech that 'if there were to be no external scrutiny, the victims would first and foremost be the citizens of the Union'.[72]

Commentators have also warned of the wider ramifications of the Opinion. The far-reaching concept of autonomy espoused by the CJEU in *Opinion 2/13* could make it very difficult in practice for the EU to conclude international agreements and isolate the EU from international law.[73] Moreover, it raises questions of the EU's legitimacy both internally and externally if the EU is seen not to be willing or able to commit itself to external accountability mechanisms such as the ECHR.[74]

V. Follow-Up Developments – The Revised DAA

After *Opinion 2/13*, accession negotiations were on hold for many years and did not recommence until the autumn of 2020. They resulted in a revised DAA finalised in

[65] de Witte and Imamović (n 39) 701.

[66] Notably see the cases *MSS v Belgium and Greece* [2011] ECHR; and *Tarakhel v Switzerland* [2014] ECHR.

[67] On these concerns in more detail, see T Lock, The Future of EU Human Rights Law: Is Accession to the ECHR Still Desirable? (2020) 7 *Journal of International and Comparative Law* 427.

[68] Spaventa (n 6) 54.

[69] Odermatt (n 39) 791.

[70] de Witte and Imamović (n 39) 703?

[71] Wessel and Łazowski (n 39).

[72] D Spielmann, Solemn hearing for the opening of the judicial year of the European Court of Human Rights, 30 January 2015, available at www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf.

[73] Ziegler (n 52) 767.

[74] ibid 771.

March 2023.[75] The approach taken by the negotiators was to work with the existing DAA and 'fix' the issues identified in *Opinion 2/13*. Some could be rectified relatively straightforwardly: concerning the co-respondent, the revised DAA leaves the decision to become a co-respondent entirely with the EU, whose 'reasoned assessment' in this regard will be 'determinative and authoritative'.[76] In addition, there will be no exceptions to the joint responsibility of the EU and its Member State(s) in such a case;[77] and the revised DAA clarifies that reservations retain their effects in respect of co-respondents.[78] Following a similar pattern, the revised DAA leaves the decision on whether or not the ECtHR must facilitate a prior involvement of the CJEU to the EU.[79] A similar solution was found for inter-party cases between EU Member States: the EU will have to make an assessment as to whether such cases concern the interpretation and application of EU law. If they do, then the procedure provided for by Article 33 ECHR is not available to them. The same will be true for all inter-party applications between the EU and one or more of its Member States.[80] The negotiators also achieved the (technically unnecessary) coordination between Article 53 CFR and Article 53 ECHR by inserting a clarifying clause into the revised DAA, which states that Article 53 ECHR shall not be construed as precluding EU Member States from applying a legally binding common level of protection of human rights, provided that it does not fall short of the level required by the ECHR.[81]

As far as the remaining issues identified by the CJEU in *Opinion 2/13* are concerned, the solutions found in the revised DAA are less certain to satisfy the CJEU's demands. On Protocol No 16, the drafters might at first glance appear to have found an elegant solution. A new Article 5 of the DAA stipulates that a court or tribunal requesting an advisory opinion in accordance with the Protocol would simply not be considered a highest court or tribunal if the question falls within the field of application of EU law. Given that only highest courts can request an advisory opinion this would seem to resolve the problem identified by the CJEU in *Opinion 2/13*. However, in contrast to the solution found with regard to inter-party cases, where the EU is entrusted with providing an answer to this question, Article 5 revised DAA is silent on who decides whether a question falls within the scope of EU law. Similarly, as far as mutual trust is concerned, the revised DAA simply states that EU accession 'shall not affect the application of the principle of mutual trust within the European Union'.[82] This, however, raises the question of what 'mutual trust' is and, much more importantly, who gets to provide an authoritative answer.

If the CJEU continues its very strict stance on the autonomy of the EU legal order which became evident in *Opinion 2/13*, these two solutions might not make the cut. At the same time, the CJEU's case law on autonomy has developed since *Opinion 2/13* was

[75] Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms 46+1(2023)36.
[76] Revised DAA, Explanatory Report, para 61.
[77] Art 3(8) revised DAA.
[78] Art 2(3) revised DAA.
[79] Revised DAA, Explanatory Report, para 76.
[80] Art 4(3) and (4) revised DAA.
[81] Art 1(9) revised DAA.
[82] Article 6 revised DAA.

handed down, sending somewhat mixed messages as to how strictly the CJEU wishes to interpret that criterion. In *Achmea*,[83] the Court reaffirmed its findings in *Opinion 2/13* and tightened them in so far as the role of national courts and the preliminary reference procedure are concerned. The Court notably considered Article 344 TFEU to not only confer exclusive jurisdiction on the CJEU over disputes between Member States concerning EU law, but extended it to cover all disputes over EU law that would ordinarily fall within the jurisdiction of national courts.[84] Furthermore, the Court added a novel nuance to the autonomy principle by linking it to the preservation of the rule of law at EU level.[85]

In doing so the CJEU buttressed its strict approach to autonomy notably concerning the principle of mutual trust. Unsurprisingly, this development did not encounter much sympathy amongst academic commentators, who in this regard described *Achmea* as 'Opinion 2/13 on steroids'.[86] Roughly one year later, the Court pronounced once more on the meaning and scope of the autonomy principle in *Opinion 1/17*.[87] That Opinion featured two clarifications, which may appear obvious but had not been expressly spelled out: first, the fact that according to long-established CJEU case law any agreement concluded by the EU becomes an 'integral part of EU law'[88] does not prevent the EU from conferring jurisdiction to an international court or tribunal concerning the interpretation of that very agreement.[89] Second, such an international court or tribunal may consider EU law as fact.[90] Some commentators concluded that the Court had been 'no longer selfish'[91] or that 'it did not take the same cautious prenuptial agreement approach it took in Opinion 2/13'.[92] While subsequent case law would appear to support the thesis that *Opinion 1/17* represented continuation rather than rupture,[93] it should be acknowledged, however, that in *Opinion 1/17* the CJEU did not seek extra insurance policies against a CETA tribunal interpreting EU law, but was quite content with a clause excluding EU law from the applicable law before it.

The biggest question marks revolve around the treatment of the CFSP, however. Perhaps surprisingly the drafters decided not to include any provision on it in the revised DAA and instead left the matter to the EU to resolve. Given that EU treaty

[83] Case C-284/16 *Achmea* EU:C:2018:158.

[84] See also S Hindelang, 'Conceptualisation and application of the principle of autonomy of EU law – the CJEU's judgment in *Achmea* put in perspective' (2019) 44 *European Law Review* 383, 387–89.

[85] Note in particular the repeated references to Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.

[86] X Groussot and M-L Öberg, 'The Web of Autonomy of the EU Legal Order: *Achmea*' in G Butler and R Wessel (eds), *EU External Relations Law* (Hart Publishing, 2022) 927, 933.

[87] *Opinion 1/17 (CETA)* EU:C:2019:341.

[88] Since Case 181/73 *Haegeman v Belgium* (n 48).

[89] *CETA* (n 86) para 117.

[90] ibid paras 130–31.

[91] C Rapoport, 'Balancing on a tightrope: Opinion 1/17 and the ECJ's narrow and tortuous path for compatibility of the EU's investment court system (ICS)' (2020) 57 *Common Market Law Review* 1725.

[92] C Eckes, 'The autonomy of the EU legal order' (2020) 4 *Europe and the World*, doi:10.14324/111.444.ewlj.2019.19.

[93] Argued inter alia by K Bradley, 'Investor-State Dispute Tribunals Established under EU International Agreements: Opinion 1/17' in Butler and Wessel (eds) (n 85) 959, 964 ff; see notably Case C-741/19 *Komstroy* EU:C:2021:655.

change granting the CJEU full jurisdiction over the entire CFSP is not forthcoming, the EU-internal solution will have to take a different form.

One possible resolution might come from the CJEU's own case law concerning the limits of its jurisdiction over the CFSP. In Rosneft the CJEU had already confirmed its power to annul CFSP sanctions decisions in the context of preliminary rulings despite the more restrictive wording of Article 275(2) TFEU.[94] In *Neves 77 Solutions* the CJEU recently confirmed that it also has jurisdiction to interpret a CFSP decision where the Council has failed to implement that decision on the basis of Article 215 TFEU.[95]

The question whether the CJEU has jurisdiction to review the fundamental rights compliance of all CFSP-related matters was raised in *KS and KD*.[96] These were two appeals against General Court orders denying jurisdiction over damages actions based on Article 340(2) TFEU concerning alleged human rights violations (mostly failures to investigate) by the EU's EULEX KOSOVO mission, which had been conducted under the CFSP. In her Opinion, Advocate General Ćapeta argued that these were fundamental rights cases, jurisdiction over which 'cannot be excluded simply because that breach occurred in the context of the CFSP'.[97] The CJEU, however, took a different approach and rejected this line of argument. Notably, it held that the express exclusion of jurisdiction over the CFSP contained in Article 275 TFEU could not be circumvented by reference to other Treaty provisions, such as Article 47 CFR and more generally that the 'claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights is not in itself sufficient to declare that it has jurisdiction'.[98] That said, the Court reiterated that even within the CFSP the EU is bound by the basic principles of the EU legal order, which includes respect for the rule of law and fundamental rights. While therefore rejecting the broader argument that the restriction of its jurisdiction should be ignored where fundamental rights are at play, the Court was adamant to confirm its case law on restrictive measures. It furthermore restricted the exclusion of its own jurisdiction to decisions 'that are directly related to … political or strategic choices' made in the context of the CFSP. Despite narrowing down the exclusion, the CJEU stopped short of cutting the Gordian knot as suggested by AG Ćapeta. This means that there are still areas of fundamental rights-relevant CFSP action conceivable that are outside the CJEU's jurisdiction, so that the CFSP question remains to be resolved either by the Court itself in future cases or some other way.

VI. Concluding Remarks

The real test of whether the CJEU has tightened or somewhat relaxed the autonomy requirements will likely be a third CJEU Opinion on EU accession to the ECHR. Given

[94] Case C-72/15 *Rosneft* EU:C:2016:381.
[95] Case C-351/22 *Neves 77 Solutions* EU:C:2024:723.
[96] Joined Cases C-29/22 P and C-44/22 P *KS and KD* EU:C:2024:725.
[97] Joined Cases C-29/22 P and C-44/22 P *KS and KD* EU:C:2023:901, Opinion of AG Ćapeta, para 93.
[98] Joined Cases C-29/22 P and C-44/22 P *KS and KD* (n 98) para 73.

that accession negotiations have been concluded, such a request is only a matter of time. The outcome of any new accession Opinion is difficult to predict. The negotiators have tried – mostly successfully – to address the CJEU's concerns in the revised accession agreement. If the CJEU shows some flexibility, it may well be satisfied that the current version of the DAA is compatible with the EU Treaties. It would then remain a matter of ratification (viz politics) whether and when EU accession will materialise. In any event, *Opinion 2/13* will remain a landmark case in EU law.