Irakli Papava

# ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: OBJECTIVE NECESSITY OR ATTEMPT TO RECONCILE THE INCOMPATIBLE?

## THE OPINION 2/13 OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

***Irakli Papava***
*International Law Expert,*
*lawyer at the Democratic Development Union of Georgia.*

## ABSTRACT

The enactment of the Lisbon Treathas enabled the European Union to start negotiations on accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms as a collective member. The agreed draft agreement was submitted to the Court of Justice of the European Union, which was to address the issue of the draft's compliance with the founding treaties of the European Union. Contrary to expectations, the Court of Justice issued a negative opinion on December 18, 2014, in fact blocking the process of EU accession to the Convention. This article examines the reasons why the EU has sought to accede to the Convention and provides a detailed analysis of the arguments put forward by the EU Court in support of its position.

***Key words:*** *Human rights, Court of Justice of the European Union, Opinion 2/13, European Convention for the Protection of Human Rights and Fundamental Freedoms, Draft Agreement on Accession, European Court of Human Rights.*

On 18 December 2014, the Court of Justice of the European Union (hereinafter the Court of Justice, CJEU) delivered an opinion 2/13 on the compatibility of the draft accession agreement (hereinafter, Draft Agreement, DAA) concerning the accession of the European Union to the European Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention, Convention) with the Founding Treaties of the European Union (hereinafter, Treaties). The Court of Justice found that the Draft Agreement did not comply with the primary law of the Union.[1]

It's hard to say that the negative opinion of the Court of Justice was not predictable. Notwithstanding the fact that the Court of Justice and the European Court of Human Rights (hereinafter, European Court, ECtHR) have treated each other respectfully and almost made it a rule to rely on each other's decisions in recent years, the ambition of the supreme judicial body of the EU to maintain independence from the Strasbourg Court is obvious. Opinion 2/3has become one ofthe mosthigh-profilerulings of the CJEUpartly because of the importance that Member States attach to the EU's accession to the Convention and partlydue to the difficult negotiations, which lasted more than two years.[2]However, the actual reason should be sought in the arguments put forward by the CJEU and in the nature of its criticism. As Strasbourg University and European College (Bruges) Professor Jean-Paul Jacquèobserves, the Court of Justice, in fact, went up against all 48 member states of the EU, which unanimously supported the Draft Accession Agreement.[3]

This present paper consists of two parts. The first part provides background and describes those basic objectives, which should have been accomplished by the accession of the EU to the Convention. It also provides a brief description of the Draft Agreement. The second part deals with the Opinion 2/13itself. The author assumes that his readers are well aware of the main phases of EU development, the legal basis of its functioning and main issues of EU law.

1 Basically, it combines the norms of the Treaties, general principles of the EU law. Unofficial translation of Founding documents of the EU (Treaty on European Union-TEU, Treaty on the Functioning of the European Union (TFEU) and also Charter of Fundamental Rights of the European Union, which is legally equal to the Treaties) into Georgian language can be found in: Legal Basis of the Functioning of the European Union: Fundamental Acts and Comments, Irakli Papava (Tbilisi, 2017):170-287; ირაკლი პაპავა, ევროპის კავშირის ფუნქციონირების სამართლებრივი საფუძვლები: საბაზისო აქტები და კომენტარები (თბილისი, 2017): 170-287.

2 The first round of negotiations was held in July 2010. Version of the draft agreement to be submitted to the Court of Justice was approved on 5 April 2013.

3 See, Jean Paul Jacquè, „Non la Convention des droits de l›homme? ", Droit de l›Unioneuropéenne. http://www.droit-union-europeenne.be/412337458 (30/06/2018).

# I. ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Discussions among law experts and politicians on the idea of the EU accession to the Convention actively started in the late 1970s. Although, it should be noted that, as early as 1951, after creation of the European Coal and Steel Community, the first attempts were made to bring this successful project of economic integration closer to another European project being implemented within the Council of Europe at that time. Today, few people know that the documents developed in the beginning of the 1950s to create the European Political Union contained comprehensive norms on the protection of human rights and freedoms. The authors of the initiative did not need great inventors' minds: without further "coquetry", theysimply insertedthetext of the European Convention of Human Rights and Freedoms in the founding documents of the European Political Union despite the fact that one of the leaders of the European integration, France, did not consider ratifying it until 1974.[4] As for accession of the EU (then European Community) to the Convention,the European Commission first announced the goal in the late 1970s, after France, which was actually the last among the EU states to ratify the Convention and acknowledge the binding jurisdiction of the European Court of Human Rights.

In 1979, the Commission of the European Communities adopted the memorandum "On the Accession of the European Communities to the European Convention for Protection of Human Rights and Fundamental Freedoms," by which the Commission officially proposed a council to accede to the Convention.[5] The memorandum acknowledged the Convention as a founding act, which "had power for strengthening authority and structure of the European Communities".

In 1994, the Council of the EUdecided to turn to the Court of Justice (then the Court of European Communities) tohear its opinion. In its opinion2/94, adopted on 28 March 1996,[6] the CJEU heldthat the Community had no competence to accede to the Convention undertheprovisions ofTreaties that were in effect at that time. In its opinion, relevant changes needed to be made to the Treaties in order to make accession possible. As a result, member states opted for developing their own charters (hereinafter Charter) of human rights. Although the Charter adopted on 7 December 2000 did not have clear legal status or a full legal effect, it was nevertheless used actively first by advocates general[7] and later, when a treaty establishing European Constitution failed, by the Court of European Communities.

4 See: Búrca G. de, „The Road Not Taken: The EU as a Global Human Rights Actor", American Journal of international law, Vol.105. N4 (2011):649–693.

5 See: Memorandum betreffend den Beitritt der EuropäischenGemeinschaftenzurKonventionüber den Schutz der Menschenrechte und Grundfreiheiten, Bulletin der EuropäischenGemeinschaften, Beilage 2/79, vom 4. April 1979.http://aei.pitt.edu/6356/4/6356.pdf (14/06/2018).

6 See Gutachten 2/94 des Gerichtshofs, vom 28. März 1996, ECR I-1763.¬https://eur-lex.europa.eu/resource.html?uri=cellar:3645916a-61ba-4ad5-84e1-57767433f326.0003.02/DOC_2&format=PDF(18/07/2018).

7 Advocates general are independent official persons in the Court of Justice. Their status in some cases are equal to those of the judges.

As a result of the enforcement of the 2007 Lisbon Treaty, the Charter became legally binding for European institutions as well as MemberStates, in which fell under the Charter in the process of implementation of EU law. In contrast to the Convention, the Charter contains a longer lists of rights (for example, rights to integrity, to asylum and to the freedom of the arts and sciences) including those rights which have been granted by establishing the citizenship of the Union. The Article 52 (pa.3) of the Charter states that the rights of the Charter that correspond to the rights guaranteed by the Convention should have the same meaning and scope as those laid down in the Convention.

However, the Member States were well aware that in the context of the increasing activity of the CJEU in the sphere of human rights, this provision would have fewer opportunities to avoid inconsistencies between practices of two courts, that of Luxemburg and Strasbourg. Which is why a provision on the EU accession to the Convention as a collective body was included in Lisbon Treaty simultaneously with granting the Charter a legal force. The Article 6 (pa.3) of the Lisbon version of the agreement (Treaty on the European Union) stipulates: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Accession to the Convention could have increased possible legal protection for individuals from the actions of the EUinstitutions by means of external review.[8] At present, control is exercised indirectly: although individuals cannot bring action against EU acts, they can charge the states that implement the acts. For example, in the case *Matthews v the United Kingdom*[9] the ECtHR found that Great Britain had breached its obligations under the Article 3 of the Convention (right to free elections) by not ensuring the holding of elections to the European Parliament on the territory ofGibraltar. But we also should take into consideration that in another case, *Bosporus Airways v Ireland*,[10] the ECtHR found that EU law offered protection of human rights at a level equivalent to that of the Convention. Consequently, member states implementing the EU law would be found in breach of their obligations within the limits ofthe jurisdiction of the ECtHR only if protection guaranteed by the Convention was manifestly deficient (inappropriate.)[11] The logic of this approach might be explained by the fact that the Council of Europe, from the very beginning, sought closer relationships with the EU as an organization with which it had commonvalues. Furthermore, the potential difficulties,whichmight be encountered by the EU Member States if they have to choose between violations of their obligations occurred within the limits of the EU or Council of Europe, were also taken into account. We may assume, if the EU accedes to the Convention it will not enjoyan advantageous position and its actions will be subjected to strict review, as are other states' actions. On

After the Court's hearings, where they participate, they submit their objective, impartial and grounded opinions to the Court. However, advocates general do not participate in the process of consideration and adopting the Court's decisions (the author's note).

8 See a detailed rationale and relevant arguments (practical benefit) for the EU accession to the Convention, in Irakli Papava, "The EU and Human Rights" („ევროკავშირიდაადამიანისუფლებები"), Georgian Journal of European Studies, №1 (2015): 147-150; Irakli Papava, Legal Basis of the Functioning of the European Union: Fundamental Acts and Comments, Irakli Papava (Tbilisi, 2017):170-287; ირაკლი პაპავა, ევროპის კავშირის ფუნქციონირების სამართლებრივი საფუძვლები: საბაზისო აქტები და კომენტარები (თბილისი, 2017): 170-287.

9 See, Appl. N24833/94, Matthews v. the United Kingdom, Judgment of 18 February 1999, ECTHR 1999-I.

10 See, Appl. N45036/98, Bosphorus Hava Yollari Turizmve Ticaret Anonim (Bosphorus Airways) v. Ireland, Judgment of 30 June 2005, ECTHR 2005-VI.

11 See, par.156 of the judgment.

the other hand,accession will enhance the protection of individuals' rights, as it will become easier for individuals to make a complaint against potential violations of the EU.

There is no denying that while consideringEU accession to the Convention, the states took into consideration international politics. Having in mind how often the EU uses political conditionality[12]in the international arena, accession to the Convention would have enhanced the legitimacy of the EU in deliberations on the protection of human rights along with other states; furthermore, it would have enabled the EU to become an actual "legal union "further strengthening its democratic nature.[13]

Further explanations of the conditions for the accession of the EU are laid down in the 8th Protocol to the Treaties.[14] To be exact, the 8th Protocol specifies a requirement for the preservation of EU law and its specific characteristics, which should be expressed, on the one hand, in granting the EU special conditions for participation in the control bodies of the European Convention and, on the other hand, in creating necessary mechanisms to ensure that the proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate. The Accession Agreement should not affect the competences of the Union and the powers of its institutions,as well as thespecific situation of Member States in relation to the Convention, its protocols, the measures taken by Member Statesderogating from the Convention in accordance with Article 15 of the Convention. The Accession Agreement should also not affect reservations to the Convention made by Member States in accordance with Article 57 of the Convention.

As for the Convention, after the enforcement of the Protocol14 (1 June 2010), a new paragraph 2 was added to the article 59 (on the grounds of the 1st paragraph of Article 17) stating that, "the European Union may accede to this Convention." Initially Article 59 covered the issue of the states' participation and signatures. The said paragraph of Article 59 prepared normative groundwork for the EU's accession. Negotiations onthe AccessionAgreement started in July 2010.

The Court of Justice, aware of its responsibility, delivered a document[15] on the very first phase of developing aDAA, where it summed up its own views and opinions concerning accession. The Court emphasized that the EU should accede to the Convention with different conditions rather than those required from individual Member States. It particularly indicated the importance of the preservation of the autonomy of the EU law and its specific characteristics as laid down in the 8th Protocol. In this respect, while assessing its interactions with the ECtHR, the Court of Justice under-

12 When the EU requires certain criteria to be met by a country for accession, respect democratic values. Often the requirements are laid down in the agreement text; level of cooperation depends on assuming political responsibilities by partners.

13 See: Problems of Accession of the EU to the Convention of Protection of Human Rights and Fundamental Freedoms; Voskresenskaia (ВоскресенскаяЛ. А., „ПроблемыприсоединенияЕвропейскогоСоюзакЕвропейскойконвенциипозащитеправчеловекаиосновныхсвобод", Международноепубличноеичастноеправо, N3 (60) (2011): 4)

14 Official title: Protocol (No 8); Releating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of human Rights and Fundamental Freedoms.

15 See Reflexionspapier des Gerichtshofs der Europäischen Union zubestimmtenAspekten des Beitritts der Europäischen Union zurEuropäischenKonventionzumSchutz der Menschenrechte und Grundfreiheiten. Luxemburg, den 5. Mai 2010. https://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_de_2010-05-21_08-58-25_999.pdf (19/03/2018).

lined that "the Union must make sure that external control over EU actions is preceded by effective internal review by the domestic courts of the member states and/or of the Union." Besides, the CJEU maintained its absolute jurisdiction over deciding the invalidity of the Union's legal act: "That prerogative is an integral part of the competence of the Court of Justice, and… must not be affected by accession (to the Convention)." With the aim of preserving the system of judicial protection, the Court of Justice indicated thepossibility to allow the ECtHR to decide on the conformity of the Union's legal actswith the Convention should be ruled out without the court's prior decision on that point (paragraph 9). In its opinion, a mechanism should be created that which would make it possible to examine effectively the validity of the Union act/actions at the CJEU before the ECtHR rules on compatibility of the said act with the Convention (paragraph 12).

Actually, this unusualand delicate situation encouraged both courts to make unprecedented steps. On 21 January 2011 they delivered a joint communication,[16] which emphasized the importance of the EU accession to the Convention for the development of human rights and fundamental freedoms.

It seemed the parties hadreached the end of the road. But while drafting the agreement, the EU Member States found themselves in serious disagreement with each other regarding some of its provisions and the UK also voiced important remarks. For a while, the process came to a haltat the EU level. Later, after some amendments were inserted in the draft, the process resumed. In June 2013 the draft agreement was ready. The final version of the project[17] specifies that the EU should have its own judge in the European Court[18] and its representative in the executive body, the Committee of Ministers. According to the draft agreement, the main characteristic of the status of the EU is its very limited responsibility: the EU will be responsible only for the acts of its institutions, bodies, offices (agencies), for example, in competition law for a decision made by Directorate-General for Competition of the European Commission.[19] Besides, if the action has been committed by a Member State, even when implementing EU law, responsibility for the action rests with the Member State and not with the EU.[20] This provision aimed at ensuring theautonomy of EU law and avoiding the potential expansion of EU competence to the detriment of Member States.[21]

In order to compensate for potential inequality, the draft agreement allows the EU to become a co-respondent, if it deems it appropriate, together with a Member State. Thus, EU instituions are guaranteed that their views on problems related to EU law will be heard by the European Court. However, there is a risk of finding the EU in violation of the Convention. Nevertheless, Member

16 See, Joint communication from Presidents Costa and Skouris, January 24, 2011.https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (18/07/2018).

17 See, final draft accession agreement, full version; https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf (14/06/2018).

18 It should be noted that a concept of national judge operates in ECTHR. This ensures participation of that country's judge in proceedings, against which application is lodged. However, they remain independent in hearings on substance.

19 See, Draft Agreement, art 1(par.3)

20 See, Draft Agreement, art 1(par.4)

21 This could have happened if the ECTHR had demanded from the EU to carry out certain measures in situation where the EU institutions were not equipped with relevant competences.

States also can participate as co-respondents in hearings of complaints against the EU.Finally, in the course of complaining against the EU, in order to protect therule of exhaustion of domestic remedies, DAA requires the exhaustion of EU legal procedures (complaint on validity, which is filed with the Court of Justice or complaint against EU law indirectly through national courts).In cases where the EU is a co-respondent, proceedings can be stopped to enable the Court of Justice to assess the lawfulness of the EU act/measures and deliver its opinion (at present this procedure does not exist in EU law.)[22]

It was obvious from the very start thatthe Draft Agreement would face considerable challenges on its path to approval. First, all 47 states of the Council of Europe had to ratify it. Second, under Article 218 of the Treaty on the Functioning of European Union (TFEU), the Committee of Ministers is authorized to take such/similar decisions unanimously and only after European Parliament's approval. Besides, considering the strict wording of the 8th Protocol, appealing to the CJEU for its opinion on the compatibility of the Draft Agreement with the Convention, had become obligatory (if not decisive) for the accession agreement to enter into legal force.

Consequently, immediately after the draft agreement was completed, the European Commission officially asked the CJEU to deliver its opinion on the compatibility of the DAA with the provisions of the 8thprotocol. In May 2014, the CJEU held a two-day public hearing where EU Council and European Parliament supported the Draft while theMember States also provided a level of support. Influential Advocate General of the CJEU Juliane Kokot also backed the draft. In June 2014, she submitted her comprehensive view to the CJEU.[23]

## II. OPINION 2/13 OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Under Article 218 of the TFEU, the Court of Justice is authorized to assess the compatibility of an international agreement with the norms of primary EU law upon request from the EU, its institutions or any of its Member States. In its Opinion 2/13, the CJEU tried to determine[24] whether the draft agreement jeopardized the basic characteristics of EU law and whether it complied with the mandatory conditionsset out by the EU for accession (by the 8th Protocol). The CJEU did not start with examining each paragraph individually. Instead, after a brief description of the Draft Agree-

22 See, Draft Agreement, art 3(par.6)

23 See, Stellungnahme der General anwält in Juliane Kokott, Gutachtenverfahren 2/13. vom 13. Juni 2014, ECLI:EU:C:2014:2475. http://curia.europa.eu/juris/document/document.jsf?docid=160929&doclang=DE(19/03/2018).

24 See, Gutachten 2/13 des Gerichtshofs (Plenum),vom 18. Dezember 2014, ECLI:EU:C:2014:2454.http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=DE(18/07/2018).

ment, it analyzed seven main topics, which may become serious problems after it has been signed. Let us examine the CJEU's arguments.

## 1. Primacy of EU Law

In the beginning of its opinion, the CJEU states that conferring powers of supervision per se over the acts of the EU on the external judicial body (ECtHR), the decisions of which would be binding for the Union, is not incompatible with EU law. It is logical that interpretations of the Convention by the ECtHR will be binding for the CJEU. Besides, the ECtHR should not be empowered to question the conclusions made by the CJEU regarding the scope of EU law, particularly if it is related to whether a Member State is required to protect fundamental rights and freedoms of the EU.

This is because Article 53 of the Convention allows contracting parties of the Council of Europe to establish higher standards of protection of fundamental rights than those guaranteed by the Convention. At the same time, according to the judgment of the CJEU in "Meloni" case,[25] a state cannot avoid the implementation of EU law on the pretext that its domestic legislation offers higher level of protection than that guaranteed by the Charter of Fundamental Rights. Consequently, the CJEU concludes that there are no appropriate (binding) provisions in the DAA that would determine the scope of the application for Article 53. In fact, the CJEU fears that Member States of the EU would be able to apply Article 53 of the Convention to circumvent their obligations under EU law that in turn may put at risk its specific characteristics, namely primacy and effectiveness.

However, even a small number of supporters of the Opinion 2/13 agree that fear of the CJEU in this paragraph is grounded on a wrong (incorrect) interpretation of Article 53 of the Convention. Although, Article 53 allows contracting parties to establish higher standards of protection than those guaranteed by the Convention, no one forces them to do so. Consequently, the EU faces no obstacles in establishing higher standards of protection through the Charter of Fundamental Rights. In this situation, it is important to ensure that minimum standards established by the Convention are met. For this purpose, the Charter has a special provision[26] stating that the rights guaranteed under the Charter, which correspond to analogous rights guaranteed under the Convention,should be interpreted according to ECtHR case law. Hence, Article 53 of the Convention in no way can serve as a pretext for Member States to violateEU law, particularly when there is a CJEU clear case law concerning this issue.

25 See, a judgement in *Stefano Melloni v. Ministerio Fiscal*, Case C-399/11, Judgment of 26 February 2013.

26 See, Charter of Fundamental Rights of the EU (Article 52 (3).

## 2. Principles of Sincere Cooperation and Autonomy of the EU Law

Concerning the area of freedom, security and justice, the CJEU states that under the principle of sincere cooperation applied in the EU, a Member State does not have the right to mandate another state it ensure protection of human rights at a higher level than demanded and recognized by the EU law. Besides, there is a presumption of equivalent protection of human rights throughout the EU. Consequently, if there are no exceptional circumstances, the states may not check whether other Member States have observed the standards of protection under EU law. Otherwise, the principle of sincere cooperation is destined to be violated. In the opinion of the CJEU, the Draft Agreement insufficiently provides for the autonomy of EU law, which requires from the states to observe certain "rules of the game." The EU is ready to accede to the Convention provided that the autonomy of EU law is respected in accordance with 8th Protocol to the Treaties.

Unlike the preceding paragraph, here the CJEU points to an actual problem. Despite the fact that the CJEU does not explicitly refer to ECtHR case law, it apparently in mind the judgment of the Grand Chamber of the ECtHR in the case *Tarakhel v Switzerland*.[27] The ECtHR found Switzerland in violation of Article 3 of the Convention for expelling Afghan refugees to Italy without carrying out mandatory inspection whether living conditions in Italian refugee reception centers werecompatible with the standards set out in the Convention. However, as a prominent expert in jurisdictions of Strasbourg and Luxemburg courts,S. Douglas-Scottobserves, it is an attempt on the part of the CJEU to strengthenthe principle of autonomy at the expense of human rights.[28] Indeed, Article 67 (first-par.) of TFEU states, "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights…" Hence, notwithstanding the great importance of mutual trust, it should not jeopardize fundamental human rights, particularly in such a sensitive area as freedom, security and justice, and should not in any way replace the fundamental values of the EU.In this respect, the Opinion of CJEU appears somewhat one-sided. In theory, there is room for political compromise between the EU and its Member States. If the EU demands respect for mutual trust from a state, the latter can be assured that the EU will participate as a co-correspondent in proceedings against the EU and will assume responsibility in cases of possible violations on its part. At the same time, this will enable the EU to carry out more comprehensive control over fulfillment of obligations by its Member States. Italy and Greece showed justhow unprepared they were to handle biggest influx of refugees through the Mediterranean.

27 See, Application N29217/12, Tarakhel v. Switzerland, Judgment of 4 November 2014.

28 See, SionaidhDouglas-Scott, „Opinion 2/13 and the "Elephant in the Room": A Response to Daniel Halberstam", Verfassungsblog ON MATTERS CONSTITUTIONAL, entry posted March 13, 2015, http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam/ (18/07/2018).

## 3. Protocol No. 16to the ECHR

In its Opinion, the CJEU reveals potential problems related to the enforcement of Protocol 16 of the Convention, which will enable supreme courts and tribunals of High Contracting Parties to turn to the ECtHR foran advisory opinion on the interpretation and application of the Convention and its Protocols in the context of cases pending before them at national level.

The CJEU fears the supreme courts of the Member States might prefer this instrument to preliminary ruling procedure under EU law. When interpreting the EU law or deciding on the lawfulness of EU acts, the supreme courts of the Member States can turn to the CJEU in order to obtain, and in some instances they are required to obtain, its preliminary ruling (the main difference between these two instruments is that a ruling by the CJEU is binding for national courts). In this case, under provisions of the DAA,the ECtHR would have been required to suspend the hearing and allow the CJEU to express its own opinion. Although, as the CJEU notes in paragraph 198 of its Opinion, Member States' courts will still have the possibility to circumvent a preliminary ruling procedure, which is a keystone of EU law.

As Advocate General Juliane Kokot justly observes in her view on the DAA, this problem has a quite clear solution,stipulated in paragraph 3 of Article 267 (3) of the TFEU. The paragraph requires that the supreme courts of the Member States turn to the CJEU for a preliminary ruling when they come across the interpretation issue of EU law. Since the provisions of the Treaties take precedence over national law and international agreements ratified by the Member States (including the Convention), any attempt by the courts to circumvent Article 267 would be a violation of the Treaties.[29]It would likely have been sufficient if the CJEU had clearly commented on this aspect without asking for additional amendments to the DAA. Finally, it should be noted, that the enactment of Protocol 16 (1 June 2010) will in any case rise this issue regardless of whether the EU joined the Convention or not.

## 4. EU monopoly over Dispute Settlement

One important characteristic of EU law is the monopoly of the CJEU over inter-state disputes as well as disputes related to the interpretation of EU law. According to Article 344 of the TFEU, Member States are required to decide disputes concerning the interpretation or application of the Treaties using only those means that are provided for in the Treaties. The Court of European Communities confirmed this monopoly in a judgment in MOX case,[30] where it found Ireland in breach of the sincere cooperation principle. The CJEU notes that inasmuch as Article 33 of the Convention allows High Contracting Parties to bring inheritance disputes to the ECtHR, accession to the Conven-

29 See, Advocate General JulianeKokot's View, paragraph 141, ECLI:EU:C:2014:2475.

30 See, a judgment in C-459/03, Commission v. Ireland, Judgment of 30 May 2006.

tion of the EU would enable the EU Member Stateto avoid requirements of Article 344 of the TFEU and bring a case to the ECtHR against another Member State or the EU itself.

As was the case with Protocol 16, the CJEU is addressing a hypothetical problem, asthe DAA does not principally forbidbringing inheritance disputes to other international courts, and it does not disapprove of the application of Article 344 of the TFEU. As the Advocate General points out in her opinion, in the case of a breach of sincere cooperation and an infringement of Article 344 of the TFEU, the European Commission is equipped with all the necessary means/methods (complaint onnon-fulfilment of obligation and preliminary ruling procedure) to stop infringement proceedings and bring the state before the court. Consequently, in her view, there is no need to make additional amendments to the text.[31]

## 5. Co-respondent mechanismfor the EU or Member State.

The EU Accession to the Convention must havebrought an end to thesituation where only Member States may be charged with violations of the Convention while implementing EU law. Under the Agreement, where an application is directed against a state, the EU may become a co-respondent to the proceedings. Similarly, when an application is directed against the EU, Member States may become co-respondents to the proceedings. The main problem revealed by the CJEU is that such involvement in the proceedings is not automatic under the Agreement, since it is subjected to a preliminary review by the ECtHRin respect to rationale and expediency. In fact, it will produce a situation where the ECtHR examines the distribution of competences between Member States and institutions, which is an exclusive prerogative of the CJEU.

In this respect, the CJEU's arguments look consistent and credible, as there is a risk that decision made by the ECtHR would affect the division of competences within the EU. We believe an optimal solution to the problem would be the addition of relevant amendments to the text of the Agreement as well as the addition of automaticity to the participation of the co-respondents in the proceedings. Abuse of this procedure is less risky: unlike the third parties in the proceedings, the co-respondents are charged not only expenses; they also face thepossible risk of paying a considerable amount to a victim against their will. Another solution might be if the ECtHR demanded from the CJEU to submit its opinion on the participation of the co-respondents in the proceedings. This procedure would have been an expression of the subsidiarity principle and, apart from that, it would have enhanced mutual trust between the ECtHR and CJEU.[32]

31 See, Advocate General JulianeKokot's View, paragraph 118, ECLI:EU:C:2014:2475.

32 See, КириллЭнтин, „ПрисоединениеЕвропейскогоСоюзакЕвропейскойКонвенциизащитеправчеловекаиосновныхсвобод: анализЗаключенияСудаЕС 2/13", СравнительноеконституционноеобозрениеN3 (106) (2015): 88.

## 6. Mechanism for Prior Involvement of the Court of Justice

As the CJEU states, the (procedure) mechanism for prior involvement[33] enables the proceedings before the ECtHR be suspended, giving the CJEU thepossibility to express its opinion on the authenticity/validity of an EU legal act. However, this possibility is not envisaged for instances, when the Strasbourg Court decides onan interpretation (not authenticity) of a legal act. This claim is hard to discuss particularly when the drafters of the Agreement provide official comment explaining this paragraph.

As Professor Jacque puts in, it isa purely technical element, which can easily be corrected in the text of the Agreement[34] or, as Peter Jan Kuijper suggests, the EU and Council of Europe can make a common statement on the interpretation of the said paragraph.[35] In any case, the CJEU did not need this "vagueness" to add to its arguments in favorof theincompatibility of the Agreement with EU law.

## 7. The Common Foreign and Security Policy(CFSP)

The CJEU decided to leave one of the mainproblems to address in thefinal stage of its Opinion. Its key claim to the DAA was that theCommon Foreign and Security Policy area (CFSP) was not removed from the ECtHR jurisdiction.Even though the Lisbon Treaty abolishedformal division in three "pillars," theCFSP has maintained a range of specific characteristics until now. In the first place, the role of supranational institutions (Commission, Parliament and CJEU) was reduced to minimum levels, while interstate institutions weremoved forward. Mechanisms for making decisions are also different: all decisions are made based on the unanimity rule.Like many characteristics of EU law, a principle of direct effect is not applied to this area.

The CFSP, in fact, is beyond the control of the CJEU albeit with two exceptions. First, the CJEU is empowered to examine whether a legal act to be adopted really belongs to the CFSP area. Second, the CJEU is authorized to checkthe legality of sanctions against individuals adopted by the EU. The logic of the CJEU is simple: its own jurisdiction in the CFSP area is limited. Consequently, the external judicial body (the ECtHR) will be authorized to consider a range of legal acts to be adopted by the EU without giving the CJEU the possibility to check the legality of these acts in advance. In the opinion of the CJEU,this situation creates a threat for the specific characteristics of the CFSP area.[36] How-

33 In German: Das Verfahren der Vorabbefassung; In English: The procedure for the prior involvement.

34 See, Jean Paul Jacqué, „Non la Convention des droits de l'homme?", Droit de l'Unioneuropéenne. http://www.droit-union-europeenne.be/412337458 (30/06/2018). See, Jean Paul Jacqué, „Non la Convention des droits de l'homme? ", Droit de l'Unioneuropéenne. http://www.droit-union-europeenne.be/412337458 (30/06/2018).

35 Kuijper P.J., „Reaction to Leonard Besselink's ACELG Blog", The BlogactivBlog, entry posted January 6, 2015, http://acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks%E2%80%99s-acelg-blog/ (21/07/2018).

36 In addition, it should be noted, that all acts of the EU related to European arrest warrant, asylum policy, illegal migration, which have been widely critisised by the ECtHR currently belong to the CFSP area.

ever, Advocate General Kokot directly indicates in her view that the fact that CJEU is not empowered with oversight over the EU in the CFSP area is not an obstacle because it is compensated by national courts with relevant competences[37].

Definitely, the limited jurisdiction of the CJEU in the CFSP area is an internal problem for the EU. It is not a relationship problem between the EU and ECtHR. In fact, the ECtHR does not have any difficulties in thejudicial review of decisions made in this area. The ruling adopted in the case Bosporus Airways v. Ireland[38] confirms that. Irishauthorities impounded anaircraft leased by a Turkish company toa Yugoslavian company under the community regulation in CFSP, which concerned the implementation of the UN Security Council resolution against Yugoslavia. The ECtHR found that transferring sovereign powers to supranational level does not absolve the states from their responsibility under the Convention.

Consequently, the ECtHR has the possibility to review fullythe acts adopted by the EU in this area even without the Accession Agreement. Furthermore, responsibility will be imposed on thestates, whichwillplace them in a disadvantageous position: they will have to violate either EU law or Convention. In this regard, a text of the Accession Agreement does not worsen the EU position. Onthe contrary, it enables anEU representative to defend the position of EU institutions before the ECtHR. It will therefore increase the likelihood of favorable results for the EU. Thus, the CJEU's reasoning in relation to this paragraph contains elements of political "blackmail." It requires the extension of its jurisdiction as a necessary condition for accession. The other option, namely consent of the Council of Europe on the removal of the CFSP area from its jurisdiction, looks unrealistic. During negotiations, representatives of the European Commission raised this issue but they met flat refusal from the Council of Europe.

## III. CONCLUSION

The Opinion, delivered on 18 December 2014,became anunpleasant surprise for the coming year for the ECtHR and European Commission as well as those 24 states which supported the DAA during hearings at the CJEU.

Opinion 2/13 of the CJEU definitely makes a bad impression. With its structure and assertive tone,it resembles a guilty verdict more than a court's decision.It is surprising how harshly the CJEU analyzes thecompatibility of the DAA with the Convention; paragraph after paragraph it reveals all

37 See, Advocate General JulianeKokot's View, 96-103 paragraphs, ECLI:EU:C:2014:2475.

38 (38. See, Application N45036/98, BosphorusHavaYollariTurizmveTicaretAnonim (Bosphorus Airways) v. Ireland, Judgment of 30 June 2005, ECtHR 2005-VI).

potential problems. The CJEU decided to ignore the possibility of solving many of the difficulties by applyingthe mechanismsthat already exist in EU law, preferring instead to modify the DAA text.

Thus, the CJEU turns a blind eye on themain unique feature of the Agreement: accession to the Convention is not the wish of the EU, rather it is a legal requirement that is stated in Article 2 of the Lisbon Treaty on the European Union and consequently, it is a provision of EU primary law. Furthermore, the Opinion makes it obvious that the EU institutions have different approaches concerning this article. For the European Commission, the obligation of accession to the Convention is most important element in this Article, while the CJEU believes accession is not a goal in itself and the protection of specific characteristics of EU law should be of the utmost importance. Consequently, if the specific characteristics cannot be preserved, accession should be taken off from the agenda.

Without question, accession to the Convention should not endanger specific characteristics of EU law. That is whyProtocol8 to the Treaties stipulates special reservation. However, as Thomas Streinz[39] justly observes, the aim of this constitutional court is to find a legal solution in a situation when it deals with competing constitutional norms (in this case, mandatory accession and the preservation of the unique characteristics of the EU and EU law) so that both provisions are effectively protected. In this regard, Opinion 2/13 looks strangely one-sided. The CJEU interprets specific characteristics of EU lawtoo broadly, such as, autonomy, and does it to the detriment of the accession obligation, without any effort to find a compromise.

Advocate GeneralJuliane Kokot interprets provisions of the Agreement as maximally compatible with the Treaties. She takes into consideration not only the "word for word" meaning of provisions but also the intent of the drafters. In result, although she too finds some problems in relation to compatibility, she believes they are not fundamental and can be easily removed. These findings led her to conclude that the Agreement, although with some reservations, is compatible with EU law.

It can be said that two significant aspects (or circumstances) influenced the negative opinion of the CJEU:

First, the CJEU fears that the EU's accessionto the Convention puts its independence at risk. This assumption is based on the fact that after accession, the EU will be equally positioned on one level with other Contracting Parties and, once all domestic remedies (within the EU final internal court instance is the CJEU) are exhausted, its legal acts will fall under ECtHR jurisdiction. In this situation, relations between the two courts will shift from coordination to marked subordination. Although, the Convention has never protected economic and social rights throughout its entire existence (that is, the rights which are central for the functioning of the Union and which will be more likely violated by the EU), only a small number of cases pending before the CJEU will moveto the ECtHR (cases concerning protection of human rights and freedoms) if the EU joins the Convention, one fact is more than obvious: the CJEU was not ready (consequently, it did not have any desire) to subject

39 See, Thomas Streinz,The Autonomy Paradox, Verfassungsblog ON MATTERS CONSTITUTIONAL, entry posted March 15, 2015, https://verfassungsblog.de/the-autonomy-paradox/(21/07/2018).

itself to anothercourt's (ECtHR) jurisdiction and external review.To some extent, this willcause the "externalization of internal problems."[40] This position is in line with a frequently cited viewpoint of a former Advocate General at the CJEU, A. Toth. In his words, there is no theoretical or practical substantiation tojustifymovingthe CJEU to the jurisdiction of another court,which may (and should) be regarded only as equal and not superior, and which at the same time represents a gradually diminishing number of non EU-states."[41]

Second, in the context of the CJEU's present roles of protection and judicial review, and taking into account the significance of human rights for the EU, any defeat in the ECtHR will be very painful for the EU since defeat may compromise its image in this sphere. Consequently, the CJEU will found itself under seriouspressure and it will be forced to change its approaches in numerous spheres.[42]As a rule, the opinion of the CJEU is binding for EU institutions. Thus, before longthe European Commission will have to return to negotiations with a package of proposals envisaging the wishes of the CJEU. In this respect, stances taken by other Contracting Parties will be interesting. One thing is obvious: if adding specifications to the preliminary participation mechanism and conceding to the EU participation as a co-respondent in the proceedings are not against the interests of other Contracting Parties, concessions in relation to any other paragraph will place the EU in an advantageous position (particularly it can be said about the idea of theremoval of acts adopted in the CFSP area by EU institutions from the control of the ECtHR). It should be taken into account that it is the EU that is interested in accession to the Convention and not the Council of Europe. In this respect, a realistic solution to the problems identified by the CJEU would be to review the texts of the Treaties (includingaddition of clarifications in relation to extension of the CJEU jurisdiction and Protocol N8 to the Treaties) and not addition of exceptions to the text of DAA. However, since a review of the Treaties is notplannedin thenear future,EU accession to the Convention appears to be postponed for an indefinite period.

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40 See Florian A. Zeitner, „Die Zukunft der Menschenrechte in der Europäischen Union – EMRK-Beitritt der EU (vorerst) gescheitert!?", Der Bevollmächtigte des Rates - BüroBrüssel, Europa-Informationen N148,https://www.ekd.de/bevollmaechtigter/bruessel/newsletter/99139.htm (19/07/2018).

41 TothA.G.,„The European Union and Human Rights: the Way Forward", Common Market Law Review, Vol.34, N3 (1997): 491–529.

42 Энтин К.В.,„Присоединении Евросоюза к ЕКПЧ", Московский журнал международного права, N3 (87) (2012 июль-сентябрь): 115.

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