Common Market Law Review **52**: 1–16, 2015.

EDITORIAL COMMENTS

The EU's Accession to the ECHR – a "NO" from the ECJ!

In its Opinion 2/13, delivered on 18 December 2014,[1] the Court of Justice has blocked the path for the accession of the European Union to the European Convention of Human Rights. This outcome may have come as a slight surprise for all the Member States and EU institutions that participated in the hearing before the ECJ on 5 and 6 May 2014, as part of the proceedings for an Opinion on the draft agreement on EU accession to the Convention;[2] at that hearing there seems to have been a far-reaching consensus among the invited participants that the draft accession agreement should be considered compatible with the EU Treaties.[3] It may also come as a surprise for all those commentators who have explored and accepted the compatibility of the final draft agreement with the fundamental principles of European Union law. Nevertheless, in her View (delivered on 13 June 2014, and published on the same day as Opinion 2/13) Advocate General Kokott already made a number of reservations, though qualifying them as being of relatively minor importance. In the end, she opined that the draft agreement could not be considered as fundamentally flawed and should therefore be declared compatible with the Treaties, provided that a couple of modifications, additions and clarifications were made which should not be too difficult to secure.[4] And yet, the Court reached a different conclusion – and one which, as this editorial will suggest, is hardly free from its own controversy. As a general observation it may be noted that whereas the View of Advocate General Kokott seems to breathe a pro-accession spirit (reflected by her conditional approval approach), the Opinion of the Court, in obvious contrast, appears to reflect a somewhat formalistic and sometimes uncooperative attitude in defence of its own powers *vis-à-vis* the European Court of Human Rights (ECtHR).[5]

1. Opinion 2/13, *ECHR*, EU:C:2014:2454**.**
2. 47+1(2013)008rev2, Final Report to the CDDH, 10 June 2013.
3. See Johansen, "Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement", <blogg.uio.no/jus/smr/multirights/content/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-1-of-2>.
4. View of A.G. Kokott relating to Opinion 2/13, EU:C:2014:2475 paras. 278–279.
5. See the insightful comments by Jacqué, "Non à l'adhésion à la Convention européenne des droits de l'homme?" <www.droit-union-europeenne.be/412337458 >.

A long story

Accession to the ECHR has been an ongoing story, starting more than thirty years ago with a Commission Memorandum[6] in 1979 and a Commission Communication to the Council[7] in 1990, arguing in favour of accession. But this initial drive encountered a first set-back when the ECJ delivered its Opinion 2/94 on 28 March 1996, in which it stated that the European Community lacked competence to conclude an international convention in the field of human rights. In the absence of any express or implied powers conferred by Treaty provisions to conclude such an agreement, the Court noted that the gap-filling provision of ex Article 235 EEC could not serve as a legal basis because accession to the ECHR would have fundamental institutional implications of such (constitutional) significance for the Community and for the Member States that only a Treaty amendment would be the correct way to proceed.[8]

The EU as a human rights player

To be sure, the importance of respect for human rights was already expressed in various declarations by Community institutions a long time ago, as well as in provisions of the Single European Act and the (pre-Lisbon) Treaty on European Union.[9] Moreover, as the Court of Justice stressed in its Opinion 2/94, fundamental rights have been an integral part of the general principles of Union (then Community) law that the Court has developed in its case law, drawing inspiration from the constitutional traditions of the Member States and attributing special significance to the ECHR, even in the absence of an express obligation to that effect.[10] This endeavour to ensure the protection of fundamental rights in the Community order culminated in the Lisbon Treaty of 2009 in a threefold dimension. First, Article 6(3) TEU has given the relevant case law of the Court of Justice a constitutional foundation.[11] Second, Article 6(1) TEU has incorporated the Charter of Fundamental Rights of the

6. Bulletin EC Supplement 2/79, part I, § 7; for more details concerning the early history see e.g. Michl, *Die Überprüfung des Unionsrechts am Maßstab der EMRK* (Mohr Siebeck 2014), pp. 51–64.

7. 19 Nov. 1990, Bulletin EC 10–1990, p. 76.

8. Opinion 2/94, *ECHR*, EU:C:1996:140, paras. 26–27, 34–35.

9. Opinion 2/94, para 32.

10. Opinion 2/94, para 33.

11. "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

European Union of 7 December 2000, giving it the same legal value as the Treaties, as part of the Union's constitution, to be interpreted in the light of the ECHR. And third, Article 6(2) TEU provides that the "Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", thereby filling the competence gap that the Court of Justice had emphasized in its Opinion 2/94. Article 6(2) TEU does not only provide a legal basis for the Union's accession to the ECHR, but has to be read as an obligation to move in that direction, though crucially qualified by the conditions set out in Article 6(2) 2nd sentence TEU and Protocol No. 8 relating to Article 6(2) TEU (and, of course, subject to the assent of the Contracting Parties of the ECHR).[12] In a somewhat parallel move, Protocol No. 14 to the ECHR, which was adopted in 2004, entered into force on 1 June 2010, amending Article 59 ECHR to allow the European Union, though an international organization and not a State, to accede to the ECHR (without becoming a member of the Council of Europe). Negotiations on the accession agreement started in 2010,[13] the draft agreement being finalized in June 2013.

Why should the Union accede to the ECHR?

Given the impressive development of human rights protection in the European Union, one may, for a moment, lean back and pose the question why the accession of the European Union to the ECHR has still remained such an important issue that it justifies a provision like Article 6(2) TEU – with all the ensuing difficulties and complexities in drafting an accession agreement, and, later on, in applying and developing the human rights case law in a dialogue between the Court of Justice and the European Court of Human Rights (ECtHR). In short, there are three reasons why accession of the EU to the ECHR has still been regarded as a viable goal that should be pursued.[14]

12. Jacqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 48 CML Rev. (2011), 995; Obwexer, "Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen", Europarecht 2012, 115, 116–117; but see Baratta, "Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism", 50 CML Rev. (2013), 1305: arguably a qualified commitment of means, rather than a genuine obligation of result; Lock, "Walking on a tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order", 48 CML Rev. (2011), 1025, 1033.

13. For details see the Draft Explanatory Report (Appendix V) of the Final report to the CDDH (fn. 2), No. 12–15.

14. See Kuijer, "The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?", 3 *Amsterdam Law Forum* (2011), 17, 20–21.

Accession to the ECHR would enhance the protection of individuals within the ECHR system insofar as individuals will be in a position to bring their complaints against acts of the EU institutions before the ECtHR. Legal protection of individuals will thereby be improved as compared with the protection provided within the EU system in cases in which individuals may have no access to judicial review at the EU level (e.g. some CFSP measures) which is not entirely compensated at the Member State level.[15] Accession of the EU to the ECHR will, moreover, create a common space of human rights protection in Europe in which all relevant actors in Europe – Member States of the EU, non-Member States, and the EU as an international organization – will be bound by the same common (minimum) standards, and in which the ECtHR will have the final say regarding these standards (Art. 46(1) ECHR). Accession to the ECHR is likely to prevent the ECJ and the ECtHR developing a diverging jurisprudence as to certain human rights provisions in the ECHR.[16] And, last but not least, on a more symbolic level, the European Union, being bound in its actions by the human rights standards of the ECHR that do not reflect a specific Union interest and that are enforced by an institution which is not part of the Union system, will be subject to a form of external control,[17] thereby enhancing its legitimacy and its stature in its attempts to improve the protection and enforcement of human rights in the rest of the world.

The legal framework for accession

The accession to the ECHR may only be pursued in a way that "shall not affect the Union's competences as defined in the Treaties" (Art. 6(2) 2nd sentence TEU). In a discussion document issued on 5 May 2010,[18] the ECJ had already clearly stated that this provision makes the accession to the ECHR dependent on whether the *specific conditions* of the European Union as a regional integration organization are appropriately taken care of. Protocol No. 8 of the EU Treaties, relating to the accession of the Union to the ECHR, is a bit more

15. Cf. Gragl, "A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights", 48 CML Rev. (2011), 995, 1027; more generally e.g. Vondung, *Die Architektur des europäischen Grundrechtsschutzes nach dem Beitritt der EU zur EMRK* (Mohr Siebeck, 2012), pp. 33–74.

16. In its Declaration No. 2, the Intergovernmental Conference which adopted the Treaty of Lisbon states that the existing regular dialogue between the ECJ and the ECtHR "could be reinforced" when the Union accedes to that Convention.

17. See View of A.G. Kokott, para 1.

18. Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, <curia.europa.eu/jcms/jcms/P_64268/>.

specific insofar as it demands that the accession of the Union shall not affect "the powers of its institutions" either (Art. 2 1st sentence). Moreover, Article 1 of Protocol No. 8 demands that the accession agreement concluded "shall make provision for preserving the special characteristics of the Union and Union law …".[19] It is no secret that these provisions are meant to reflect the case law of the ECJ[20] relating to international agreements concluded by the Union, and therefore have to be interpreted accordingly. In this case law the Court has been eager to stress the "autonomy of the Community/Union legal order",[21] and especially the "special characteristics" of the Union system of judicial protection.

Since its Opinion 1/91, *European Economic Area***,** the Court has made it clear that an international agreement concluded by the Union (at that time, the Community) may provide for a system of courts whereby the Union (necessarily) submits itself to (binding) decisions of those courts.[22] By implication, the Court has thereby admitted that it will be bound by decisions of such an external court. This position has, however, explicitly been made subject to a number of qualifications related to the autonomy of Union law and its special characteristics. In a nutshell, this case law comprises the following features. First, the decision of such an external court should be confined to the interpretation and application of the provisions of the agreement. Second, it should not touch upon the exclusive jurisdiction of the ECJ to decide disputes among the Member States (Art. 344 TFEU, ex 219 EEC).[23] And third, the external court should not be attributed the competence in one way or another to authoritatively interpret EU law.[24]

In its discussion document of 2010, dealing with its (future) relationship to the ECtHR in case of accession, the ECJ underlines a number of further points that an accession agreement would have to take care of. The Court stresses its competence to authoritatively interpret Union law (Art. 19(1) TFEU), and its exclusive competence to declare an act of the Union invalid,[25] as one of its powers that must not be affected by the accession (referring to Protocol No. 8 EU). The ECJ takes pains, moreover, to dwell on the implications of the principle of subsidiarity as a special feature of the system of judicial

19. See also Declaration No. 2 of the Intergovernmental Conference: "The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law."

20. Lock, op. cit. *supra* note 12, 1028.

21. Opinion 1/91, *European Economic Area,* EU:C:1991:490 para 35; Opinion 1/09, *European Patent court,* EU:C:2011:123, para 67.

22. Opinion 1/91, para 40.

23. Opinion 1/91, para 35.

24. Opinion 1/91, para 43; Opinion 1/09, para 78.

25. Discussion document, cited *supra* note 18, para 8.

protection for individuals. Whenever individuals, after having exhausted domestic remedies, challenge national measures implementing or applying Union law before the ECtHR, the principle of subsidiarity (inherent in the ECHR)[26] would require effective internal review by the courts of the Member States or of the Union before the ECtHR gives its final (and binding) decision.[27]

The draft accession agreement

In a nutshell, the most important provisions of the draft accession agreement are the following:[28]

(1) The agreement provides for details of the accession of the European Union that relate to the fact that the European Union is not a "State" as set forth by the ECHR (Art. 1(5)).
(2) It introduces a so-called co-respondent mechanism whereby the EU will become a party to proceedings in an application or complaint directed against one or more of its Member States, or the Member States may become party to proceedings directed against the European Union (Art. 3(1)-(5)).[29]
(3) Article 3(6) provides for a prior-involvement procedure, in the case of proceedings in which the EU is a co-respondent, whereby the ECJ is given the opportunity to assess the compatibility of a Union act with the rights under the ECHR or the protocols that the Union has acceded to. This prior involvement of the ECJ is meant to take place in cases in which the ECJ has not yet decided on the invalidity of a Union act for non-observance of the rights and freedoms set out in the ECHR, but this question has been raised before a national court that, for whatever reason, has not requested a preliminary reference to the ECJ on the issue of invalidity.
(4) With regard to potential disputes among the Member States involving the interpretation of the ECHR, the draft agreement takes notice of Article 344 TFEU which establishes an exclusive jurisdiction of the

26. Discussion document, ibid., para 12.
27. Discussion document, ibid. para 7.
28. The accession agreement is part of a package of instruments comprising, among other instruments, a draft explanatory report to the accession agreement, which highlights some of the essential features of the agreement.
29. This mechanism is foreshadowed by Art.1 (under b.) Protocol No. 8, requiring that the accession to the ECHR will contain provisions on a mechanism to ensure that proceedings and applications are correctly addressed to Member States and/or the Union as appropriate.

ECJ concerning disputes that relate to the interpretation or application of the Treaties. Whereas Article 55 ECHR provides for exclusive jurisdiction of the ECtHR with regard to disputes among the High Contracting Parties relating to the interpretation and application of the Convention, Article 5 of the draft agreement authoritatively interprets Article 55 in such a way that any proceedings before the ECJ shall not be regarded as proceedings for which Article 55 ECHR claims exclusive jurisdiction for the ECtHR.

(5) Finally, the draft agreement contains a number of provisions relating to institutional questions, such as the election of judges (Art. 6) and the participation of the EU in the meetings of the Council of Europe (Art. 7),[30] and, last but not least, the participation of the EU in the expenditures related to the Convention (Art. 8).

Opinion 2/13

In its Opinion 2/13, the ECJ holds the draft agreement to be incompatible with Article 6(2) TEU or Protocol No. 8 EU for a number of reasons. Most importantly, the Court argues that the agreement is likely to have an adverse effect on the autonomy of European Union law and its specific characteristics (referred to in Protocol No. 8 EU), notably relating to its own position and competences within the EU legal system.

In the introductory part of its Opinion, the Court explains in some detail what those "specific characteristics" of the EU and EU law amount to.[31] They include the principle of conferral of powers, the institutional structure set up by Articles 13 to 19 TEU, EU law as an independent source of law, characterized by its primacy and direct effect. The Union is based on a set of common values (Art. 2 TEU), foremost fundamental rights, that the Member States share, which justifies the existence of mutual trust between the Member States that these values will be recognized. The autonomy of EU law requires that the interpretation of those fundamental rights be ensured within the framework and structure of the Union. It is considered as the very function of the Union Courts and the courts of the Member States to ensure full application of Union law, with the preliminary ruling procedure as the keystone of the judicial system, securing consistency and uniformity of

30. It should be noted that the EU is only meant to accede to the ECHR, but not to the Council of Europe.

31. Opinion 2/13, paras. 164–177.

interpretation of Union law, and thereby preserving its autonomy and its specific characteristics.

The Opinion picks out seven points[32] in which the draft agreement lacks necessary provisions or requires modification. These points concern the compliance of the Member States with EU law and the relationship between the Member States (*points one* to *four*), the protection of the EU legislature and the Court's integrity (*points five* and *six*), and CFSP matters (*point seven*). With regard to most points, the Court states that the draft agreement does not have regard to the specific characteristics of the EU and EU law.

As a *first point*, the Court faults the agreement for not containing a provision clarifying the relationship between Article 53 ECHR and Article 53 of the EU Charter of Fundamental Rights. Whereas Article 53 ECHR reserves to the Contracting Parties the power to lay down higher standards of protection of fundamental rights than set out in the ECHR, Article 53 of the Charter provides that the Charter can not be interpreted as restricting the application of the fundamental rights protected by the ECHR and by the Member States' constitutions. The ECJ, in *Melloni*,[33] has interpreted Article 53 of the Charter to mean that the application of those national standards must not compromise the primacy, unity and effectiveness of EU law. Against this background, the ECJ argues that the draft agreement lacks a provision that makes it clear that the "power" granted to the Contracting Parties by Article 53 ECHR can only be exercised by the Member States according to the standards set out by the ECJ's interpretation of Article 53 of the Charter (paras. 188–190).

As a *second point*, the ECJ deals with the principle of "mutual trust" between the Member States (as was at issue in *N.S.*[34]) which applies in the framework of EU law implementing common values[35] and which is built upon the presumption that all Member States comply with EU law. Concerning compliance with the Charter, the principle of "mutual trust" excludes an approach based on the Convention whereupon one Member State would have to check in each *specific case* whether the other Member State has observed the fundamental rights of the ECHR. Such an obligation would disregard "the intrinsic nature of the EU",[36] built on mutual trust. The ECJ opines that the draft agreement fails to make any provision securing the observance of the principle of mutual trust, creating the danger of undermining the autonomy of EU law (paras. 194–195). It should be noted, however, that the

32. The Opinion does not deal with Arts. 6–8 draft Accession Agreement, and therefore, by implication, does not regard them as incompatible with European Union law

33. Case C-399/11, *Melloni,* EU:C:2013:107, para 60; also Case C-617/10, *Fransson*, EU:C:2013:105, para 29.

34. Joined cases C-411 & 493/10, *N.S.*, EU:C:2011:865, para 83.

35. Opinion 2/13, para 168.

36. Opinion 2/13, para 193.

ECJ, in its own case law, has limited the principle of mutual trust in case of "exceptional circumstances", e.g. where compliance with fundamental values in a Member State is tainted by basic flaws or deficiencies.[37]

As a *third point*, the ECJ deals with Protocol No. 16 ECHR to the Convention, which was signed on 2 October 2013 (after the draft agreement had been finalized by the negotiators in April 2013). Protocol No. 16 ECHR provides for advisory opinions by the ECtHR on the interpretation of the Convention rights at the request of courts or tribunals from the Contracting Parties that have acceded to the Protocol. As this procedure might imply the danger that the Article 267 TFEU procedure relating to the interpretation of the Charter could be circumvented, the ECJ finds the agreement insufficient, as it has no provision clarifying the relationship between the Protocol No. 16 ECHR and Article 267 TFEU in order to guarantee the effectiveness of the Article 267 TFEU procedure (paras. 198–199).

A *fourth point* relates to the exclusive jurisdiction that Article 344 TFEU accords to the ECJ for all disputes between Member States that relate to the interpretation and application of EU law – a jurisdiction that extends also to disputes between the EU and its Member States. As the Convention, after the accession of the EU to the ECHR, will be an integral part of EU law, the accession agreement will have to fully accord with the exigencies of Article 344 TFEU – a consideration that is expressly set forth in Article 3 of Protocol No. 8 EU. The ECJ regards Article 5 of the draft agreement, with its interpretation of Article 55 ECHR, as insufficient to preserve the exclusive jurisdiction of the Court, as it still allows for the possibility that a Member State or the EU might submit an application to the ECtHR under Article 33 ECHR. The ECJ states that only a provision *expressly* excluding the ECtHR's jurisdiction within the scope of EU law would be compatible with Article 344 TFEU (para 213).

As a *fifth point*, the ECJ deals with specific features of the co-respondent mechanism that allegedly run afoul EU law.[38] If a Member State (or the EU) makes a request to become co-respondent in a proceeding directed against the EU (or a Member State), the ECtHR, according to Article 3(5) of the draft agreement, will have the power to assess whether it appears to be "plausible" that the conditions for joining as co-respondents (Art. 3(2) and (3) of the draft

37. Joined cases C-411 & 493/10, *N.S.*, paras. 86–88, 89, 94; Opinion 2/13, paras. 191–192. See also ECtHR 4 Nov. 2014, *Tarakhel* v. *Switzerland*, Application No. 29217/12, § 90. For a discussion of this issue see von Bogandy and Ioannidis, "Systemic Deficiency in the Rule of Law: What it is, what has to be done, what can be done", 48 CML Rev. (2011), 1029; Dawson and Muir, "Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma", 48 CML Rev. (2011), 751.

38. Some of the problems have been discussed by Eckes, "EU Accession to the ECHR: Between autonomy and adaptation", 76 MLR (2013) 254, 267.

agreement) are met. Such a (binding) decision will imply that the ECtHR will have to assess the EU rules on the division of competences and on the criteria for the attribution of acts (to a Member State or to the EU), and thereby interfere with the division of powers between the EU and its Member States (paras. 224–225). Moreover, the provisions on joint responsibility of the EU and its Member State(s) in Article 3(7) of the draft agreement misconceive the possibility that a Member State might have made a reservation (thereby excluding its responsibility), and they neglect the exclusive competence of the ECJ to decide on matters of apportionment of responsibility (para 234). With regard to both issues the co-respondent mechanism as provided for by the draft agreement does not ensure that the specific characteristics of the EU and EU law are preserved (para 235).

As a *sixth point*, the ECJ expresses its discontent with the prior involvement procedure, as set forth in Article 3(6) of the draft agreement, with regard to two issues. First, the prior involvement procedure is triggered only if the ECJ has not yet given a ruling on the question of law which is at issue in the proceedings before the ECtHR. The decision on the question whether the ECJ has already given a ruling cannot, so the ECJ argues, be left to the ECtHR – which would, indeed, amount to a competence to interpret the case law of the ECJ – but has to be conferred on an EU institution that has the power to resolve the issue and whose decision should bind the ECtHR (para 238). To enable this institution to effectively perform its task, an information system would have to be set up that fully and systematically gives information on all pending cases before the ECtHR so that the competent institution may be in a position to assess whether the ECJ has already given a ruling on the relevant question of law (para 241). Second, Article 3(6) of the draft agreement provides for the prior involvement procedure to enable the ECJ to assess the compatibility of EU law with the rights guaranteed by the Convention or the protocols. The ECJ considers that as far as this provision may be interpreted to extend only to questions of interpretation of primary law and the *validity* of secondary law, as the draft explanatory report seems to suggest (in its para 66), the prior involvement procedure should be extended to the *interpretation* of secondary law in order to give the ECJ the chance to deliver a definite interpretation of secondary law in the light of the rights guaranteed by the ECHR (paras. 244–247).

The *seventh point*, probably the most important, relates to judicial review of CFSP matters. Such measures are covered by the ECHR with no possibility for the EU to make a reservation excluding this area of law. In a proceeding before the ECtHR, the EU may be held responsible either on the basis of Article 1(3) of the draft agreement or as a co-respondent in accordance with Article 1(4). In contrast, the Lisbon Treaty excludes the jurisdiction of the

Court of Justice of the EU in CFSP matters generally (Art. 24(1) TEU, Art. 275(1) TFEU), limiting jurisdiction only to so-called "restrictive measures" (Art. 275(2) TFEU) and policing the boundaries between CFSP and TFEU competences. Consequently, the prior involvement procedure cannot be applied, except in the case of Article 275(2) TFEU. The Court argues that it would prove incompatible with the "specific characteristics" of EU law to confer jurisdiction in CFSP matters exclusively on an international court like the ECtHR, which is outside the institutional and judicial framework of the EU. The conclusion of the Court is straightforward: the draft accession agreement fails to have regard to the specific characteristics of the EU legal system relating to judicial review in CFSP matters, though this is, admittedly, a consequence of the Treaties' provisions on the restricted jurisdiction of the ECJ in these matters. The implicit consequence of this position is as simple as problematic: the EU cannot accede to the ECHR as long as the ECJ is restricted in its jurisdiction to review CFSP matters.[39]

A few comments

This is not the place to go into an in-depth discussion of Opinion 2/13; a few preliminary comments must suffice.[40] As a general matter, the Opinion attracts criticism for its somewhat *formalistic* approach. As to the *first point*, concerning the relationship between Article 53 ECHR and Article 53 of the Charter, one may wonder why a coordinating provision which the Court considers as missing in the draft agreement is really necessary at all: Article 53 ECHR merely clarifies that the Contracting Parties may go beyond the protective standards of the ECHR. This provision does not, however, (explicitly or implicitly) absolve the Contracting Parties from any legal commitments that they may have with regard to other legal sources, like Article 53 of the Charter. Insofar, the alleged need for a coordination provision seems to be rather far-fetched.

The line of reasoning with regard to the *substantive* issues raised by *points three* (Art. 267 TFEU) and *four* (Art. 344 TFEU) appears, at first sight, to be rather straightforward. However, both points deal with issues that relate more to obligations of the Member States and Member State courts that follow from the EU Treaties and have to be enforced with the instruments provided for by Union law. Again, the argumentation of the Court sounds very formalistic.

39. It should be noted that the ECJ does not argue in favour of an enlargement of its jurisdiction on the basis of Art. 13 ECHR, but points to a failure to have regard to the "special characteristics" of EU law with regard to judicial review of EU acts.

40. See also the discussion by Jacqué, op. cit. *supra* note 5.

Moreover, it is not quite clear why the accession agreement should deal with these matters, internal to the European Union, at all.

As to *points five* and *six*, the problematic details of the draft agreement that have been uncovered by the ECJ reveal that the negotiating partners may not have always fully taken into account the "specific characteristics" of Union law which the ECJ emphasizes so strongly in order to defend its position *vis-à-vis* the ECtHR. Again, the Court leans towards a rather formalistic view as far as Article 3(6) of the draft agreement is concerned. This provision seems to be formulated in a sufficiently broad manner as to involve the prior involvement procedure also with regard to questions of "interpretation" of secondary Union law (and not only of its validity) as well. Nevertheless, for the sake of clarity and legal certainty, a revision of Article 3(6) of the agreement may have its merits.

As for the implications of "mutual trust" (*point two*), the Court seems to connect this principle with the notion of membership of the Union.[41] It is, however, another question and certainly beyond the scope of this editorial whether the ECJ is not somewhat overstretching this (normative) concept of "mutual trust" with regard to the compliance of Member States with the fundamental rights guaranteed by EU law.[42] Whereas the ECJ allows an exception to the principle of mutual trust only in case of "exceptional circumstances", the approach under the ECHR calls for a consideration of the *specific case* of the complaint.[43] One may wonder whether the latter approach does not prove to be more adequate with regard to effective protection of fundamental rights – given the realities in some of the Member States.[44] It should not come as a surprise if the Opinion will find some approbation from Member States which may not be strictly compliant with the protection of fundamental rights.

The most problematic argument that the ECJ has put forward relates to the *seventh point* – the judicial review of the CFSP measures. The argument has already been foreshadowed by the Court's discussion document of 2010, in which the Court extensively dealt with the principle of subsidiarity with regard to the direct protection against Union acts,[45] demanding that whenever any act of the Union is challenged before the ECtHR, an internal review of the Union act by the ECJ as to its validity would have to take place *before* the external

41. Opinion 2/13, para 168.

42. See para 168. The ECJ derives from the premiss that all Member States share a set of common values (Art. 2 TEU) the consequence that this "implies and justifies the existence of mutual trust between the Member States that those values will be recognized …".

43. ECtHR 4 Nov. 2014, *Tarakhel* v. *Switzerland*, paras. 92–93.

44. See Editorial Comments: "Fundamental rights and EU membership: Do as I say, not as I do!", 49 CML Rev. (2012), 481, 485–488.

45. Discussion document, cited *supra* note 18, para 11.

review is carried out.[46] It is in this perspective that the ECJ has now expounded the principle (as a "specific characteristic" of EU law) that the EU, in an international agreement, cannot confer jurisdiction to an international court with regard to matters in which the ECJ itself has no power of judicial review.

The position advanced by the ECJ will appear as somewhat surprising for all those who have argued in favour of the accession of the EU to the ECHR precisely with regard to the "enormous lacuna" in the protection of human rights in the EU.[47] The recognition of jurisdiction of the ECtHR in CFSP matters would only strengthen the effectiveness of the legal protection for individuals – as compared to the present situation![48] The gist of the problem, however, seems to be the following: does the principle of autonomy of EU law and its specific characteristics preclude the EU from granting jurisdiction to an international court to an extent that goes beyond the jurisdiction of the ECJ?[49] This issue will surely be at the centre of the debate that Opinion 2/13 will stir up. And, moreover and of utmost importance: the authors of the Lisbon Treaty have imposed on the Member States and the EU institutions an obligation for an accession of the Union to the ECHR[50] and thereby foreseen an external control of CFSP measures, at the same time deliberately restricting the ECJ's jurisdiction as to those measures. This strongly suggests that the authors of the Lisbon Treaty did not see any contradiction between the limited jurisdiction of the ECJ on the one hand (Art. 40 TEU, Art. 275(1) TFEU) and the recognition of jurisdiction of the ECtHR in CFSP matters on the other.[51] Or, to put it in other terms: the Member States (as authors of the Lisbon Treaty) seem to follow a notion of the "specific characteristics" of Union law set forth in Protocol No. 8 EU that deviates from that espoused by the ECJ.

The way ahead

Given the fact that Article 6(2) TEU obliges the Union to accede to the ECHR, the competent Union institutions seem forced to ask for a further round of negotiations concerning an accession agreement. Whether the Committee of

46. Discussion document, ibid., paras. 11–12.
47. Gragl, op. cit. *supra* note 15, 1027.
48. The exclusion of the ECtHR's jurisdiction does not seem to be very convincing, bearing in mind that Member States may be held liable for collective actions mandated by the EU under the ECHR system.
49. View of A.G. Kokott, para 191.
50. It seems remarkable that in its Opinion the ECJ does not discuss the implications of the *obligation* to accede to the ECHR as set forth in Art. 6(2) TEU.
51. View of A.G. Kokott, para 194.

Ministers of the Council of Europe will be ready to re-open negotiations and whether a revised draft agreement may be reached in the negotiations which accords to the diverse points set out in Opinion 2/13 remains to be seen. Some of the points mentioned above may perhaps be easy to resolve by clarifying provisions (e.g. *points one*, *three* and *four*). Others may present a problem, because the other Contracting Parties may not be ready to give in (*point two*).

Point seven will not be a matter to be resolved by a modified accession agreement. As Article 57(1) ECHR allows reservations only for particular matters, and not for broad areas of law, the EU will not be in a position to exclude CFSP measures from the accession agreement. Accordingly, the only (likely) way the EU will be able to accede to the ECHR is by way of a Treaty amendment.[52] One option would be to extend the jurisdiction of the ECJ to all CFSP matters. Indeed, Opinion 2/13 could be seen as a strategic move of the ECJ to provoke such a modification of those unloved provisions of the Treaties that limit its judicial powers.[53] It may, however, be doubted whether the Member States will be willing to take such a road. Another option would be an amendment to Protocol No. 8 with the specific clarification that ECHR accession is possible and required despite the lack of jurisdiction of the Court over CFSP matters.[54] This option would, indeed, reflect the position taken by the Member States in the Opinion procedure that the draft agreement is compatible with the Treaties; and it would restate the intention of the authors of the Lisbon Treaty to provide for an obligation to accede to the ECHR while at the same time limiting the jurisdiction of the ECJ over CFSP matters. It is another question whether, in the near future, a Treaty amendment procedure has a realistic chance at all. Given existing and growing strong feelings in one or the other Member State against "more Europe" in general, and against the Strasbourg Court and its human rights jurisprudence in particular, the accession of the European Union to the ECHR may now have turned into a *mission impossible*.

Opinion 2/13 exudes the impression of being strongly influenced by the endeavour of the ECJ to defend its position *vis-à-vis* the ECtHR rather than by a spirit of cooperation.[55] The somewhat inflexible defence of its judicial powers at the expense of an accession of the EU to the ECHR may,

52. See Opinion 2/13, para 253, arguing that the situation "can only be explained by reference to EU law alone."

53. Whether the ECJ has not thereby overstepped the limits of a legitimate interpretation of the Lisbon Treaty will probably be questioned in the future discussion on Opinion 2/13.

54. See the proposal of a "Notwithstanding Protocol" (which would go beyond CFSP matters) by Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13" www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/#.VKrsffmQCOw.

55. While such spirit of cooperation seemed to be foreshadowed by the Joint communication from Presidents Costa and Skouris, published in 2011, <curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf>.

unfortunately, lead to an (unexpected) backlash in the relationship between the ECJ and the constitutional courts of the Member States, who may, paradoxically, draw some inspiration from the ECJ's attitude. Constitutional Courts may be willing to defend their judicial powers (with regard to fundamental rights) *vis-à-vis* the ECJ in a fashion parallel to the ECJ *vis-à-vis* the ECtHR. It will be interesting to see whether the Constitutional Courts will wholeheartedly accept the sweeping implications of the principle of "mutual trust" as set out by the ECJ.[56] Moreover, if and when some of the Member States accede to Protocol No. 16 of the ECHR, the courts of these Member States may feel inclined to turn to the ECtHR as the more "competent" human rights court. If such a development were to happen, Opinion 2/13 might one day be regarded as a questionable defence of the "specific characteristics" of European Union law.

56. See paras. 191–194 of Opinion 2/13.