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Implications of the Revised Draft EU Accession Agreement for the ECHR

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Abstract

This article explores the implications of the EU's accession to the ECHR from the ECHR perspective based on the revised Draft Accession Agreement (DAA 2023). The article analyses key procedural innovations in the DAA 2023, notably how the co-respondent mechanism, the prior involvement of the CJEU, and the DAA's solutions for advisory opinion requests and for dealing with the EU law concept of mutual trust would work. It exposes the EU's new role as a gatekeeper in relation to certain procedural questions. The article further contrasts the position of EU member states and non-EU member states post-accession by pointing out potential inconsistencies and assesses proposed solutions in light of their effectiveness and workability. The article suggests that, despite the considerable concessions made to the EU, EU accession to the ECHR would nonetheless result in a strengthening of the ECHR system and is thus worth the effort and compromises.

Keywords

EU – accession – ECHR – ECtHR – co-respondent – prior involvement – non-EU member states

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1 Introduction

This article explores the implications of the European Union's (EU) accession to the European Convention on Human Rights (ECHR or Convention) from the perspective of the ECHR. The assessment is based on the revised Draft Accession Agreement (DAA 2023), which was made public in March 2023.[1] There is now renewed political momentum behind accession: after the Court of Justice of the European Union (CJEU) had declared the 2013 version of the DAA to be incompatible with the EU treaties,[2] accession negotiations resumed in 2020 and a revised Draft Accession Agreement was published in March 2023 (the DAA 2023). The EU Commission President confirmed shortly thereafter that she wanted to see the EU 'join the European Convention on Human Rights as soon as possible';[3] and in their Reykjavík Declaration, the Council of Europe states emphatically welcomed the DAA 2023 and committed to its adoption to 'set relations between the Council of Europe and the European Union on a new path of reinforced co-operation'.[4]

The EU's accession to the ECHR will have a profound impact on the ECHR itself and the ECHR system more broadly. EU accession will necessitate amendments to the Convention, notably due to the introduction of new procedures designed to accommodate the EU as a unique contracting party to the ECHR. The most remarkable aspect of these procedural innovations is the exclusive role accorded to the EU in determining the applicability of certain ECHR procedures (such as the co-respondent mechanism, the prior involvement of the CJEU, but also inter-party cases between EU member states). Accession will further result in a starker differentiation between EU and non-EU member states, which will be particularly evident where a non-EU member state is applying EU law. Apart from these technical and procedural changes, the article assesses the wider implications of EU accession and shows that accession will likely result in an overall strengthening of the ECHR system.

While the article builds on the existing literature on EU accession, it is the first to provide an in-depth analysis of the procedural innovations in the

1 Council of Europe, 'Final Consolidated Version of the Draft Accession Instruments' (17 March 2023) 46+1(2023)36 (DAA 2023).

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

3 U von der Leyen, 'Speech by President von der Leyen at the General Debate 'United for Europe' of the Council of Europe Summit' (Reykjavik Summit, 17 May 2023): <https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2803>.

4 Council of Europe, 'Reykjavík Declaration: United Around Our Values' (17 May 2023): <https://edoc.coe.int/en/the-council-of-europe-in-brief/11619-united-around-our-values-reykjavik-declaration.html>.

DAA 2023 from the perspective of the ECHR.[5] By contrast, most of the existing literature – which typically goes back to the time the previous version of the DAA was published in 2013 – is based on an EU-perspective. In particular, the article is a first in exploring the difficult post-accession position of non-EU member states that nonetheless apply EU law (directly or indirectly) and the consequences for the overarching principle of equality of the Convention parties. The article is the result of doctrinal research incorporating the analysis of EU law, the law of the ECHR and Council of Europe, and international law. The significance of the article lies in its contribution to a proper understanding of the procedural changes to the ECHR that accession would bring; and in providing an evidence-based argument in favour of EU accession to the ECHR weighing up the advantages and drawbacks of the solutions found in the DAA 2023. Overall, the article comes to the conclusion that – despite the compromises made – EU accession to the ECHR based on the DAA 2023 is going to strengthen the ECHR system and human rights protection in Europe as a whole and should therefore be welcomed.

The article is structured as follows: in a first step, it provides a brief background to the DAA 2023; it secondly explores the key procedural innovations in the DAA 2023 with a particular focus on the EU's unique role as gatekeeper in relation to certain procedural questions; the article thirdly contrasts the position of EU member states and non-EU member states post-accession by pointing out potential inconsistencies and assessing proposed solutions; it fourthly suggests that EU accession would result in a strengthening of the ECHR system as a whole, before concluding that EU accession to the ECHR is overall worth the effort and compromises.

2 EU Accession to the ECHR – A Long Time in the Making

EU accession to the ECHR has been under discussion for more than 40 years.[6] After the CJEU had found in Opinion 2/94[7] that the EU lacked competence to accede to the ECHR, an express provision granting such competence and even stipulating a duty to accede was included in the Lisbon Treaty.[8] In addition,

5 The DAA 2023 is discussed more broadly by P Gragl in this Issue.

6 A first test balloon was launched in 1979: European Commission, 'Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2 May 1979) COM/1979/0210 final.

7 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECLI:EU:C:1996:140.

8 Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU) Article 6, supplemented by Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C307/1, Protocol No 8 (Lisbon Treaty).

Protocol No 14 to the ECHR amended the ECHR by adding Article 59 (2), which states: 'The European Union may accede to this Convention.'

A first attempt at accession was made soon after the entry into force of both the Lisbon Treaty and Protocol No14. It resulted in a draft accession agreement published in early 2013 (DAA 2013).[9] This draft agreement was laid before the CJEU for an assessment of its compatibility with EU law. In the resulting Opinion 2/13, however, the CJEU found that the accession agreement was incompatible with the treaties, most notably with the autonomy of the EU legal order.[10]

Following Opinion 2/13, there was a hiatus in accession negotiations, which did not recommence until the autumn of 2020. They concluded in March 2023 with the DAA 2023,[11] which is a reworked version of the DAA 2013. The EU is next expected to adopt a suite of internal rules, which – as will be shown below – will be necessary to make the DAA work in practice. It is almost certain that the DAA 2023 will then be put before the CJEU again for an opinion on its compatibility with the EU treaties.[12] Assuming that the CJEU gives the green light, the DAA 2023 will need to be ratified by the EU and all 46 Council of Europe states.[13]

In the meantime, any individual application brought against the EU will continue to be inadmissible *ratione personae*.[14] Following an established line of European Court of Human Rights (ECtHR) case law, the EU member states can be held responsible if a violation of the ECHR resulted from their EU law obligations. In the case of *Matthews v the United Kingdom*, the ECtHR famously held that:

> 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.[15]

9 Council of Europe, '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' (10 June 2013) 47+1(2013)008rev2 (DAA 2013).

10 Opinion 2/13 (n 2).

11 DAA 2023 (n 1).

12 This procedure is laid down in Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C115/01 (TFEU) Article 218 (11).

13 Ibid Article 218 (6) and (8), which stipulate that the DAA 2023 (n 1) can only be adopted by way of unanimity in the Council and with the consent of the European Parliament.

14 *Confédération Française Démocratique du Travail v European Communities* 8030/77 (ECmHR, dec, 10 July 1978).

15 *Matthews v the United Kingdom* [GC] 24833/94 (ECtHR, 18 February 1999) para 32.

This general rule was subsequently modified in the *Bosphorus v Ireland*[16] case, which concerned an alleged violation of the right to property guaranteed in Article 1 Protocol No 1 ECHR because Ireland had impounded an aircraft on the basis of an EU sanctions regulation. There was no discretion for the member states. For such cases, the ECtHR adapted the approach found in *Matthews* and introduced a rebuttable presumption of compatibility on the basis of the doctrine of equivalent protection: since the EU provided human rights protection equivalent (viz comparable, not necessarily identical) to what the Convention requires, there is a 'presumption [...] that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation' (ie, if the member state did not have discretion). The 'presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'.[17] The *Bosphorus* presumption has been fleshed out further in a rich set of follow-up cases, a detailed discussion of which would go beyond the scope of this paper.[18]

A further modification to the rule in *Matthews* followed in the case of *Connolly v 15 EU Member States*, in which a former EU civil servant alleged a violation of his Article 6 ECHR rights due to alleged deficits in the procedure before the Court of Justice.[19] He had challenged his own dismissal from the EU's civil service following the publication of a highly EU-critical book that he had authored. The ECtHR found that the alleged violation was not attributable to any of the (then) 15 EU member states because no member state institution had been involved in the proceedings: only EU institutions were involved in the dismissal and the subsequent legal challenge. At no point did any of the member states intervene, be it directly or indirectly.[20]

16 *Bosphorus v Ireland* [GC] 45036/98 (ECtHR, 30 June 2005).

17 Ibid paras 155–156. A manifest deficit was only ever found in one case, see *Bivolaru et Moldovan v France* 40324/16 and 12623/17 (ECtHR, 25 March 2021).

18 For example, *Michaud v France* 12323/11 (ECtHR, 6 December 2012), in which the ECtHR denied the applicability of *Bosphorus* (n 16) to EU Directives and further clarified the need for a prior preliminary ruling; as well as *Avotiņš v Latvia* [GC] 17502/07 (ECtHR, 23 July 2016), in which the ECtHR further refined the need for the deployment of the 'full potential of the preliminary reference procedure', as well as the manifest deficit criterion. For a discussion of *Bosphorus*-related case law see, for example, T Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015) 190–212.

19 *Connolly v 15 Member States of the European Union* 73274/01 (ECtHR, 9 December 2009).

20 This was subsequently narrowed down, such as in *Kokkelvisserij v the Netherlands* 13645/05 (ECtHR, 20 January 2009) where the ECtHR deemed it sufficient for member state involvement that a national court made a reference to the CJEU, even though the alleged violation concerned an alleged defect in the CJEU's procedural rules.

3 Procedural Innovations in the DAA 2023

3.1 *The Difficulty of Fitting in the EU*

The difficulty with the EU's membership of the ECHR is that it will differ from that of all other Convention parties in that the EU will be a party whose member states remain fully bound by the Convention. Because of the EU's 'executive federalism', the member states typically execute EU law, which makes rules on the attribution of responsibility necessary.[21] The facts of the *Bosphorus* case[22] are instructive in this regard: Ireland as an EU member state was under a legal obligation found in an EU Regulation – itself based on a UN Security Council Resolution[23] – to impound Bosphorus Airline's aircraft. The airline alleged that this was contrary to its right to property guaranteed by Article 1 Protocol 1 ECHR. If the EU had been a party to the ECHR at the time, it would have been necessary to answer the question of who should be responsible for the alleged violation: the EU (as the entity legislating) or Ireland (as the entity executing) or both; and if the latter how should that responsibility be allocated between them? One can conceive of numerous other examples that can give rise to this kind of conundrum, for instance: member state A is asked to execute a European Arrest Warrant (EAW) issued by member state B. The person named in the EAW (and subsequently arrested by A and surrendered to B) brings an individual complaint to the ECtHR claiming that the prison conditions in B were contrary to Article 3 ECHR and that the surrender should not have happened. The requested person might additionally claim that the EAW Framework Decision[24] was itself flawed (eg, in that it violated Article 6 ECHR) and/or that member state A had violated the requested person's Convention rights by subjecting them to inhuman and degrading treatment in the process of surrender. Who would be responsible in each of these scenarios?

One way of answering this question would be to allow the ECtHR to develop its own rules on the attribution of conduct and on allocating responsibility, based on Article 1 ECHR or alternatively to have recourse to general international law standards. This is what the ECtHR is doing already where an

21 Contrast this with other federal systems – Germany, Belgium, Austria, Switzerland – that are bound by the ECHR: only the federation is a party and is responsible even for exercises of sovereignty by its constituent parts. On executive federalism, see, for example, R Schütze, *European Union Law* (3rd edn, Oxford University Press 2021) 347–352.

22 *Bosphorus* (n 16).

23 On this aspect of the case, see, for example, VP Tzevelekos, 'When Elephants Fight it is the Grass That Suffers: "Hegemonic Struggle" in Europe and the Side-Effects for International Law', in *Human Rights Law in Europe*, K Dzehtsiarou and others (eds), (Routledge 2014) 9.

24 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States [2002] OJ L 190/1.

application is brought against more than one Convention state: with respect to each respondent, applying Article 1 ECHR, the ECtHR examines whether the act or omission complained of occurred within the jurisdiction of the state concerned.[25]

As Opinion 2/13 showed, however, such an approach would be incompatible with EU law. As the CJEU has made clear, international agreements concluded by the EU – such as the DAA – must not undermine the 'autonomy of the EU legal order'.[26] This means that international agreements must not: a) give an international court the power to interpret EU law in a binding manner (this is the sole privilege of the CJEU flowing from its exclusive jurisdiction found in Article 344 TFEU);[27] b) give an international court power to decide on the allocation of competences between the EU and its member states (this also confirms the CJEU's exclusive jurisdiction);[28] or c) alter the essential character of the powers of the EU's institutions (namely, there must be no EU treaty change through the back door).[29] The autonomy of EU law meant that the CJEU declared several aspects of the DAA 2013 to be incompatible with EU treaties, so that the EU was prevented from ratifying it.[30]

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25 Article 1 ECHR – an example of these rules being spelled out and applied can be found in *Catan and Others v The Republic of Moldova and Russia* [GC] 43370/04, 18454/06, and 8252/05 (ECtHR, 19 October 2012).

26 Going back to Opinion 1/91 *Agreement on the European Economic Area* [1991] ECLI:EU:C:1991:490. For more detail, see T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *Common Market Law Review* 1025.

27 TFEU (n 12). An exception is the agreement entered into itself, see Opinion 1/17 *CETA* [2019] ECLI:EU:C:2019:341, para 118.

28 Opinion 1/91 (n 26) paras 30–34.

29 Ibid.

30 Opinion 2/13 (n 2). For critical discussions see, for example, 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; 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 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; 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; 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; 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; 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. For analyses with a little more sympathy, see D Halberstam, '"It's the

3.2 *The Solution: The EU as a Gatekeeper*

As indicated above, the DAA 2023 is a reworked version of the DAA 2013 and expressly addresses most of the issues identified by the CJEU. As will be shown, the way in which the drafters tried to overcome the challenges posed by the autonomy of the EU legal order identified in Opinion 2/13 is by giving the EU a decisive procedural role in: a) the decisions on the applicability of the co-respondent mechanism; b) the connected prior involvement of the CJEU; and c) the availability of inter-party applications for cases between EU member states. Interestingly, no such procedural role is envisaged for advisory opinions, though the DAA 2023 envisages them to be available to EU member states only where EU law is not at issue. Moreover, the DAA 2023's approach to the EU law principle of mutual trust remains cryptic. Finally, the DAA 2023 is silent on the Common Foreign and Security Policy (CFSP).

3.2.1 Co-Respondent Mechanism and Prior Involvement

The DAA 2023 gives the EU the role of a procedural gatekeeper in respect of the co-respondent mechanism and the connected prior involvement of the CJEU. It will be for the EU to assess whether the conditions for the co-respondent mechanism and prior involvement are met. The ECtHR is expressly excluded from questioning this assessment, so that the procedural decision rests entirely with the EU. The following sections analyse the procedural mechanics and provide a normative assessment, which concludes that in addition to the ECtHR losing control over parts of the procedure, there is a risk that the EU will adopt an overly restrictive approach and thus partially thwart the benefits that the co-respondent mechanism would have for an applicant.

3.2.1.1 *Co-Respondent Mechanism*

The co-respondent mechanism is the key innovation of the DAA. It provides an answer to the question outlined above on who should be held responsible. It builds on a rule of attribution of conduct found in Article 1 (4) DAA 2023, 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, including decisions taken under 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.

> Treaty on European Union and under the Treaty on the Functioning of the European Union.

This means that any member state conduct will be attributed to the member state concerned, even if it was prompted or indeed required by EU law. This is no different to the current situation pre-accession.[31]

Once conduct has been attributed to either the EU or a member state, the question of responsibility arises. This is where the co-respondent mechanism comes into play. It differs from the existing third-party intervention found in Article 36 (1) and (2) ECHR in the following respects: first, the co-respondent is a party to the case; and, second, if a violation is found, respondent and co-respondent are jointly responsible.[32] The co-respondent mechanism therefore aims to ensure an allocation of ultimate responsibility for violations of the ECHR, which guarantees that the entity capable of removing that violation is bound by the judgment of the ECtHR.

Article 3 (1) DAA will add a fourth paragraph to Article 36 ECHR, which reads:

> The [EU] or a member State of the [EU] may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the [DAA]. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

The DAA itself then provides the details. It distinguishes three scenarios: a) the EU joins as a co-respondent in proceedings brought against a member state; b) one or more member states join as co-respondent(s) in proceedings brought against the EU; c) proceedings are brought against both the EU and one or more member states and the status of either is changed to that of co-respondent.

A *Bosphorus*-type scenario would be dealt with by Article 3 (2) DAA, which says:

> Where an application is directed against one or more member States of the [EU], 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 [EHCR] of a provision of [EU] law, including decisions taken under the [EU treaties], notably where that violation could have

31 See above at section 2.

32 DAA 2023 (n 1) Article 3 (8).

> been avoided only by disregarding an obligation under European Union law. The Court shall make available to the European Union information concerning all such applications that are communicated to its member States.

In a scenario like *Bosphorus*, the act of impounding the aircraft would be attributable to the member state (Ireland) in the first instance, even though the member state had no discretion. However, given that the legal basis for Ireland's action was an EU Regulation and that ECHR-compatibility of this EU Regulation was called into question, the EU could be brought in as a co-respondent. In light of the object and purpose of the co-respondent mechanism, this makes sense. After all, the EU alone is capable of removing the violation (if one is found).

Article 3 (3) DAA deals with the – in practice much rarer – reverse scenario, in which an alleged violation is attributed to the EU, but its root cause is found in the EU treaties or other EU primary law, which only the member states can amend.[33] The provision says:

> Where an application is directed against the [EU], the [EU] 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. The Court shall make available to the member States of the [EU] information concerning all such applications that are communicated to the [EU].

Much of this will be fact dependent. *Matthews* provides a useful illustration here. The applicant had applied to be included on the electoral register for European Parliament elections, was refused, and then complained against that refusal. Applying Article 1 (4) DAA, the conduct (refusal to enter on the electoral register) would be attributable to the member state. However, the root cause for the refusal was the EU Act on Direct Elections, which had deprived the applicant of her vote. Applying Article 3 (2) DAA, the EU could therefore become co-respondent. After accession, however, Ms Matthews could have

33 The procedure for a revision of the EU treaties is laid down in TEU (n 8) Article 48.

also brought her case directly against the EU (without having to first apply for inclusion in the electoral register) as the EU Act on Direct Elections directly resulted in her exclusion from the franchise. In that case, the conduct allegedly violating the ECHR (exclusion of Gibraltar residents from the franchise) would have been attributable only to the EU. There would then be a question over the 'compatibility with the rights at issue defined in [Protocol No 1] 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 [viz the EU Act on Direct Elections, which forms part of EU primary law]',[34] so that the member states could become co-respondents.

The third option of a case being brought simultaneously against the EU and one or more member states is found in Article 3 (4) DAA, which allows for a status change from respondent to co-respondent if the conditions for the co-respondent mechanism are met. This option does not raise any additional issues.

The innovation in the DAA 2023 compared with the DAA 2013 concerns the procedures for activating and for terminating the co-respondent mechanism. Article 3 (5) DAA 2023 says that the EU or a member state become co-respondent 'either by accepting an invitation from the Court or upon their initiative'. A close reading of the DAA 2023 and its explanatory report is needed to shed light on the precise process on the ECtHR-side.[35]

According to the final sentences of Article 3 (2) and (3) DAA 2023, the ECtHR must make available to the prospective co-respondent information concerning applications 'communicated to the [respondent]'. Cases are only communicated to a respondent if they have not been declared inadmissible or struck out of the ECtHR's list of cases.[36] Inadmissibility decisions include decisions that an application is manifestly ill-founded,[37] so that even in such cases – where the ECtHR engages in a cursory review of the merits of the case – the co-respondent mechanism would not apply. This puts flesh on the bones of the envisaged Article 36 (4) ECHR, which expressly states that the admissibility is to be 'assessed without regard to the participation of a co-respondent in the proceedings'. This means in all likelihood that most cases brought against the EU member states or the EU after accession will be dismissed without the

34 DAA 2023 (n 1) Article 3 (3). Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage [1976] OJ L 278/5.

35 The precise internal EU rules on this remain to be published.

36 See Article 54 (2) (b) of the Rules of Court; the criteria for striking out a case are found in Article 37 ECHR.

37 See Article 35 (3) (a) ECHR; this is expressly reiterated in the DAA 2023 (n 1) Explanatory Report, para 59.

need to inform a potential co-respondent. After all, according to the ECtHR's statistics for 2023, more than 75% of cases were either deemed inadmissible or struck out.[38]

As to the timing of a decision to join the EU – or a member state as the case may be – as a co-respondent, the key point in time will be the communication of the case to the respondent. There are two possible scenarios: either the ECtHR invites the potential co-respondent(s) to join at the same time as it is communicating the case; or the ECtHR simply informs the potential co-respondent(s) of the fact that the case has been communicated to the respondent. According to the explanatory report, in the former case, the ECtHR may stipulate a time-limit for its acceptance.[39] In the latter case, the request by the potential co-respondent to join must 'happen in a timely manner'.[40] Here the question arises whether the ECtHR would be in a position to deny a request if it considers it to be untimely. Given that the requirement to respond in a timely manner is not laid down in the actual agreement, but only mentioned in the explanatory report accompanying the DAA 2023, this will only be realistic in extreme circumstances, which would amount to an abuse of process or similar.[41]

In both scenarios, however, Article 3 (5) DAA 2023 applies, which must be considered the crucial difference in regard of the co-respondent mechanism compared with the DAA 2013. It says: 'The Court shall admit a co-respondent by decision if a reasoned assessment by the European Union sets out that the conditions in paragraph 2 or 3 of this article are met'. This formulation was included as a direct response to Opinion 2/13, in which the CJEU had found fault with the requirement that a co-respondent request had to be considered plausible by the ECtHR as such a plausibility assessment would interfere with the autonomy of the EU legal order.[42]

The DAA 2023 therefore takes any decision to join a co-respondent out of the ECtHR's hands and instead grants it exclusively to the EU. All the EU will have to do is to provide a 'reasoned assessment' setting out that the conditions

38 ECtHR, 'Annual Report 2023' (2024): <https://www.echr.coe.int/documents/d/echr/annual-report-2023-eng> 110.

39 DAA 2023 (n 1) Explanatory Report, para 62.

40 Ibid Explanatory Report, para 61.

41 On the very rarely used doctrine of abuse of process in international law see, for example, C Ceretelli, 'Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?' (2020) 11 *Journal of International Dispute Settlement* 47; Lock (n 18) 54; F Baetens, 'Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?' (EJIL: Talk!, 15 October 2019): <https://www.ejiltalk.org/abuse-of-process-and-abuse-of-rights-before-the-icj-ever-more-popular-ever-less-successful/>.

42 Opinion 2/13 (n 2) paras 224–225.

for joining a co-respondent are met. This will be the case in both scenarios (ie, whether it is the EU joining as co-respondent or one or several member states). No review of this reasoned assessment by the ECtHR is envisaged. This follows from the explanatory report, according to which the 'reasoned assessment by the EU will be considered as determinative and authoritative'.[43] This makes it clear that the ECtHR must not second guess the EU's assessment. In legal terms, the explanatory report – if adopted by all parties to the accession agreement – must be considered an authentic – and thus legally binding – interpretation of the accession agreement and is therefore conclusive.[44]

3.2.1.2 *Prior Involvement Mechanism*

The DAA 2023 also gives the EU the decisive say on whether a prior involvement of the CJEU takes place. The prior involvement procedure is found in Article 3 (7) DAA 2023 and has the purpose of ensuring compliance with the principle of subsidiarity on which the ECHR is built.[45] The prior involvement mechanism is designed to address a situation in which during the national proceedings before the courts of the respondent EU member state the CJEU was not involved via a preliminary ruling.[46] In such a situation, Article 3 (7) DAA decrees:

> [...] sufficient time shall be afforded by the Court for the [CJEU] to make such an assessment [...]. The [EU] 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, including to make a final determination of whether there has been a violation of the Convention.

The previous version of the DAA contained essentially the same provision but was silent on who was to decide whether a prior involvement was necessary or not. Since it could not be excluded that it would be left to the ECtHR, which

43 DAA 2023 (n 1) Explanatory Report, para 62.

44 On authentic treaty interpretation, see, for example, K Berner, 'Authentic Interpretation in Public International Law' (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 845.

45 See the ECHR preamble as amended by Protocol No 15.

46 Found in TFEU (n 12) Article 267. The preliminary ruling procedure allows a national court to ask the CJEU for an interpretation of all EU law and for rulings on the validity of secondary EU law. Highest national courts are under an obligation to make such references, but there are exceptions: if either the interpretation of EU law is obvious (acte clair) or if there is a CJEU precedent providing an answer (acte éclairé). See Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR I-3417 ECLI:EU:C:1982:335. The CJEU's judgments are binding.

would involve the ECtHR interpreting the case law of the CJEU, the CJEU considered this to be contrary to the autonomy of the EU legal order.[47] The CJEU also demanded that this assessment would be made by the EU itself, which is now reflected in the amended explanatory report. The EU's finding in this regard will be 'determinative and authoritative'.[48] In other words, the ECtHR will be bound by this and will have to suspend proceedings for as long as the CJEU's involvement takes.

Details of the prior involvement process will be determined by the EU's internal rules. Apart from question marks over which EU institution will be tasked with initiating the prior involvement, there are questions over the precise process before the CJEU. It is likely that that process will be modelled on the preliminary reference procedure and enacted via an amendment to the CJEU Statute,[49] though it would probably be the EU Commission – and not the ECtHR – that formulates the questions for the CJEU based on the ECtHR proceedings. It is also not clear what the effects of the CJEU's decision would be: would they be confined *inter partes* or would the CJEU be empowered to declare EU law invalid with *erga omnes* effect?

Once the prior involvement has finished at EU level, proceedings can resume before the ECtHR. Crucially, even a finding by the CJEU that there has been a violation of fundamental rights does not automatically affect the powers of the ECtHR to determine whether there has been a violation of the Convention. That is, even if the CJEU acknowledges a violation (and even remedies it as far as possible), the ECtHR remains seized of the dispute. In fact, the explanatory report expressly states that the CJEU's assessment will not bind the ECtHR.[50] Nonetheless, depending on the circumstances, there are a number of procedural options if the matter has been resolved in the eyes of the ECtHR: first, the ECtHR could find that the applicant has lost their victim status and declare the case inadmissible;[51] second, the ECtHR may strike out the application if the conditions set out in Article 37 ECHR are met; third, the CJEU's determination could prompt the parties to reach a friendly settlement (Article 39 ECHR).

47 Opinion 2/13 (n 2) paras 238–239.

48 DAA 2023 (n 1) Explanatory Report, para 76.

49 Protocol (No 3) on the Statute of the Court of Justice of the European Union [2012] OJ L 228/1. Even though the Statute is a Protocol to the EU treaties, it can be amended on the basis of TFEU (n 12) Article 281 by way of the ordinary legislative procedure, ie, by the European Parliament and the Council.

50 DAA 2023 (n 1) Explanatory Report, para 78.

51 Apart from a removal of the violation this may also require the payment of compensation or similar, see D Harris and others, *Law of the European Convention on Human Rights* (5th edn, Oxford University Press 2023) 91.

3.2.1.3 *Co-Respondent and Prior Involvement: Assessment*

The modifications contained in the DAA 2023 put the EU into the role of a gatekeeper when it comes to the co-respondent mechanism and the prior involvement of the CJEU. Such a position would appear unproblematic as far as the EU's own co-respondent status is concerned: after all, the co-respondent mechanism was always designed to be voluntary.[52] What is new, however, is that the EU's power to determine the applicability of the co-respondent mechanism goes further in a number of respects: first, the explanatory report to the DAA 2023 clarifies that not only the EU, but also its member states will 'accept to become co-respondent if the reasoned assessment by the EU concludes that the material conditions [...] are met'.[53] Interestingly in this regard, Article 3 (5) DAA does not require a 'reasoned assessment' if the conditions are *not* met. That may yet prove problematic (and may still be required by the EU law duty of loyal cooperation and a duty to give reasons)[54] in cases in which a member state wishes to join a case brought against the EU but the EU refuses that.[55]

Second, the EU may subsequently terminate the co-respondent status by way of reasoned assessment. This results from a new clause included in the DAA 2023 and found in Article 3 (6) DAA 2023 which says that the 'Court shall terminate the co-respondent mechanism by decision at any stage of the proceedings only if a reasoned assessment by the [EU] sets out that the conditions in paragraph 2 or 3 of this article are no longer met'. Again, this is not confined to the EU's own status as co-respondent, but extends to the member states; and again, this cannot be questioned by the ECtHR.

Third, in a unilateral declaration annexed to the DAA 2023, the EU has promised to tie its own hands by ensuring that 'it will request to become a co-respondent to the proceedings before the [ECtHR] or accept an invitation by the Court to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met'.[56] While this is technically a binding

52 See DAA 2013 (n 9) Explanatory Report, para 53.

53 DAA 2023 (n 1) Explanatory Report, para 62.

54 The basis for such a duty would probably be found in the duty of loyal cooperation given that TFEU (n 12) Article 296 only applies to 'legal acts' and Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (CFR) Article 41 (2) only obliges the EU to give reasons in proceedings involving individuals.

55 The member states could still apply to become third-party interveners: if the applicant has the nationality of one of the member states, that member state has a right to become third party; in all other cases, this will depend on the discretion of the ECtHR's President.

56 DAA 2023 (n 1) Appendix 2: Draft Declaration by the European Union to be Made at the Time of Signature of the Accession Agreement.

commitment under international law,[57] it may not amount to much in practice. This follows from the fact that it cannot be considered reviewable by the ECtHR. The reason is that any review by the ECtHR would run counter to the whole purpose of giving the EU the power to decide on the applicability in the first place, which is to remove the decision-making power from the ECtHR to protect the autonomy of the EU legal order. Hence, compliance with this unilateral commitment is entirely in the EU's own hands.

It is important to note that the EU's internal process for the 'reasoned assessment' is yet to be devised (or at least made public). Institutionally, it is likely that the EU Commission will be charged with providing it (and within the Commission probably the Commission's legal service). It will remain to be seen what factors will drive the EU's decisions in this regard. Research on third-party interveners – the next closest 'relative' of the co-respondent mechanism – conducted by Dzehtsiarou suggests that the decision of states to apply to become third-party interveners in cases before the ECtHR is mostly driven by self-interest.[58] They intervene in particular to influence the ECtHR's case law, notably when they believe that they may be faced with a similar legal issue in the future.[59] If the EU is similarly motivated by self-interest, this could go one of two ways: either the EU will define its self-interest in accordance with the natural instincts of any (potential) respondent in legal proceedings and be reluctant to join proceedings. Alternatively, it will develop an attitude of wanting to be involved (and thereby being given an element of control) in as many cases against an EU member state as possible. If the latter is the case, this would have repercussions for the length of proceedings before the ECtHR as it may result in a frequent need for a prior involvement of the CJEU and thus procedural delays.

From a principled perspective, it is remarkable that the ECtHR will lose control over important parts of the process. In the case of applications to become a third-party intervener, the ECtHR must grant the right to

57 Though not mentioned as a source of international law in Article 38 of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ), it is widely accepted that unilateral acts can be binding in nature provided that there is an intention to be bound on part of the subject of international law making them. See, for example, *Nuclear Tests* (*Australia v France*) (Judgment) [1974] ICJ Reports 253, para 43; International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) UN Doc A/61/10, 366.

58 K Dzehtsiarou, 'Conversations with Friends: 'Friends of the Court' Interventions of the State Parties to the European Convention on Human Rights' (2023) 43 *Legal Studies* 381, 390–396.

59 Ibid 383.

intervene only to the state of nationality of the applicant; all other requests for intervention are at the discretion of the ECtHR's President.[60] Yet, third-party interveners are just that: a third party. Unlike the co-respondent, which is a party to the dispute, they do not have full participation rights. It should therefore be considered highly unusual for the EU to be given the far-reaching procedural powers envisaged by the DAA 2023.

From an applicant's perspective, the co-respondent mechanism has the practically useful advantage of resulting in joint responsibility of both EU and the member state(s) concerned in case of a judgment finding a violation. This greatly enhances the chances of enforcement in two ways: first, the Council of Ministers – the body tasked by Article 46 ECHR with the supervision of the execution of judgments – will scrutinise compliance not only by the respondent but also by the co-respondent. Second, Article 4 (3) TEU places the EU and its member states under obligations of loyalty towards each other.[61] This means that in case of a judgment finding a violation, they are not only obliged to compliance by virtue of the ECHR, but also by virtue of EU law, which is then enforceable before the EU courts (eg, by way of infringement proceedings brought by the European Commission against a member state[62] or by way of an action brought by a member state against the EU institution that is obliged to act).[63]

The precise arrangements of the co-respondent mechanism have potential downsides for the applicant as well, however. First, there is the danger of the EU trying to avoid liability by adopting a very strict test for its own involvement (or concerning the termination of the co-respondent status), thus greatly reducing the advantages just described. The criteria for the application of the co-respondent mechanism are not entirely straightforward so that it is conceivable that in the end a violation can only be removed if the EU (or in the reverse scenario the member state) is involved despite having decided either not to join as co-respondents or to terminate the co-respondent status. Second, the EU's attitude to the prior involvement of the CJEU will also be critical. If it regularly requires this to occur, the applicant may be facing significant delays and, more problematically still, additional costs, depending

60 Article 36 (1) ECHR; here too the ECtHR routinely informs the state of nationality of applications lodged by their nationals against other states to give them a chance to intervene.

61 For details, see, for example, M Klamert, 'Article 4 TEU', in *The EU Treaties and the Charter of Fundamental Rights*, M Kellerbauer, M Klamert, and J Tomkin (eds), (2nd edn, Oxford University Press 2024).

62 TFEU (n 12) Article 258.

63 Ibid Article 265.

on whether the CJEU will charge for the prior involvement, whether it will involve representations by the parties – it would be difficult to see how it could not in light of Article 6 ECHR –, and whether there would be an oral hearing.

3.2.2 Inter-Party Applications

Article 4 DAA – dealing with inter-party applications – also had to be redrafted to reflect the issues identified by the CJEU in Opinion 2/13 in relation to the autonomy of the EU legal order and more specifically in relation to Article 344 TFEU.[64] That provision gives the CJEU exclusive jurisdiction over disputes between member states that concern the interpretation or application of EU law.[65] The CJEU thus required the express exclusion of the ECtHR's jurisdiction over disputes between member states.[66] Instead, member states must bring infringement proceedings according to Article 259 TFEU before the CJEU, which, crucially, give the European Commission an opportunity to be involved.

Article 4 (3) DAA now excludes all inter-party applications between the EU and its member states, as by their very nature these would involve the interpretation or application of EU law. By contrast, inter-party applications between two member states are more difficult to assess because not all inter-party disputes between EU member states necessarily concern EU law.

Inter-state applications between member states are rare, but not unheard of. The only such case resulting in a judgment on the merits was *Ireland v the United Kingdom*.[67] That case concerned violations of Article 3 ECHR – prohibition of torture, inhuman or degrading treatment or punishment – which had occurred in Northern Ireland and were entirely unconnected to the two states' EU membership.[68] *Latvia v Denmark*[69]concerned the possible extradition of a Latvian national to South Africa by Denmark, and in *Slovenia v Croatia*[70] Slovenia alleged a violation of Articles 6, 13, 14, and 1 of Protocol No 1 by Croatia because Croatia allegedly prevented a Slovene bank from enforcing and collecting debts in Croatia. These cases were resolved out of court and declared inadmissible respectively. Both could have potentially involved questions of EU law, however, touching on the law around the free movement

64 Lisbon Treaty (n 8) Article 3 of Protocol No 8 (which deals with EU accession to the ECHR) reiterates the need to protect TFEU (n 12) Article 344.

65 For more detail on this provision, see Lock (n 18) 77 et seq.

66 Opinion 2/13 (n 2) para 213.

67 *Ireland v the United Kingdom* [Plenary] 5310/71 (ECtHR, 18 January 1978).

68 It should be noted that the material events in the case occurred before the accession of the two states to the EU.

69 *Latvia v Denmark* 9717/20 (ECtHR, dec, 9 July 2020).

70 *Slovenia v Croatia* [GC] 54155/16 (ECtHR, dec, 18 November 2020).

of EU citizens[71] and the enforcement of judgments or the free movement of services or capital.[72]

Hence, the drafters had to find a solution that would allow for inter-party cases unrelated to EU law to go ahead, but for cases involving EU law to be excluded. Following the model set by the redrafted co-respondent mechanism, the DAA 2023 achieves this by requiring the ECtHR to provide the EU 'upon request with sufficient time to assess […] whether and to what extent an inter-party dispute […] between member States of the European Union concerns the interpretation or application of European Union law.'[73] An assessment by the EU will therefore be decisive as to whether an inter-party application according to Article 33 ECHR between two EU member states is admissible.

Again, a procedural question is to be resolved by the EU. In practical terms, this may not be of huge importance given the low number of inter-party cases. Nonetheless, the DAA gives the EU the power to determine which potential inter-party applications between EU member states are admissible and which ones are not.

In symbolic terms this is a big step, which might reinforce a suspicion that the EU is given the status of a 'super-party' to the ECHR. This is particularly so because where inter-party cases are concerned, the EU's role differs to that in the co-respondent and prior involvement scenarios, in that the EU itself is not even a potential party to the dispute. In a co-respondent scenario, one could imagine the EU institution tasked with making the decision to adopt an inclusive approach trying to get the EU involved as much as possible to influence the outcome of the case. The EU's role could potentially morph into a constructive one. By contrast, in the case of a possible inter-party application between two member states, the task of the EU institution would be to protect the autonomy of the EU legal order from outside interference. In other words, it would be to protect the jurisdiction of the CJEU over EU law by not allowing such cases to proceed. The EU's role would therefore amount to that of a guardian of the EU treaties compared with the co-respondent scenario where the EU's primary motivation will be to decide on its own involvement. In other words, the EU's role would be to obstruct.

71 See, for example, Case C-182/15 *Petruhin* [2016] ECLI: EU:C:2016:630, which stipulates a duty to consult with the member state of nationality in such a case.

72 See, for example, Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1 and TFEU (n 12) Articles 56 and 63, respectively.

73 DAA 2023 (n 1) Article 4 (4).

3.2.3 Advisory Opinions – The Odd One Out?

In Opinion 2/13, the CJEU also took issue with the lack of coordination between the accession agreement and Protocol No 16, which has so far been ratified by ten EU member states.[74] Accordingly, the highest courts of these ten states can request advisory opinions from the ECtHR on questions of principle relating to the interpretation and application of the rights and freedoms in the ECHR. The issue, according to Opinion 2/13, is that by requesting an advisory opinion from the ECtHR, a highest court of a member state would be in a position to circumvent the preliminary reference procedure laid down in Article 267 TFEU. According to that provision, highest courts of EU member states must, however, – subject to exceptions laid down in case law[75] – refer any question on the interpretation and validity of EU law to the CJEU. Given that after accession the CJEU would consider the ECHR to be an integral part of EU law,[76] a solution had to be found.

In light of the solutions discussed so far, one might have expected the DAA to contain a provision along the lines of Article 4 (4) DAA on inter-party applications: that the highest courts of the member states were prevented from requesting an advisory opinion in cases concerning the interpretation or application of EU law and that it was for the EU to make a determination to that effect.

That, however, is not what the DAA 2023 says. Instead, it provides in Article 5 that a highest court or tribunal of a member state that has ratified Protocol No 16 'shall not be considered as a highest court or tribunal [...] if the question falls within the field of application of European Union law.' At first glance this makes sense as in such cases the CJEU could be considered the highest court and – if the EU decided to sign up to Protocol No 16 – might itself be in a position to request an advisory opinion from the ECtHR.

If, however, a highest court of a member state decides to request an advisory opinion from the ECtHR after accession, it is unclear who would make the assessment as to whether the question falls within the field of application of EU law. Neither Article 5 nor the explanatory report provide any clues. In light of the stark contrast with the previous examples, however, and in light of the ECtHR's overall jurisdiction to authoritatively interpret the ECHR and associated treaties, it would be reasonable to assume that it would be for the ECtHR to make this assessment.

74 Belgium, Estonia, Finland, France, Greece, Luxembourg, Netherlands, Romania, Slovakia, and Slovenia.

75 Joined Cases 28-30/62 *da Costa* [1963] ECLI:EU:C:1963:6; Case 283/81 CILFIT [1982] ECR I-3415 ECLI:EU:C:1982:335.

76 Case 181/73 *Haegeman* [1974] ECR I-449 ECLI:EU:C:1974:41.

This would be a rather strange position for the ECtHR to be in, however. After all, Article 10 of Protocol No 16 obliges the parties that have ratified the Protocol to designate the 'highest courts' that are entitled to request advisory opinions. The ECtHR therefore normally has no role in deciding which national court counts as a highest court for these purposes. By tasking the ECtHR with making such an assessment – due to the dual role of highest member state courts as both purely national courts and courts ensuring the application and uniform interpretation of EU law[77] – the DAA accords a new role to the ECtHR, which the ECtHR is ill-equipped to fulfil.

The test in Article 4 (4) DAA would be whether a question before the ECtHR 'falls within the field of application of European Union law'. In the EU treaties, this formulation itself is only found in Article 51 (2) of the EU Charter of Fundamental Rights,[78] where it says that the 'Charter does not extend the field of application of Union law beyond the powers of the Union.' This is not much use for the interpretation of Article 4 (4) DAA, so that the ECtHR would probably be best advised to consult the CJEU's case law on Article 51 (1) of the Charter, which says that the member states are only bound by the Charter where they are 'implementing Union law'. According to the CJEU, this means that they must be acting in the scope of EU law.[79] On the face of it, therefore, this is the question the ECtHR would need to answer in order to determine if an advisory opinion request from an ordinarily highest court of a member state was to be deemed to be coming from a highest court – and thus admissible – or not.

The practical problem with this is that the required assessment is a notoriously difficult one to make, requiring a deep understanding of EU law and CJEU case law.[80] The ECtHR is not well-placed to make such a decision as – at least in some cases – it would require an in-depth investigation of EU law. Furthermore, if this is so, then there is a real risk that the CJEU will find this solution to be incompatible with the autonomy of the EU legal order as it would require the ECtHR to determine whether an advisory opinion request

77 This role is hinted at by TEU (n 8) Article 19 (1) (2) and was made explicit by the CJEU in Opinion 1/09 *Creation of a Unified Patent Litigation System* [2011] ECLI:EU:C:2011:123, para 84, for instance.

78 CFR (n 54). And also in a Declaration on the Charter annexed to the Lisbon Treaty (n 8).

79 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

80 Instructive: D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267; A Ward, 'Article 51', in *The EU Charter of Fundamental Rights,* S Peers and others (eds), (2nd edn, Hart 2021); T Lock, 'Article 51 CFR', in *The EU Treaties and the Charter of Fundamental Rights*, M Kellerbauer, M Klamert, and J Tomkin (eds) (2nd edn, Oxford University Press 2024).

concerns a question of EU law or not. It would therefore seem that the solution found in the DAA 2023 is not workable in practice. It would have been better to leave the decision to the EU – much like in the case of inter-party applications: first, the EU is more capable of making the requisite assessment; and second, it would more likely be compatible with the autonomy of the EU legal order.

3.2.4 Mutual Trust – A Paradoxical Solution?

Another problematic provision introduced into the DAA 2023 concerns mutual trust, which is the key concept underpinning the law governing the EU's Area of Freedom, Security and Justice (AFSJ). It forms the basis of the doctrine of mutual recognition, which requires member states to recognise the procedural and fundamental rights standards of other member states as adequate and thus precludes challenges to their compatibility *inter alia* with fundamental rights before those member state courts (ie, there is a presumption of compliance). Challenges must instead be brought before the courts of the member state that is allegedly violating those rights. Examples of mutual recognition operating within the AFSJ include the EAW; reception conditions for refugees and transfers under the Dublin Regulation;[81] procedural fairness in the execution of civil judgments and orders (Brussels I and II Regulations).[82] It is obvious that mutual recognition helps to speed up the processes in the AFSJ considerably.

As is well known, however, there is a body of case law in which the automaticity of mutual recognition has been challenged both before the CJEU and the ECtHR. Famous examples on the ECtHR-side include Dublin Regulation cases such as *MSS*[83] and *Tarakhel*,[84] which have by and large been replicated by the CJEU[85] and even extended into its case law on the European

81 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast) [2013] OJ L 180/31.

82 Council Regulation (EC) No 44/2001of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12/1 and Council Regulation (EU) 1111/2019 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast) Repealing Regulation (EC) No 2201/2003 [2019] OJ L 178/1.

83 *MSS v Belgium and Greece* [GC] 30696/09 (ECtHR, 21 January 2011).

84 *Tarakhel v Switzerland* [GC] 29217/12 (ECtHR, 4 November 2014).

85 Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department* [2011] ECR II-13991 ECLI:EU:C:2011:865; Case C-578/16 PPU *CK and Others v Slovenia* [2017] ECLI:EU:C:2017:127.

Arrest Warrant.[86] The potentially harsh effects of mutual recognition have thus been softened somewhat, not least under pressure from the ECtHR.[87]

The CJEU recognised this in Opinion 2/13 when it said that:

> the 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.[88]

Based on this, the CJEU in Opinion 2/13 requested that the DAA prevent a situation in which a member state is required to check that another member state has observed fundamental rights even though there is an obligation of mutual trust between those member states.[89]

In *Avotiņš v Latvia* – a case concerning the enforcement of a civil judgment under the Brussels I Regulation – the ECtHR had an opportunity to respond to this demand.[90] The ECtHR held that the *Bosphorus* presumption applied in principle but then spelled out the obligations on national courts faced with a human rights challenge in a mutual recognition case: they had to give full effect to mutual recognition 'where the protection of Convention rights cannot be considered manifestly deficient'.[91] While recognising the importance of mutual recognition for the EU legal order,[92] the ECtHR stressed – in direct response to Opinion 2/13 – that the Convention required that the courts of the member state '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'.[93] It follows that the principle of mutual recognition must not be applied 'automatically and mechanically [...] to the detriment of fundamental rights'.[94]

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86 Case C-404/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198; Case C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586.

87 For more details 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* 428.

88 Opinion 2/13 (n 2) para 192.

89 Ibid paras 194–195.

90 *Avotiņš* (n 18).

91 Ibid para 116.

92 Ibid para 113.

93 Ibid para 114.

94 Ibid para 116.

While *Avotiņš* places much emphasis on commonalities in the two courts' approaches – the ECtHR expressly invoked the 'spirit of complementarity'[95] – it did not resolve the conundrum for the drafters posed by Opinion 2/13: how to marry the CJEU's insistence that the DAA must not require a member state to check another member state's ECHR compliance with the ECtHR's demand that this needs to happen in some cases to avoid a manifest deficit. As the ECtHR expressly pointed out, the CJEU's limitation to exceptional cases 'could, in practice, run counter to the requirement imposed by the Convention'. This would appear to be a stricter standard than what the CJEU envisaged,[96] making this conundrum difficult to resolve.

The drafters' response was to include Article 6 DAA 2023, which says that EU accession 'shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured'.

Article 6 DAA 2023 is curious in several respects. While it was ostensibly included in response to Opinion 2/13, it does not mirror the demand spelled out by the CJEU in that Opinion, which was that the DAA should prevent a development which would mean that the EU and its member states are considered contracting parties in their relations with each other.[97] Instead, Article 6 seems to be an attempt at reconciling the two Courts' approaches.

The first sentence of Article 6 appears to achieve the task of preventing that the EU and its member states are considered contracting parties in their relations with each other. After all, Article 6 expressly states that mutual trust shall not be affected by accession. However, it then seems to be contradicted by the second sentence, which appears to recognise what has become the established case law of both the ECtHR and the CJEU: that there may be situations where mutual trust must yield on the basis of severe human rights concerns. The explanatory notes are confined to two short paragraphs. The first sums up the principle of mutual trust under EU law by reference to key CJEU case law on (unwritten) exceptions to that principle on fundamental rights grounds. The second paragraph reiterates the ECtHR's case law in mutual trust cases. It appears from these that the drafters aimed to achieve a continuation of the status quo: a general acceptance of mutual recognition, but with fundamental rights exceptions in certain (perhaps extreme) cases.

95 Ibid.

96 See LR Glas and J Krommendijk, 'From Opinion 2/13 to Avotins: Recent Developments in the Relationship Between the Luxembourg and Strasbourg Courts' (2017) 17 *Human Rights Law Review* 567, 584, who also describe the ECtHR's response as using 'blunt language'.

97 Opinion 2/13 (n 2) paras 194–195.

While this may be a useful starting point for the uninitiated, it is questionable that it would be of much assistance to the ECtHR in determining whether and if so in how far Article 6 DAA constrains its own powers of review. If, for instance, a case like *MSS* were to be brought before the ECtHR after accession, the ECtHR would need to consider Article 6 DAA 2023.[98] It would then need to ensure that mutual trust was not affected, which would beg the question of what 'mutual trust within the European Union' really is. It is no longer – if it ever was – a form of blind trust,[99] but is rather a nuanced and developing concept. Therefore, for the ECtHR, that question cannot really be answered in practice without the ECtHR itself continuing to help develop the principle in light of the ECHR standards. The ECtHR would therefore continue to be the final arbiter of the limits of mutual trust where mutual trust comes up against fundamental rights. Article 6 DAA 2023 will not change this, which suggests that Article 6 DAA is likely to be practically meaningless.

Whether the CJEU will accept this 'solution' or consider it to be contrary to the autonomy of the EU legal order will be an important issue to watch.

Article 6 warrants two further observations. First, the absence of a formal role for the EU – akin to inter-state applications – is remarkable. There may well be good reasons for this: after all, a literal adoption of the CJEU's demands in Opinion 2/13 might have resulted in a regression in protection standards in mutual trust cases, if, for instance, the ECtHR's jurisdiction were completely excluded to protect the autonomy of the EU legal order.[100] Hence, giving the EU – and in practice probably the Commission – the power to stop the progress of individual applications challenging mutual trust – and thus removing an already existing avenue to seek a human rights-based review for individuals – would have rightly been considered unacceptable from the ECHR perspective.

Secondly, there is also a practical difference to the advisory opinion scenario, where no formal EU involvement is envisaged either in that the EU would qualify as a co-respondent in each conceivable mutual trust case. That is because such cases would inevitably involve the interpretation and application of EU law, so that the EU could – and according to its unilateral declaration would have to – involve itself as a co-respondent. It would then be in a position to at least argue for the protection of the mutual trust principle before the ECtHR. The fact that the EU would be a party to proceedings in such

98 *MSS* (n 83).

99 E Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) 55 *Common Market Law Review* 489.

100 See Lock (n 87).

cases is an important safeguard which in the case of an advisory opinion being requested by a highest court of a member state would not be in place.

3.2.5 The Common Foreign and Security Policy – Missing in Action?

Even though the CJEU in Opinion 2/13 expressly held that the DAA 2013 insufficiently addressed the EU's CFSP, the DAA 2023 does not mention it at all. The reason appears to be that the negotiators could not find a workable approach that would resolve the issue identified by the CJEU: that the ECtHR's jurisdiction over CFSP cases could not go further than the limited jurisdiction of the CJEU over such cases.[101] Article 24 (1) TEU stipulates that the CJEU's jurisdiction over the CFSP is excluded save for two matters: compliance with Article 40 TEU (on the delineation between CFSP competences and the external competences found in the TFEU); and Article 275 TFEU, which gives the CJEU jurisdiction to rule on sanctions.

Two approaches to addressing the CJEU's concerns are conceivable: a clause in the DAA narrowing the ECtHR's jurisdiction over CFSP cases or an extension of the CJEU's jurisdiction to cover all conceivable scenarios that could arise before the ECtHR; or leaving the matter to the EU to resolve internally. Having unsuccessfully pursued the former option,[102] the negotiators decided to leave the resolution of this question with the EU. As this article is primarily concerned with the implications of accession for the ECHR, a more detailed discussion would go beyond its remit. Suffice it to say that any solution short of treaty change – which is highly unlikely – will most probably come under intense scrutiny by the CJEU in a future opinion.[103]

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101 Opinion 2/13 (n 2) paras 252–256.

102 See, for example, draft Article 1 (4a) in Council of Europe, 'Consolidated Version of the Draft Accession Instruments (as of 7 July 2022)' (30 September 2022) 46+1(2022)26.

103 Part of the solution may be found in two recent judgments: Case C-351/22 *Neves 77 Solutions SRL* [2024] ECLI:EU:C:2024:723, where the CJEU held that it had jurisdiction to interpret a CFSP decision, which the Council had failed to implement by way of a regulation based on TFEU (n 12) Article 215, thus the Court interpreted its own jurisdiction broadly and more generously than the Advocate General in the case had proposed, and Joined Cases C-29/22 P and C-44/22 P *KS and KD* [2024] ECLI:EU:C:2024:725, where the Court considered itself to have jurisdiction over CFSP acts which do not relate to the political or strategic choices made within the framework of the CFSP; again this can be seen as an expansion of CJEU jurisdiction over the CFSP. The EU Commission made (as yet unpublished) proposals, including the adoption of an internal interpretive declaration giving the CJEU jurisdiction over all CFSP cases brought before the ECtHR, but these have received negative feedback notably from the French Senate on 7 March 2023 (Résolution européenne sur le volet relatif à la politique étrangère et de sécurité commune des négociations d'adhésion de l'Union européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, INPS230655 8X).

4 A (New) Chasm Between EU and Non-EU Members?

As has been demonstrated, fitting the EU into the ECHR framework necessitates procedural innovations and trade-offs. The procedural innovations contained in the DAA 2023 throw into relief the difference between the 27 Convention parties that are EU member states and the 19 that are not. Ever since the introduction of the *Bosphorus* presumption there has been a concern with double standards as *Bosphorus* can be perceived as granting privileges to the EU member states, from which non-member states do not benefit.[104] When accession negotiations recommenced in 2020, various non-EU delegations to the negotiation group stressed the need for accession on an equal footing. They voiced concerns that accession might result in double standards with the EU and its member states enjoying some certain privileges compared with the others.[105] These concerns are now reflected in the DAA's explanatory report, which emphasises that the EU should 'as a matter of principle, accede to the Convention on an equal footing with the other High Contracting Parties'.[106]

The risk of double standards is most obvious in cases where non-EU member states are applying EU law and are alleged to have committed a violation of the Convention when doing so. The Convention states in question are Norway, Iceland, Liechtenstein, Switzerland, and the United Kingdom (UK). Norway, Iceland, and Liechtenstein are members of the European Free Trade Association (EFTA) and they are the three member states of the European Economic Area (EEA) that are not also EU member states. The EEA Agreement makes most EU single market legislation applicable to them and they take part in many EU Justice and Home Affairs policy areas, notably the Schengen zone (thus applying the EU border regime) as well as EU migration and asylum law.[107] Switzerland did not join the EEA, but is obliged to apply

104 See, for example, *Bosphorus* (n 16) Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharaova, Zagrebelsky, and Garlicki, para 4 and Concurring Opinion of Judge Ress, para 2; K Kuhnert, 'Bosphorus – Double Standards in European Human Rights Protection?' (2006) 2 *Utrecht Law Review* 177.

105 See, for example, the interventions by non-member states Switzerland, Turkey, and Andorra and by EU member the Netherlands in the informal meeting preceding the official resumption of accession negotiations, Council of Europe, 'Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group (47+1) on the Accession of the European Union to the European Convention on Human Rights' (22 June 2020) 47+1(2020)Rinf.

106 DAA 2023 (n 1) Explanatory Report, para 7.

107 See Agreement Concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway Concerning the Latter's' Association with the Implementation, Application and Development of the Schengen Acquis – Final Act [1999] OJ L 176/36; Protocol Between the European Union, the European Community,

much EU single market law.[108] Switzerland is also a member of the Schengen zone and applies some EU asylum law (notably the Dublin Regulation and the Returns Directive).[109] Despite having left the EU, the UK continues to apply a limited amount of EU law, notably with respect to Northern Ireland. Under the EU-UK Withdrawal Agreement,[110] rules on the EU's free movement of goods continue to apply with respect to Northern Ireland and have direct effect there.[111] Furthermore, the UK has given a non-diminution guarantee in relation to civil rights guaranteed in the Belfast/Good Friday Agreement, which means that EU rights guarantees as they stood at the time of the UK's withdrawal from the EU continue to be binding on the UK.[112] Examples are EU asylum rules, EU data protection rules or victims' rights. These may in the future play a role in litigation before the ECtHR too.[113]

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the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's Association with the Implementation, Application and Development of the Schengen Acquis of 28 February 2008 [2008] OJ L 160/3.

108 Through the so-called bilaterals with the EU, see, for example, M Oesch, *Switzerland and the European Union* (Dike Verlag 2018).

109 See Agreement Between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's Association with the Implementation, Application and Development of the Schengen Acquis of 26 October 2004 [2008] OJ L53/52.

110 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7.

111 This follows from the so-called Windsor Framework (Protocol on Ireland/Northern Ireland), which is part of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C2019/1.

112 C McCrudden, 'Human Rights and Equality', in *The Law and Practice of the Ireland-Northern Ireland Protocol*, C McCrudden (ed), (Cambridge University Press 2022) 143; E Frantziou and S Craig, 'Understanding the Implications of Article 2 of the Northern Ireland Protocol in the Context of EU Case Law and Developments' (2022) 73 *Northern Ireland Legal Quarterly* 65; S Weatherill, 'The Protocol on Ireland/Northern Ireland: Protecting the EU's Internal Market at the Expense of the UK's' (2020) 45 *European Law Review* 222. As for case law, see, for example, *Northern Ireland Human Rights Commission's Application and JR295's Application in the Matter of The Illegal Migration Act 2023* [2024] NIKB 35; *Dillon, McEvoy, McManus, Hughes, Jordan, Gilvary, and Fitzsimmons' Applications for Judicial Review* [2024] NIKB 1; *SPUC v Secretary of State for Northern Ireland and Others* [2023] NICA 35, *Angesom* [2023] NIKB 102.

113 For further examples, see: Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission, 'Working Paper: The Scope of Article 2 (1) of the Ireland/Northern Ireland Protocol' (December 2022): <https://nihrc.org/assets/uploads/NIHRC-and-ECNI-Scope-of-Article-2-Working-Paper-1.pdf>.

There have been several ECtHR cases featuring EU law as applied by non-EU member states. For instance, in *Tarakhel*[114] the ECtHR found that Switzerland would be in violation of Article 3 ECHR if it returned a family to Italy applying EU asylum rules (the Dublin Regulation). In the so-called *Holship* case, the Norwegian Supreme Court had considered a boycott by trade unions of a Danish-owned shipping company in Norway to be incompatible with freedom of establishment under the EEA Agreement.[115] In doing so, the Supreme Court followed a line of CJEU case law concerning clashes between the identically phrased freedom of establishment under EU law and the right to collective action guaranteed by the EU Charter of Fundamental Rights.[116] The ECtHR found no violation of the freedom of association guaranteed by Article 11 ECHR. Similarly, in *Konkurrenten.no v Norway*, the applicant company indirectly challenged a decision by the EFTA court to grant it standing.[117] Again, no violation was found.

In the latter two cases, the ECtHR refused to apply the *Bosphorus* presumption in favour of the EEA states,[118] resulting in a difference of responsibility between EU member states and non-EU member states applying EU law. It is recalled that the *Bosphorus* presumption results in a presumption of compliance with Convention rights if an EU member state has no discretion when implementing legal obligations flowing from its EU membership.[119] The consequence is that the ECtHR will not engage in a substantive examination of whether a human rights violation has occurred. Because the *Bosphorus* presumption does not apply in favour of EEA states – or by extension in favour of Switzerland or the UK when they are applying EU law – the EEA states would have to defend a case brought against them before the ECtHR even if in a parallel scenario an EU member state would not.

After EU accession to the ECHR, it is expected that the ECtHR will no longer apply its *Bosphorus* presumption,[120] even though the DAA does not demand this so that there are no guarantees that this will happen. This is because the

114 *Tarakhel* (n 84).

115 *Norwegian Confederation of Trade Unions* (*LO*) *and Norwegian Transport Workers' Union* (*NTF*) *v Norway* 45487/17 (ECtHR, 10 September 2021) (*Holship*).

116 Case C-438/05 *Viking* [2007] ECR I-10779 ECLI:EU:C:2007:772.

117 *Konkurrenten.no AS v Norway* 47341/15 (ECtHR, 29 November 2019).

118 Notably citing the lack of direct effect and supremacy of EEA law and the lack of binding effect of EFTA Court decisions, see *Holship* (n 115) para 107. For critical assessments of these judgments, see S Øby Johansen, 'The EEA Agreement as a Jack-in-the-Box in the Relationship Between the CJEU and the European Court of Human Rights?' (2020) 5 *European Papers* 707; U Lattanzi, 'The Inapplicability of the 'Bosphorus' Presumption in the European Economic Area Agreement' (2023) 19 *EU Constitutional Law Review* 441.

119 *Bosphorus* (n 16). See the discussion above.

120 See, for example, J Polakiewicz, 'EU Law and the ECHR: Will the European Union's Accession Square the Circle?' (2013) *European Human Rights Law Review* 592, 601; A Kornezov, 'The Area of Freedom, Security and Justice in the Light of the EU ACcession

presumption was introduced to account for a potential normative conflict in which the EU member states would otherwise find themselves: EU law might ask of them to do one thing, whereas the ECHR might demand the exact opposite without the member state being in a position to resolve the conflict. After all, EU secondary law can only be amended through the appropriate EU process, which involves a proposal by the EU Commission and the agreement of both the Council and European Parliament.[121] That problem would go away with accession since the EU could be brought in via the co-respondent mechanism. Hence if a violation was found, the EU would be bound by the judgment and under an obligation to remove the violation. At the same time, there is of course no guarantee that the ECtHR will abandon the *Bosphorus* presumption since the material conditions for its applicability (equivalent protection of fundamental rights) are still present.

The (possible) abandonment of the *Bosphorus* presumption, however, does not mean that the differences between EU and non-EU states would disappear entirely. To the contrary, new differences would emerge as the procedural innovations contained in the DAA 2023 – co-respondent mechanism and prior involvement first and foremost – are only open to the EU and its member states.

The facts of the *Holship* case provide the basis for a hypothetical example.[122] If a case like *Holship* reached the ECtHR after accession, it would be dealt with in much the same way: Norway would be the respondent state; it would not benefit from the *Bosphorus* presumption (which in the meantime might have been abandoned in respect of EU member states in any event); even though freedom of establishment was at issue, the EFTA Surveillance Authority (or any other body representing EFTA states) could not be involved as co-respondent and neither could the EU. If a violation was found, Norway would be solely responsible and would have to deal with the awkward situation of being either in breach of the ECHR or in breach of the EEA Agreement without being able to comply with both.

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to the ECHR – Is the Break-up Inevitable?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 227, 238; C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *Modern Law Review* 254, 263; P Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 *Fordham International Law Journal* 1114, 1140–1141; L Besselink, 'Should the European Union Ratify the European Convention on Human Rights? Some Remarks on the Relations Between the European Court of Human Rights and the European Court of Justice', in *Constituting Europe*, A Føllesdal, B Peters, and G Ulfstein (eds), (Cambridge University Press 2013) 301, 310–312.

121 For the ordinary legislative procedure in the EU, see TFEU (n 12) Article 289.

122 *Holship* (n 115).

If the same situation arose in one of the EU member states, things would be markedly different. The case would be brought against the member state, applying the rule of attribution found in Article 1 (4) DAA, but the EU could decide to become a co-respondent. This is because Article 3 (2) DAA enables the EU to join as a co-respondent 'if it appears that such allegation calls into question the compatibility with the rights at issue defined in the [ECHR] of a provision of European Union law'. And if the domestic court has not made a reference to the CJEU, the EU can also ask for the prior involvement mechanism to be launched.

For the EU member state this has several advantages: first, if a violation is found, there is a realistic prospect of that violation being rectified by the EU given that the EU will be jointly liable; second, if the CJEU is involved via the prior involvement mechanism, there is a likelihood that the CJEU will find that there was indeed a violation of fundamental rights, so that the member state and the EU might rectify the issue before a judgment by the ECtHR. As mentioned above, the ECtHR might find that the applicant has lost their victim status; or strike out the application – Article 37 (1) (b) ECHR – as the matter has been resolved; or the member state and the EU might offer a friendly settlement.

These advantages do not present themselves to the non-member states. At first glance this might seem bewildering and might even be perceived to be unfair, in particular in light of the stated desire of the accession negotiators of ensuring the equality of all Convention states, from which followed that the EU should accede to the ECHR on an equal footing to all other contracting parties.[123]

To mitigate this, the EU has released a draft memorandum of understanding, annexed to the DAA 2023, which the EU plans to agree with non-member states like Norway. In it the EU promises to request leave to intervene pursuant to Article 36 (2) ECHR in cases in which an alleged violation 'calls into question a provision of European Union law [...] which pursuant to an international agreement concluded with the European Union [the non-member state] is under an obligation to apply'.[124] If a judgment finds a violation against that non-member state, the EU will undertake to 'examine which measures are required by the [EU] following such judgment.'[125] This would go some way towards addressing the issue for non-member states, but would not be

123 See the general principles of the accession negotiations as formulated in the Explanatory Report to the DAA 2023 (n 1) Explanatory Report, para 7; DAA 2013 (n 9) Explanatory Report, para 7.

124 See DAA 2023 (n 1) Appendix 4.

125 Ibid.

as effective as the co-respondent mechanism, which was created precisely because of the shortcomings of a third-party intervention. As shown above, third-party intervention entails a much weaker procedural status than that of co-respondent. It cannot, for instance, result in a prior involvement of the CJEU and does not result in the third-party intervener being bound by the eventual judgment. Furthermore, the memorandum of understanding presupposes that the non-EU member state signs up to it; this is by no means guaranteed. Additionally, the commitment to 'examine which measures are required' are a far cry from an obligation to remove the human rights violation, which may result in enforcement deficits.[126]

Moreover, if applied strictly, the EU's undertaking would not capture all situations in which there might be an interest on non-member states of having the EU involved. Depending on the EU's attitude to interpretation of the memorandum, it may or may not get involved in such a case. The *Holship* case is a good example; taken literally, the promise in the memorandum of understanding would not apply. This is because Norway was not technically applying EU law, but the EEA Agreement. That agreement is by-and-large a mirror image of parts of the EU treaties and those provisions that are identical to EU law (eg, the freedom of establishment) according to Article 6 EEA Agreement 'shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the [CJEU] given prior to the date of signature of this Agreement.' As far as rulings handed down since the adoption of the EEA are concerned, the EFTA Court is under an obligation to 'pay due account to the principles laid down by the relevant rulings by the [CJEU]'.[127] Hence the EU's draft memorandum of understanding does not go far enough.

5 Discussion: Centrifugal and Centripetal Forces

The preceding discussion showed that from the perspective of the ECHR system, EU accession comes at a certain cost: in procedural terms, the ECtHR will have to give way to assessments made internally by the European Union without any possibility to question these; and the ECHR system will have to make compromises concerning the equality of the high contracting parties to the Convention. The question is whether these compromises – which

126 On enforcement, see above. Also note that in such a scenario in practice it may happen that another applicant brings an identical complaint against a member state and against the EU as co-respondent, which might result in eventual enforcement.

127 Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L 344/3, Article 3 (2).

could be conceived of as centrifugal forces undermining the equality of the high contracting parties and thus one of the foundations of any international treaty like the ECHR – are worth it. After all, the sovereign equality of states is foundational for international law[128] and an important guarantor for its legitimacy.[129]

Accession would entrench the chasm between EU member states and non-EU member states in the ECHR as the DAA would make this difference – currently only existent in relation to the *Bosphorus* case law – an integral part of the ECHR system. The concessions made to the EU brings with it a danger that the EU may be using its procedural powers – concerning co-respondent, prior involvement, and inter-party cases – to its own advantage and thereby counteract the good that accession is meant to bring. If this is the case, the legitimacy of the entire ECHR system might be in peril.

There are, however, good arguments to suggest that these dangers are counter-balanced by the advantages of EU accession, which would lead to a better protection of individuals' human rights and to a strengthening of the ECHR system as a whole.

First, accession would close existing gaps in the protection of the rights of individuals. In situations like in *Connolly*, where an alleged violation cannot be attributed to a member state because no member state institution or body was involved, such a violation will be attributable to the EU as a party to the Convention and a case brought against it would no longer be inadmissible *ratione personae*. Additionally, if – as expected – the ECtHR abandons the *Bosphorus* presumption, that currently existing accountability gap – where EU member states can theoretically not be held responsible for a violation of the Convention, which does not cross the threshold to constitute a 'manifest deficit' – would be closed as well.

Accession would secondly lead to a more appropriate distribution of responsibility. Bringing the EU into proceedings as a co-respondent would result in a joint responsibility of the EU and the member state(s) if a violation

128 Enshrined in the UNGA, 'UN Friendly Relations Declaration' (24 October 1970) UNGA Res 2625 (XXV).

129 The Friendly Relations Declaration was adopted in the context of decolonisation; its mentioning of 'sovereign equality' has the clear intention of putting paid to the notion that the old European states enjoyed more legitimacy than others and could therefore exercise sovereignty over others. See M Koskenniemi and V Kari, 'Sovereign Equality', in *The UN Friendly Relations Declaration at* 50, JE Viñuales (ed), (Cambridge University Press 2020) 166, 166–170. On sovereign equality as an institutional response to disagreements on what constitutes legitimate public order, see BR Roth, *Sovereign Equality and Moral Disagreement* (Oxford University Press 2011) Chapter 3.

is found. This would markedly increase the chances of enforcement of the judgment.

Thirdly, accession would be conducive to greater consistency in the case law of the ECtHR and the CJEU. While the CJEU does not (normally) interpret ECHR rights, it does interpret and apply the EU Charter of Fundamental Rights, which features all the rights contained in the ECHR, either without modification or in a slightly updated version.[130] There is thus a danger of the two courts interpreting the (essentially) same rights differently.[131] Though not impossible, such a development will be less likely after accession a) because the EU – and indirectly the CJEU – will become accountable before the ECtHR; and b) because the prior involvement mechanism will establish a formal avenue for dialogue between the two courts. Taken together this is likely to result in the CJEU engaging more with ECtHR case law. Such engagement would be a necessary step in ensuring consistency as it either results in the CJEU following the ECtHR's lead; or where it does not follow, it will likely advance an argument why the ECtHR's case law does not apply or does not convince.

Fourthly, accession will copper fasten the EU member states' ECHR membership at a time when calls for leaving the ECHR are heard in various contracting states.[132] Albeit not expressly stipulated as such in the EU treaty,

130 For example, the restriction of the right to marry in the ECHR to 'men and women' is not present in the Charter, which simply gives 'everyone' the right to get married.

131 There is a large body of literature dedicated to existing and non-existing divergences between the two courts. See, for example, R Lawson, 'Confusion or Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in *The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G Schermers*, vol III, R Lawson and M de Blois (eds), (Martinus Nijhoff Publishers 1994) 219; S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *Common Market Law Review* 629; T Lock, 'The Influence of EU Law on Strasbourg Doctrines' (2016) 41 *European Law Review* 804; C Timmermans, 'The Relationship Between the European Court of Justice and the European Court of Human Rights', in *A Constitutional Order of States?*, A Arnull and others (eds), (Hart 2011) 151; J Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) *European Human Rights Law Review* 768; CFR (n 54) Article 52 (3) addresses this problem somewhat in that it defines the ECHR standard as the minimum standard for the interpretation of 'corresponding' CFR rights.

132 Under the previous UK Government this discussion is particularly advanced in the UK, see, for example, C McKeon, 'Sunak Hints that UK Could Leave ECHR if Rwanda Plan Blocked' (The Independent, 4 April 2024): <https://www.independent.co.uk/news/uk/politics/sunak-echr-rwanda-human-rights-b2523025.html>. In Hungary, too, voices close to the Government have called for a denunciation of the ECHR. See European Parliament, 'Question for Written Answer E-002208/2017 to the Commission. Rule 130. Csaba Molnár (S&D)' (29 March 2017): <https://www.europarl.europa.eu/doceo/document/E-8-2017-002208_EN.html>.

being a party to the ECHR is already a pre-requisite of EU membership.[133] After the entry into force of the DAA, this will become even more obvious as the DAA simply assumes that all EU member states are also parties to the ECHR. It would become practically impossible for a member state to leave the Convention after accession without also violating its EU law duty of loyal cooperation with the EU. That is because the DAA operates on the premiss that EU acts that are potentially in violation of the ECHR but implemented by the member states are attributed to the member states, which in turn opens the door for the EU's involvement as co-respondent. If, however, the member state is no longer a party to the ECHR, no attribution of conduct can happen, and the EU could not be involved in proceedings for violations of human rights caused by it even though the EU would be bound by the ECHR. Hence, being subject to the ECHR will – after accession – become an indispensable part of EU membership.[134]

Finally, there are the practical benefits of accession, which would mean the addition of one Judge to the ECtHR – helping to deal with its enormous case load – and it would involve a significant financial contribution to the ECtHR's budget. According to the DAA 2023, the EU will contribute 36% of the highest contribution of any Council of Europe state towards the 'functioning of the Convention'. Most of this money is likely to go to the ECtHR, the remainder to the Committee of Ministers and the Parliamentary Assembly.[135] A precise figure is not currently available, but the approximate sum can be calculated by taking the annual contribution to the ordinary Council of Europe budget of large states like Germany as a basis. In 2023 Germany contributed just under €43 million to the Council of Europe.[136] A hypothetical EU contribution based on this figure for 2024 would therefore be in the region of €15 million. Considering the ECtHR's overall budget of €77 million in 2022,[137] even if a portion of this contribution is allocated to the Committee of Ministers and the Parliamentary Assembly, this would mean a significant increase.

The question then is whether in light of these centripetal forces, the concessions made by the non-EU member states in favour of the EU, notably the sacrifices regarding the equality of all parties, are worth it. It is suggested

133 See EU Commission, 'Answer Given by Mr Frattini on Behalf of the Commission' (26 January 2007): <https://www.europarl.europa.eu/doceo/document/E-6-2006-5000-ASW_GA.html?redirect>.

134 The ECtHR's backlog, while a lot lower than before the entry into force of Protocol No 14 ECHR, still tallies at over 68,000 cases. See ECtHR (n 38).

135 See DAA 2023 (n 1) Article 9 (3).

136 Deutscher Bundestag, 'Deutscher Mitgliedsbeitrag zum Haushalt des Europarats' (28 February 2023): <https://www.bundestag.de/presse/hib/kurzmeldungen-935926>.

137 See ECtHR (n 38).

here that they are despite the risks involved. The benefits to the ECHR system as a whole that accession would bring outweigh the downsides, which the DAA 2023 has tried to minimise. Granted, the EU is given certain procedural privileges, but importantly these do not result in the individual applicant (and potential victim of a human rights violation) from being deprived of a remedy by the ECtHR. While the EU could – technically – evade responsibility in co-respondent cases by refusing to activate it, the discussion above has shown that the member states cannot. Moreover, the practical relevance of the EU's power to determine whether inter-party cases between its member states can proceed is extremely limited. Finally, there is little to no danger that any such concessions will be made to another organisation: the EU is unique in the way it operates and thus replication in the ECHR context is difficult to imagine. Before the background of the ECHR's precarious position in some high contracting parties – notably the UK – the EU's accession would provide an important reaffirmation of and thus a boost to the system. Most importantly, it would close existing accountability gaps and thus provide victims of human rights violations with new remedies.

6 Conclusion

This article has shown that EU accession to the ECHR will result in the introduction of innovative procedural mechanisms and explained these considering the constraints arising from EU law. Further details will need to be fleshed out in the EU's internal rules, which – so far as they already exist – have not yet been published. When this has happened, the CJEU will again be tasked with assessing the DAA's compatibility with the EU treaties. While most of the issues identified in Opinion 2/13 appear to have been addressed satisfactorily, there remain question marks over the compatibility of the solutions concerning advisory opinions and mutual trust. The CFSP – which is not at all mentioned in the DAA – is an additional uncertainty. Any EU-internal solution short of Treaty change granting additional powers of review to the CJEU will have to comply with the limitations on those powers contained in the EU treaties. It will likely be crucial whether the CJEU manages to incrementally expand its own jurisdiction over CFSP-related human rights violations to such a degree that allows it to conclude that the ECtHR's jurisdiction in such cases no longer went beyond that of the CJEU itself.

It seems that there is plenty of space in the DAA for judicial politics to decide the fate of this renewed attempt at accession. Add to that the 'real' politics: the ratification process will require ratification by all 46 contracting

parties and the EU. Some of the non-EU member states may harbour concerns about the number of concessions made to the EU system. This paper has shed light on how these would work, the reasoning behind them, and has advanced an argument why the compromises made – notably concerning the equality of the contracting parties – are worth it: they will not result in a reduction of the level of protection for the individual; they will to the contrary lead to a better attribution of responsibility; better chances of enforcement and a strengthening of the ECHR system as a whole. That said, not all of the 46+1 parties will at all times be driven by a desire to improve human rights protections in Europe. While this article makes the case that EU accession to the ECHR based on the DAA 2023 should be welcomed, it is clear that there are many hurdles left to clear before an EU-nominated Judge can take their seat in Strasbourg.

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