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Opinion 2/13: Game Over or Just Another Pit-Stop?

1. Introduction

In the controversial Opinion 2/13,[1] the Court of Justice of the EU (CJEU) took a clear and unambiguous position—the Draft Agreement on the accession of the EU to the European Convention on Human Rights (ECHR) is not compatible with Article 6(2) of the Treaty on EU or Protocol No. 8 to the ECHR. Consequently, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.[2]

Both, the opinion as such as well as its reasoning were criticised soon after the document became publicly available.[3] It seems Opinion 2/13 has more foes than friends.

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1 Opinion 2/13, ECLI:EU:C:2014:2454.

2 See Article 218(11) TFEU.

3 Ritmeyer and Pirker stated: "Instead of at least opting for a somewhat encouraging wording that could serve as a road map for the Commission, the Court, however, decided to hand down a no spread over nine pages." See: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back (2015), URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/. See also: Douglas-Scott, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the CJEU, URL: http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/; Lazowski, Wessel, When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR (2015); Peers, The EU's Accession to the ECHR: The Dream Becomes a Nightmare (2015), p. 213; Shleina, Opinion 2/13: Some Further Reflections, URL: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=966#.

Therefore, in this article, we first light up and analyse major concerns of the CJEU as stressed in Opinion 2/13 and then discuss possible scenarios regarding the EU accession to the ECHR.

Prior to discussing Opinion 2/13, we would like to clearly emphasise there should be no dispute regarding the position that the EU accession to the ECHR cannot be accomplished without prior modification of the ECHR since the EU, unlike other contracting parties of the ECHR, is not a state. Modification of Article 59 of the ECHR was a mere precondition for the discussed accession. Moreover, we assume that further modifications of the Draft Agreement and/or of the Treaties[4] are unquestionably needed and consequently all the criticism of the CJEU because of Opinion 2/13 was not justified. Yet, the question remains which modifications of the Draft Agreement are vital and what could and should be done on the side of the EU and its legal system having in mind the limits, arising from its specific characteristics.[5] Therefore, a challenging balancing is needed, also in the light of the different roles and functions of the CJEU and the European Court of Human Rights (ECtHR).[6] It seems there is more than just one scenario for reaching this balance and the desired EU's accession to the ECHR.

XGqmCK3MyRs; and others. Some, however, also found, that »*the ruling of the CJEU is actually not that shocking*". See: Brabcová, Accession of the European Union to the European Convention on Human Rights, URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791028, p. 7.

4 Indeed, it is not highly likely that the Treaty will be modified solely because of the EU's accession to the ECHR. However, we believe that the EU is at a crossroads, which demands proper action at all levels, including the modification of the Treaties. Thus, when the Treaties will be "opened", that could present a good opportunity to amend the accession provision and relating protocol.

5 At this point, it is worth mentioning that Article 6(2) TEU and the Protocol (No. 8) define challenging accession conditions aiming to preserve special characteristics of the EU and its law, which are binding for the CJEU. In this regard, the CJEU highlighted the following special characteristics: (conferred or assigned) competences of the EU, institutional structure and powers of institutions of the EU, autonomous legal system, primacy of EU law and direct effect of certain provisions, EU values and aims, mutual trust and sincere cooperation, protection of fundamental rights, judicial system, etc. In short, the CJEU pointed out that the EU is not comparable to any international organisation, it is unique, that is to say, a legal person of its own kind (*sui generis*). Moreover, also EU legal system or EU law is unique; it is supranational rather than classical international law and after EU law penetrates into the legal system of an individual Member State, according to its own rules and it becomes integral part of that legal system having constitutional character.

6 Polakiewicz notes: "The European Union has acquired more and more competences in areas directly affecting the daily lives – and the fundamental rights – of individuals. Both making the EU Charter of Fundamental Rights legally binding and acceding to the ECHR are responses to this development. They ensure that the legal protection of human rights is strengthened internally – within the legal order of the EU – as well as externally, by making that legal order subject to the ECtHR's judicial review. It is the combination of these two measures that will ensure better protection for individuals, legal certainty and coherence in fundamental rights protection all over Europe." See:

2. Opinion 2/13

In Opinion 2/13, the CJEU highlighted several objections against the Draft Agreement and its compatibility with EU law which are related to:

1. The autonomy of the EU legal system (in relation to the external judicial control and Article 53 of the ECHR, to principle of mutual trust between the Member States, and to the advisory opinion of the ECtHR);
2. The dispute settlement and Article 344 of the TFEU;
3. The co-respondent mechanism;
4. The procedure for the prior involvement of the CJEU;
5. The judicial control in the CFSP matters.

For practical reasons, we now first point to the view of AG Kokott before turning to the analysis of the CJEU's arguments. AG Kokott highlighted several shortcomings that might emanate from the Draft Agreement, yet, she argued they are manageable.[7] In her view, the Draft Agreement could be compatible with EU law, provided it is ensured, in a way, binding under international law, that certain modifications or conditions are met.[8] At this point, we do not want to make a premature judgment neither of the view of AG Kokott nor of the opinion of the CJEU. However, it seems that AG Kokott took a much milder approach than the CJEU.[9] Such an assessment can only be made after a thorough

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Polakiewicz, EU law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?, URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331497.

7 Despite the AG Kokott's criticism of a number of points in the Draft Agreement, she suggested that the CJEU should avoid pronouncing the Draft Agreement incompatible with the Treaties and instead hold that the Draft Agreement was compatible with EU law if certain amendments were undertaken following the Court's opinion. See: View of AG Kokott, para. 279.

8 Namely that: – having regard to the possibility that they may request to participate in proceedings as co-respondents pursuant to Article 3(5) of the Draft Agreement, the EU and its Member States are systematically and without exception informed of all applications pending before the ECtHR, in so far and as soon as these have been served on the relevant respondent; – requests by the EU and its Member States pursuant to Article 3(5) of the Draft Agreement for leave to become co-respondents are not subjected to any form of plausibility assessment by the EctHR; – the prior involvement of the CJEU pursuant to Article 3(6) of the Draft Agreement extends to all legal issues relating to the interpretation, in conformity with the ECHR, of the EU primary law and the EU secondary law; – the conduct of a prior involvement procedure pursuant to Article 3(6) of the Draft Agreement may be dispensed with only when it is obvious that the CJEU has already dealt with the specific legal issue raised by the application pending before the ECtHR; – the principle of joint responsibility of respondent and co-respondent under Article 3(7) of the Draft Agreement does not affect any reservations made by contracting parties within the meaning of the Article 57 ECHR; and – the ECtHR may not otherwise, under any circumstances, derogate from the principle, as laid down in Article 3(7) of the Draft Agreement, of the joint responsibility of respondent and co-respondent for violations of the ECHR found by the ECtHR.

9 This is not to say, however, AG Kokott identified no shortcomings of the Draft Agreement.

analysis of the concerns that the CJEU pointed out in Opinion 2/13. Thus, the authors offer the aforementioned final assessment in the last section of this article.

2.1. The Principle of Autonomy of the EU Legal System

The principle of autonomy of the EU legal system is a fundamental legal principle and one of the earliest creations of the then Court of Justice.[10] By its very nature, the principle in question is relevant in almost every clash between EU law and classical international law.[11] The analysis of the case law reveals its frequent use. Not surprisingly, this principle was also used as an argument against the Draft Agreement on more than one occasion in Opinion 2/13.[12] The CJEU pointed out, *inter alia*, that the autonomy, enjoyed by EU law in relation to the laws of the Member States and in relation to international law, requires the interpretation of fundamental rights to be ensured within the framework of the structure and objectives of the EU. The CJEU then stressed insufficient consideration of the special features of EU law, and it found, *inter alia*, a breach of the principle of autonomy of the EU legal system. More precisely, it found several breaches, which are, according to the CJEU, not questions of minor, but rather of great importance. Consequently, the CJEU pulled an "emergency Opinion 2/13 brake".

2.1.1. External Control and Article 53 of the ECHR

In case of the EU's accession to the ECHR, the EU or its institutions, including the CJEU, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the ECtHR. As the CJEU explained in Opinion 2/13, such external control would not be, in principle, *a priori* incompatible with the Treaties.[13] Nevertheless, the CJEU has also declared that an international agreement, such as the ECHR, may affect the powers of the CJEU only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal system.[14] In particular, any action by the bodies, given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law. That is to say, the CJEU is willing to accept the fact that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the CJEU, and that, on the

[10] See 6/64, *Costa vs. ENEL*, ECLI:EU:C:1964:66.

[11] Similar: Rossem, The Autonomy of EU Law: More is Less? (2013), pp. 19–20.

[12] For example in Opinion 2/13, paras. 183, 194, 197, 201, 234.

[13] This approach can be traced back in the earlier case law; see for example Opinion 1/09.

[14] Ibid.

other, the interpretation by the CJEU of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR. However, the situation is rather different when it comes to the (remaining)[15] EU law and its interpretation by the CJEU. Namely, the CJEU emphasised that it should not be possible for the ECtHR to call into question the CJEU's findings concerning the *ratione materiae* scope of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU. In this regard, the CJEU, unlike AG Kokott, is concerned about Article 53 of the ECHR, a provision similar to Article 53 of the Charter. Both provisions define a safeguard for the current level of protection of human rights and fundamental freedoms.[16] However, while the CJEU believes it can limit effects of Article 53 of the Charter as demonstrated in the case C-399/11, *Melloni*,[17] it is convinced the same cannot be true for Article 53 of the ECHR (and its interpretation by the ECtHR), which could, according to the CJEU, enable the Member States to bypass Article 53 of the Charter.[18] Therefore, the CJEU posed a demand for a so-called coordination mechanism, which could effectively prevent the alleged circumvention by appropriate coordination of Article 53 of the ECHR with Article 53 of the Charter, so that the power granted to the Member States by Article 53 of the ECHR is limited—with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR—to what is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.

Indeed, the Draft Agreement does ensure a kind of coordination, but certainly not as far-reaching as demanded by the CJEU.

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15 In case of the EU's accession to the ECHR, the convention becomes an integral part of the EU legal system and thus part of EU law.

16 The terms »human rights and fundamental freedoms« or »fundamental rights« are used interchangeably throughout the article when discussing human rights and fundamental freedoms as defined both in the Charter and the TEU, except when the context clearly shows that only the fundamental rights as defined by the Charter are meant.

17 The CJEU has interpreted Article 53 of the Charter in a way that the application of national standards of protection of fundamental rights shall not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.

18 See Opinion 2/13, para. 189: "In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited - with respect to the rights recognized by the Charter that correspond to those guaranteed by the ECHR - to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised."

Numerous scholars have criticised the CJEU position mentioned above.[19] Some of them stressed that in essence the CJEU demands that the ECtHR must respect the principles of primacy, unity and effectiveness of EU law, and to treat them as more important than the rights stemming from the ECHR.[20] Some have even argued that the CJEU does not even try to hide that it deems EU law and the Charter more important than other legal sources, including the ECHR,[21] and that it seems like the CJEU believes that in order for the EU's accession to the ECHR to happen, the ECHR should only play a background role.[22] Such criticism can be described as a kind of overreaction, yet, this does not mean the CJEU is (totally) right.

As already explained in this article, after EU law or more precisely, acts forming EU law, penetrate into the legal system of an individual Member State, they become an integral part of their respective legal systems having constitutional character. In other words, the Member States adopt EU law which they directly help to create not only in the process of forming the Treaties but also indirectly within the EU institutions, as their own law, which is similar to situations where they adopt international agreements, such as the ECHR (the latter also becomes domestic law after it successfully penetrates into the respective legal system).[23] What is more, EU law takes precedence within the legal system of respective Member States over all other acts, which form this system, including over their constitutions. Therefore, the Member States are bound by 'their' EU law when they deal with human rights protection[24] and, consequently, Article 53 of the ECHR cannot

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19 For example: Douglas-Scott, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the CJEU, URL: http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/; Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, URL: http://eulawanalysis.blogspot.si/2014/12/the-cjeu-and-eus-accession-to-echr.html; Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

20 Compare: Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, URL: http://eulawanalysis.blogspot.si/2014/12/the-cjeu-and-eus-accession-to-echr.html.

21 Ibid.

22 Compare: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

23 The same would be also true in case of the EU's accession to the ECHR. The latter would become an integral part of the EU legal system or let us say of EU law. Its (hierarchical) position within the EU legal system would be subject to Article 216(2) TFEU, namely, "under" the TEU, TFEU, Protocols and the Charter, but "above" the regulations, directives and other acts of EU institutions.

24 Also in cases that fall outside the scope of application of the Charter, the Member States must act in accordance with the (remaining) EU law, including with the principles of primacy, unity and

change this fact. Moreover, we believe the ECtHR should apply or respect the Charter and all other sources of EU law as the constitutional law of the respective Member States. This ECtHR obligation is already established by Article 53 of the ECHR, according to which the ECtHR must respect "the laws of any High Contracting Party" (and in this regard the ECtHR also the CJEU's case law).[25] To ensure greater clarity in this regard, the new accession agreement shall include some kind of an interpretative provision, declaration or explanation report related to Article 53 of the ECHR. It seems suitable to amend the Draft Agreement with an additional article further clarifying the relationship between the two articles on the fundamental rights protection standards. Drafting the additional article would require additional care so that the article would not allow the ECtHR to interpret EU law and Article 53 of the Charter in any way. It would also be possible for the Member States to sign a binding statement, stating that Article 53 ECHR does not provide them with any additional rights, not given to them by the Charter, although it is questionable whether that is even necessary.[26] In case the Member States would agree to such a solution, difficult negotiations of amending the Draft Agreement could be avoided (at least regarding to this issue).[27] The addition should in particular also contain the "correct" interpretation of the expression "the laws of any High Contracting Party" which includes, *inter alia*, sincere consideration of the CJEU's case law.[28]

2.1.2. Principle of Mutual Trust between the Member States

The principle of mutual trust between the Member States is another important principle, given that it allows an area without internal borders to be created and maintained. The principle requires, particularly concerning the area of freedom, security and justice,[29] each of the Member States, save in exceptional circumstances, to consider all other Member States to be complying with EU law and particularly with the fundamental

effectiveness of EU law.

25 Including any international agreement to which the respective Member States is a member.

26 Article 53 of the ECHR does not empower the ECHR signatory states and does not give them any rights they did not have before ratifying the ECHR. It therefore also cannot give the Member States rights, which were already limited or "taken away" from them by the CJEU (such as in the *Melloni* case).

27 Lock proposes an explanation that the provision in question does not provide the signatory states with a permission to establish higher standards of human rights protection in a way, which would amount to a breach of Article 53 of the Charter and the principle of unity, primacy and effectiveness. For more see: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 17; Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (2015), p. 123.

28 Ibid.

29 The creation and maintenance of this area is an explicit aim of the EU; see Article 3(2) TFEU.

rights recognised by EU law.[30] Thus, when implementing EU law, the Member States may be required, under EU law, to presume that fundamental rights have been observed by other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not even check whether that other Member State has actually, in an individual case, observed the fundamental rights guaranteed by the EU. The CJEU believes that the approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law, to the exclusion, if EU law so requires, of any other law. According to the CJEU, the ECHR requiring a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other including where such relations are governed by EU law, mean that accession is liable to upset the underlying balance of the EU and undermine the autonomy of the EU legal system.

The interesting but relatively strict stance of the CJEU is most likely based on the experience with the ECtHR case law.[31] For example, in the cases No. 14038/88 *Soering*[32] and No. 22414/93 *Chahal*,[33] the ECtHR decided that extradition must be prevented in situations, where there is a serious threat that a person will not enjoy appropriate fundamental rights protection in the other Member States. It confirmed this position in the case No. 30969/09 *M.S.S. v. Belgium and Greece*,[34] where it decided that a Member State breaches Article 3 ECHR if it transfers a person to another Member State in which a serious threat of a breach of fundamental rights exists.[35] The CJEU later decided in a similar situation that only systematic deficiencies in the asylum process allow the Member States to stop the process of extradition in line with Article 3(2) of the Dublin Regulation.[36] The CJEU basically contradicted the ECtHR and the ECtHR answered with the judgments going in the opposite direction than those of the CJEU as one can

30 Opinion 2/13, para. 191ff.

31 The problems arose when dealing with the Regulation No. 604/2013, OJ L 180, 29. 6. 2013.

32 App. no. 14038/88, *Soering v. United Kingdom.*

33 App. no. 22414/93, *Chahal v. United Kingdom.*

34 App. no. 30969/09, *M.S.S. v. Belgium and Greece.*

35 Ibid., paras. 341–369.

36 Case C-394/12 *Shamso Abdullahli v. Bundesasylamt*, ECLI:EU:C:2013:813, para. 60.

see for example in the case No. 29217/12 *Tarakhel v. Switzerland*,[37] where it stated that even in the absence of systematic deficiencies in the asylum process, the circumstances of each individual case must be taken into account and actions must be taken, if necessary.[38] The stated reveals some friction between the courts.[39] In Opinion 2/13, the CJEU already indicates a negative attitude towards the ECtHR position regarding the discussed problem[40] and it will be interesting to examine the ECtHR's reaction.[41]

The area in question, regulated by the Dublin regulation, was the only one, which caused trouble for now, but it cannot be predicted whether any difficulty would also emerge in other areas.[42] It, therefore, seems logical for the CJEU to try to protect the relationship between the Member States and the EU from the interference of the ECtHR since it always tried to preserve the autonomy of EU law.

Some scholars argue that it is surprising that the CJEU is willing to take this protection so far as to exclude or at least negatively affect the protection of human rights,[43] or that the area of freedom, security and justice is an area in which the EU could gain a lot in the sense of legal security of individuals, but obviously the CJEU believes that no one should have the jurisdiction, rather than that jurisdiction belongs to the ECtHR only.[44] At the end of the day, such criticism is hard to accept. The EU has developed a decent

37 App. no. 29217/12, *Tarakhel v. Switzerland.*

38 Compare further: Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky, URL: http://www.jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky; App. no. 29217/12, *Tarakhel v. Switzerland*, paras. 88, 114–120.

39 Some authors observe that the CJEU has, for example, recently been citing the ECtHR less and in a more reserved way. See for example: Glas, Kommendijk, From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court (2017).

40 Compare: Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky, URL: http://www.jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky.

41 The ECtHR already got the chance to react in the case *Avotiņš v. Latvia* (App. no. 17502/07), in which it chose to uphold the *Bosphorus* doctrine. Yet, when closely examining the ECtHR's judgment, one can see the implicit criticism of Opinion 2/13. The ECtHR clarifies that the autonomy of EU law is not unlimited and it seems to apply the *Bosphorus* doctrine somewhat stricter than before *Opinion 2/13* in comparison with the handful of judgments in which it dealt with the doctrine previously. See: Glas, Kommendijk, From Opinion 2/13 to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court (2017).

42 For example in the field of cross-border parental child abductions.

43 Lock even states that the CJEU "is playing a dangerous game here". Compare: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175.

44 Compare: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

system of human rights protection, which, in principle, guarantees acceptable level of human rights protection (even in the absence of the EU's accession to the ECHR). It seems the CJEU trusts in this system and in it simply follows the logic of the area of freedom, security and justice as defined in the TEU and the TFEU (by the Member States). Moreover, one of the main features of the discussed area is the abolition of internal frontiers, similar to the concept of internal market. It seems the CJEU follows the same or at least a quite similar approach in the case of the area of freedom, security and justice as developed in the case 120/78 *Casis de Dijon*[45] for purposes of strengthening the internal market.[46]

The solution to this issue would have to prevent those cases which could threaten the principle of mutual trust between the Member States could land in the hands of the ECtHR. Some believe making reservations could be possible, but opinions diverge since the reservations would have to be made against multiple ECHR rights and a bunch of EU law, which would not make them specific enough.[47] It is also hard to amend the reservations, so they seem an inappropriate solution for the quickly developing area of freedom, security and justice.[48]

It seems it would be best to add a provision to the Draft Agreement and try to avoid breaching EU law by following the wording of the CJEU in Opinion 2/13 as much as possible.[49] The added provision would have to exclude the discussed area from the jurisdiction of the ECtHR or include the jurisdiction of the CJEU and more specifically determine the extent of the principle of mutual trust between the Member States. Lock suggests the following additional provision to the Draft Agreement:

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45 Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 (*Casis de Dijon*).

46 Namely, if a certain product is lawfully produced and marketed in one Member State, it must be, in principle, allowed to market it in other Member States. This logic can be also recognised in cases dealing with the recognition of legal personality in another Member State; namely, if a certain legal person is lawfully established in one Member State, organs of other Member States must recognise it as a legal person. Moreover, also in case of the EU citizenship, which depends on citizenship of at least one EU Member State, the similar logic applies; namely, if one person gained citizenship of one Member State, organs of other Member States must recognise this citizenship and treat such person as a citizen of the EU. In all these cases, one can recognise, *inter alia*, the principle of mutual trust between the Member States.

47 Compare further: Krenn, Autonomy and Effectiveness as Common Concerns: A part to ECHR Accession after Opinion 2/13 (2015), pp. 164, 165; Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 20.

48 Halberstam claims that the problem will solve itself when the co-respondent mechanism is properly handled. See: Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (2015), p. 137. Ibid.

49 Opinion 2/13, paras. 191–194.

> "Member States of the EU cannot be held responsible under the Convention for failing to carry out a review of another Member State's compliance with Convention rights."[50]

According to Lock, the ECtHR would not be allowed to judge EU law in these situations, it would merely have to verify whether the case deals with two Member States. However, the weakness of such solution is that this provision also covers cases where the situation would not involve EU law at all (e.g. extraditions based on bilateral agreements).[51] Therefore, the provision mentioned above should have a narrower scope of application; namely, it shall not be applicable to cases without the EU dimension.

2.1.3. The Advisory Opinion of the ECtHR

The advisory opinion is defined by Protocol No. 16 to the ECHR. According to the latter, the highest courts and tribunals of the High Contracting Parties may ask the ECtHR for an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR and protocols thereto.

The CJEU explicitly emphasised a concern that the institute of advisory opinion could threaten the autonomy of EU law and the effectiveness of the preliminary question proceeding in Article 267 TFEU.[52] Although the Draft Agreement does not provide for the accession of the EU to the Protocol No. 16 and that the latter was signed after the Draft Agreement was already finalised, the CJEU correctly described scenarios which could lead to the application of the advisory opinion in practice, therefore, we decided to analyse this issue as well.

The CJEU is concerned that Member States' courts would prefer asking for an advisory opinion over referring a preliminary question according to Article 267 of the TFEU. According to the CJEU, advisory opinions could therefore also reach into the field of fundamental EU rights,[53] jeopardise the institute of preliminary ruling and affect the autonomy of the EU legal system.

In this respect, we believe, the fear is superfluous. Namely, the advisory opinion does not bind the national courts,[54] and the national courts are, in line with Article

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50 Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 21.

51 Ibid., p. 21.

52 Opinion 2/13, para. 197; Compare further: Gotev, Court of Justice rejects Draft Agreement of EU accession to ECHR, URL: http://www.euractiv.com/section/justice-home-affairs/news/court-of-justice-rejects-draft-agreement-of-eu-accession-to-echr/.

53 Opinion 2/13, para. 196ff. Compare: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

54 Article 5 Protocol No. 16.

267 TFEU, still obliged to refer preliminary questions to the CJEU.[55] Furthermore, it must also be noted that any possible effects would not be a consequence of the EU's accession to the ECHR since the same situation would also arise without the accession[56] and the same questions could still find their way to the ECtHR.[57] Despite the CJEU's opinion, the solution to this issue can actually be found in the Treaties, more precisely in Article 267(3) of the TFEU. The obligation to refer a preliminary question enjoys priority over Protocol No. 16 and sufficiently regulates the issue. Such was also the opinion of AG Kokott.[58] If a national court asks the ECtHR for an advisory opinion when that is not necessary, a procedure under Article 258 of the TFEU could be started against the Member State for a breach of the Treaties.[59]

Nevertheless, the CJEU's opinion remains a fact. A possible solution for pleasing the CJEU might be achieving that the Member States make a binding statement that they will not sign and ratify Protocol No. 16. If they were prepared to make such a statement, this could theoretically please the CJEU.[60] The other possible option might be a change of the Draft Agreement with an added provision stating that the Member States do not have the right to ask for an advisory opinion in cases, in which they (their national courts) could or should refer a question for the preliminary question to the CJEU.[61] However, even such a solution could be regarded, considering the stricter version of the concept of autonomy of EU law, as seen in Opinion 2/13, a breach of the principle of autonomy of EU law, since ECtHR could be given the power to decide whether the conditions are fulfilled, and therefore interpret EU law. And last but not least, the ECtHR always has the option of denying the request for advisory opinion, but must "give reasons" for doing so.[62] A reason for denying the requests could be a binding unilateral declaration of the

55 Compare further: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, pp. 21, 22.

56 View of AG Kokott, para. 140.

57 Ibid., para. 141.

58 Ibid., para. 140.

59 Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

60 Compare further: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 23.

61 Ibid.

62 Halberstam "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (2015), pp. 122, 123.

Member States to use the preliminary question procedure and not the advisory opinion procedure, when necessary.[63]

2.2. Dispute Settlement and Article 344 of the TFEU

Dispute settlement between the EU and the Member States as well as between the Member States shall follow Article 344 of the TFEU.[64] According to Article 344 of the TFEU the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties (and of the sources EU law deriving from them or based on them) to any method of settlement other than those provided for therein.[65] At the same time, Article 33 ECHR allows for inter-state disputes between the Contracting States regarding the breaches of the ECHR (which must be treated as EU law after the EU's accession to it). Since the Draft Agreement does not exclude the option of using ECHR for solving the disputes between the Member States or between a Member State and the EU, the CJEU pointed out that the mere existence of this possibility breaches Article 344 TFEU.[66] Thus, according to the CJEU, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between the Member States or between the Member States and the EU concerning the application of the ECHR within the *ratione materiae* scope of EU law would be compatible with Article 344 of the TFEU.[67]

Such position of the CJEU is relatively strict, and we have to check whether it is justified. Some scholars describe the viewpoint of the CJEU as too restrictive for four main reasons. First, such a demand would create an exception for the Member States and exclude them from dispute resolution in a way that contradicts the established practice of international agreements.[68] It does not give the option of such an exception to the other signatory states of the ECHR.[69] Also, other signatories might contradict such an exception.[70] Second, this demand would mean that other agreements, already concluded by the EU, could likewise be in contradiction to Article 344 of the TFEU, since they also do

63 Compare further: ibid.

64 Article 3 of Protocol No. 8 states: "Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union."

65 Opinion 2/13, paras. 201–204.

66 Opinion 2/13, paras. 208, 212.

67 Ibid., paras. 201, 213. See also: Opinion 1/91, para. 35; Cases C-402/05 P in C-415/05 *Kadi*, para. 282; Article 3 Protocol No. 8.

68 They are called "disconnection clauses".

69 View of AG Kokott, paras. 115, 116.

70 Compare further: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

not include provisions about such exceptions.[71] Third, in line with Article 351(2) of the TFEU the Member States would also have to amend the already concluded international agreements that lack such provisions.[72] Fourth, if the Draft Agreement will have a general provision, excluding all the disputes between the Member states and the Member States and the EU, it would also be excluding the disputes that have nothing to do with EU law.[73] And last, according to some scholars, it is questionable if this way of protecting the autonomy of EU law, in which other signatories would practically have to consent to a judicial monopoly of the CJEU, is appropriate.[74] In this regard, we must also stress the fundamental question that is to be put forward—should it not be, in the light of the development of EU law and the close connection between EU law and the Member States, already clear to the Member States, that they cannot start a dispute against another Member State without checking first whether the dispute is connected to EU law?

Thus, it is debatable whether this question should be dealt with in the Draft Agreement, since a Member State, initiating such a procedure before the ECtHR, would breach EU law, namely Article 4 TEU.[75] Besides, according to some, the options suggested by AG Kokott could be applied. AG Kokott emphasised the mechanisms under Article 344 TFEU as sufficient[76] and suggested an additional safeguard in the form of a binding declaration of the Member States within the ECHR system, stating that they

[71] View of AG Kokott, para. 117. Halberstam warns, that the fact, that CJEU did not object such regulation in other agreements, does not mean it cannot contradict it now. Compare: Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (2015).

[72] Reitmeyer and Pirker warn that "as soon as two or more EU Member States – as in the MOX Plant case – form parties to an agreement with a dispute settlement mechanism and provisions that overlap in substance with EU law, the monopoly of dispute settlement under Article 344 TFEU would thus be endangered and the relevant agreement incompatible with the autonomy of EU law". See: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

[73] Perhaps a special mechanism, similar to the prior involvement procedure, could be established, in which the CJEU could provide an assessment before the ECtHR continues with the procedure. However, this sort of a mechanism could slow down and complicate the proceedings and it could also run into the same obstacles as the prior involvement procedure. Compare: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, pp. 15, 16.

[74] See also: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

[75] Compare: Hojnik, Ročna zavora Sodišča EU pri pristopanju EU k EKČP (2015), pp. 13–14. Similar situation occurred in C-459/03 *European Commission v. Ireland*.

[76] View of AG Kokott, paras. 114–119; Bagchi, EU Accession to the ECHR: In Defense of the ECJ, URL: http://jean-monnet-saar.eu/?p=745.

will not initiate such a procedure when dealing with the scope *rationae materiae* of EU law.[77]

The arguments mentioned above against the CJEU's position are not entirely convincing and even less so the allegations that the CJEU artificially caused the unpleasant situation. First, we believe the Draft Agreement should deal with the discussed issue since Article 3 of Protocol No. 8 explicitly demands full respect of Article 344 of the TFEU. This could not be achieved simply by relying on the obligation of sincere cooperation as defined by Article 4 of the TEU since the daily practice clearly shows numerous violations of this obligation.[78] Moreover, the agreement between the Member States and the EU should not be enough either, unless it is binding within the ECHR system and leaves no room for the ECtHR jurisdiction. Of course, the latter approach must be agreed between all parties of the ECHR. Thus, the Draft Agreement should most definitely cover the issue discussed.

Indeed, the Draft Agreement addresses the issue in its Article 5 stipulating that proceedings before the CJEU are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo under Article 55 of the ECHR. We agree with the CJEU that Article 5 of the Draft Agreement is not sufficient to preserve the exclusive jurisdiction of the CJEU. It merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or its Member States might submit an application to the ECtHR under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law. Moreover, the proposal of AG Kokott can effectively protect Article 344 of the TFEU only if, as already mentioned, it is binding within the ECHR system and leaves no room for the ECtHR jurisdiction. We do not accept the argument that a provision, excluding all the disputes between the Member States and the Member States and the EU, would also exclude the disputes that have nothing to do with EU law since the provision can be specific enough to prevent such a situation. And, of course, a possibility exists that other contracting parties refuse to accept such reservation in favour of the EU, but this risk should not be attributed to the CJEU but rather to the Member States which defined accession conditions, such as those in Article 3 of Protocol No. 8.

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77 View of AG Kokott, para. 120. See also: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

78 See for example: C-433/03 *Commission v. Germany*, ECLI:EU:C:2005:462; C-246/07 *Commission v. Sweden*, ECLI:EU:C:2010:203; C-355/04 *Segi and Others v. Council*, ECLI:EU:C:2007:116; and others.

2.3. The Co-respondent Mechanism

The co-respondent mechanism has been introduced to avoid gaps in participation, accountability and enforceability in the ECHR system, i.e. the gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR, and to ensure that, under the requirements of Article 1(b) of Protocol No. 8, proceedings by non-Member States and individual applications are correctly addressed to the Member States and/or the EU as appropriate in each particular case.[79] This way the drafters tried to preserve the specific characteristics of EU law, as required by Article 1 of Protocol No. 8. Yet, the CJEU found several shortcomings of the proposed co-respondent mechanism, which are discussed below.

First, according to the Draft Agreement—more precisely its Article 3(5)[80]—a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by a decision of the ECtHR upon the request of that Contracting Party. In this regard, the CJEU correctly stressed that the material conditions for applying the co-respondent mechanism result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR. Therefore, the decision as to whether those conditions are met in a concrete case necessarily presupposes an assessment of EU law. Furthermore, the CJEU demands that the EU and its Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met, which is not the case when the ECtHR makes a decision regarding the status of the co-respondent based on the Contracting Party request. Essentially, the CJEU demands that the ECtHR should not have a possibility to interfere with the division of powers between the EU and the Member States since that can be considered an internal matter.[81] Again, this demand can be explained as a direct consequence of Article 1(b) of Protocol No. 8.[82]

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79 See Opinion 2/13, paras. 215, 216.

80 Article 3(5) of the Draft Agreement states: "A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met."

81 Article 3(5) of the Draft Agreement should be modified; agreement envisaged should for example contain an explicit demand for the ECtHR to give the EU or a Member State the status of the co-respondent on their request, as that would mean that the ECtHR would not make any "EU law based" decision.

82 Article 1 of Protocol No. 8 states: "The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinaf-

Second, the CJEU (as well as AG Kokott) also identified another shortcoming of the Draft Agreement—its Article 3(7).[83] According to the CJEU, the provision in question (nor any other provision of the Draft Agreement) does not (effectively) preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.[84] On the one hand, Article 3(7) of the Draft Agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co--respondent are to be jointly responsible for that violation, while on the other hand, Article 2 of Protocol No. 8 demands that nothing in the agreement envisaged affects the situation of the Member States in relation to the ECHR, in particular in relation to the Protocols thereto, measures taken by the Member States derogating from the ECHR in accordance with its Article 15 and reservations to the ECHR made by the Member States under Article 57 thereof.[85] As already indicated, the CJEU found some divergence in the discussed provisions.

And third, Article 3(7) of the Draft Agreement defines an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. According to the provision in question, the ECtHR may decide, based on the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation. In this regard, the CJEU correctly pointed out that a decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a vio-

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ter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate."

83 Article 3(7) of the Draft Agreement states: "If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co- respondent, and having sought the views of the applicant, decides that only one of them be held responsible."

84 Opinion 2/13, para. 227; Compare: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, pp. 10, 11.

85 View of AG Kokott, para. 265; Opinion 2/13, paras. 226-228; see also: Reitmeyer, Pirker, Opinion 2/13 of the CJEU on Access of the EU to the ECHR – One step ahead and two steps back, URL: http://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/.

lation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States. In this regard, the same reasoning can be applied as those related to the first point of this subsection.

Some scholars argue that the position of the CJEU and its reasoning is unconvincing due to at least two points. Firstly, the EU can become a co-respondent in the proceedings, where a Member State is obviously already involved in the proceeding as the respondent. The Member State would not be involved if it made a reservation. And secondly, the ECtHR can check who becomes the co-respondent in a proceeding. They believe, that it is highly unlikely that the ECtHR will invite a Member State that made a reservation to specific ECHR provision to become a co-respondent in a case which deals with this provision and is wondering why the CJEU found this so problematic.[86] They admit that the Draft Agreement remains silent on the issue, but they think it would be more appropriate merely to assume that the general ECHR rules apply and the reservations will be taken into account.[87]

Notwithstanding that opinion, Lock proposes, that one option for resolving this could be "an interpretative declaration to the effect that reservations made by the Member States of the EU must be respected." Additionally, the Member States could make a statement that they will never request the ECtHR to decide on the division of responsibility. However, such a decision would not *express verbis* exclude the option of the ECtHR to decide on the division.[88] In this context, it is appropriate to emphasise a proposal made by Halberstam—that the ECtHR should be deprived of the power to second-guess the EU's view regarding the division of responsibility.[89] Although this solution seems to be following the requirements of the autonomy of EU law, it would, as was already pointed out by Lock, contradict the ECHR system as a whole since it could deprive the plaintiff

[86] Lock is of the opinion that "instead of assuming that the Member State would be responsible despite its reservation, it would have been more convincing to hold that where the DAA is silent, the standard rules of the ECHR would be applied, which means that the reservation would be given effect." Compare further: Reitmeyer, Pirker, ibid.; Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 10, 11.

[87] Lock, ibid., p. 11.

[88] Ibid., p. 10.

[89] Or as Halberstam puts it: "eliminating the ECtHR's power to second guess EU's bid to become a co-respondent and the EU's view on joint versus sole responsibility." See: Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (2015), p. 137.

of the possibility of the respondent being found accountable for the breach.[90] At the end of the day, all these views, however, indicate that some improvements of the Draft Agreement would be necessary or at least highly welcome.

For us, the CJEU's position and its argumentation seem to be more convincing than the arguments of its opponents. The former would like to eliminate all risks and uncertainties while the latter appears to be more "relaxed". Considering what is at stake we opt for the CJEU's stricter approach. Moreover, having in mind all the specific circumstances (including the division of powers between the EU and its Member States and their legal ties) we believe that Article 3(7) of the Draft Agreement envisaged which explicitly introduces joint responsibility would be capable, in case it would become effective, to overrule the reservations made by the Member States.[91] Last but not least, it also seems that the drafters of Protocol No. 8 in the name of the Member States wanted to avoid legal uncertainty. To make things clear we propose that the accession agreement contains a special provision following the wording of Protocol No. 8 by removing the criticised part of Article 3(7) that provides the ECtHR with the problematic power. If the negotiators deem it necessary, it would also be possible to change the article to ensure that reservations of the Member States are respected.[92] The provision could contain a safeguard that could effectively prevent errors in this field, which is in our opinion only possible if the CJEU retains full and sole jurisdiction to assess whether the material conditions for applying the co-respondent mechanism are met. In other words, all other "solutions" where the CJEU cannot perform such control are not in line with the express demand in the provision mentioned above as defined by the Member States. However, it is our position that such an addition to the provision is not necessary.

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90 See: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 10.

91 At least theoretically. Of course, this would not be in line with the Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ C 326, 26. 10. 2012, p. 273. Article 2 of the discussed protocol explicitly demands that the accession agreement shall ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by the Member States in accordance with Article 57 thereof.

92 Compare further: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 11.

2.4. Procedure for the Prior Involvement of the CJEU

The procedure for the prior involvement of the CJEU is defined in Article 3(6) of the Draft Agreement,[93] but according to the CJEU it does not satisfy the requirement set in Article 2 of Protocol No. 8[94] since in cases brought before the ECtHR in which EU law is at issue, the requirement that the competences of the EU and the powers of its institutions, notably the CJEU, shall be preserved, is not followed. With other words, the CJEU underlined that Article 3(6) of the Draft Agreement does not exclude the power of the ECtHR to interpret the so-called *acquis communautaire*, including also the case law of the CJEU. Consequently, the CJEU suggests that the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the CJEU has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

Some scholars describe the CJEU's position as an exaggeration since the consequences of the matter seem to be purely procedural;[95] Article 3(6) of the Draft Agreement merely binds the ECtHR to give the CJEU sufficient time to determine whether an individual EU law provision is (not) compatible with fundamental rights, under the condition that the CJEU has not previously ruled on the issue. They argue that the Draft Agreement does not give the ECtHR any other powers, only the power of a brief overlook of the national proceeding (to see if the CJEU was already involved) and in case the CJEU was already involved and a preliminary question was referred to it, whether it decided on the question relevant in a particular case. Moreover, some argue the argumentation of the CJEU would be much more convincing if it also took into consideration the view

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

94 Article 2 of Protocol No. 8 states: "The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof."

95 Compare further: Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, pp. 12, 13.

of AG Kokott in regards to the rights of defence in connection to the co-respondent mechanism.[96] In addition to the presented arguments, we would also like to point to a fundamental concern—the evident distrust the CJEU showed towards national courts. Are they really not to be trusted to follow the appropriate proceedings?

We agree with the CJEU and its expressed doubts in Article 3(6) of the Draft Agreement. However, we do not necessarily share the same opinion of how to solve the problem in question. Halberstam, for example, who shares a similar view, stressed an interesting proposal not to include anything in the Draft Agreement about the prior involvement of the CJEU.[97] Such an approach can cause legal uncertainty, and it does not strictly follow the requirement as defined in Article 2 of Protocol No. 8. As we already emphasised, the CJEU just followed the express requirement made by the Member States. Even if we accept the position mentioned above that the discussed provision has merely procedural effects or that the problem is artificial only, since the question of prior involvement of the CJEU only arises when the EU already decided to become a co-respondent in the procedure (the EU is therefore already notified about the case and could suggest the prior involvement procedure if so necessary), such arguments cannot outweigh the express requirement and risk of its breach. Moreover, if the CJEU's proposal regarding the prior involvement is really only a cosmetic one, it should not be too difficult to include it in the agreement envisaged. Thus, to avoid any adverse effect on the competences of the EU and its institutions, including the CJEU, the ECtHR should be merely empowered to use EU law, including the case law of the CJEU, as an objective fact, that is to say, it should not have the right to interpret any provision of primary as well as secondary source of EU law, which is open to more than one plausible interpretation. In case such position is accepted, surely several technical solutions of how to amend Article 3(6) of the Draft Agreement can be thought of.

2.5. Judicial Review in the CFSP Matters

The judicial review in the CFSP matters seems to be a challenging issue. In many ways, also after the Lisbon Treaty, the CFSP is different from other EU policies (for example, in terms of the role of the EU institutions, decision making, specific procedures, non-application of some legal acts as well of certain fundamental principles, etc.). The CFSP combines supranational and international (intergovernmental) elements. In this vein, the CJEU has only limited powers in the field of the CFSP (which can be explained as the Member States' measure for prevention of the so-called judicial activism in favour of the (more) supranational character of the CFSP) and it is not entirely cle-

[96] View of AG Kokott, paras. 222–228.

[97] Compare: Halberstam, "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward (2015), pp. 116, 117.

ar—despite the fact that the CJEU has already had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions[98]—if the scope of the CJEU's judicial review in this field is sufficiently broad to encompass any situation that could be covered by an application to the ECtHR. In this regard, the CJEU stressed that the Draft Agreement enables the ECtHR to rule on the compatibility with the ECHR of some acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the CJEU cannot, for lack of jurisdiction, review in the light of fundamental rights. Such a situation would, according to the CJEU, effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.[99] Therefore, the CJEU decided that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

In our opinion, the CJEU is right and wrong depending on the formal(istic) or substantive approach, also considering its stance from the *Rosneft* case. From the formal perspective, the CJEU is the highest judicial authority in cases when EU law is concerned and, of course, after the accession, the ECtHR shall also be treated as an integral part of EU law. The CJEU's acts are binding for other institutions of the EU as well as for the Member States (and their organs). However, this is not to say that the CJEU is rigidly bound by its past case law, in our case by Opinion 1/09, because we think the circumstances of the case, on which Opinion 1/09 is related, are not the same as in our case or comparable enough for a kind of "template" decision making. Moreover, the CJEU has only limited powers in the field of CFSP. Thus, when looking at the whole picture,

[98] Pursuant to the second subparagraph of Article 24(1) TEU and Article 275(1) TFEU, the CJEU cannot, in principle, adjudicate with respect to acts adopted in the context of the CFSP. This is a so-called "carve-out" derogating from the general jurisdiction which Article 19 TEU. However, the last sentence Article 24(1)(2) TEU and Article 275(2) TFEU include an "exception to the exception". They provide the CJEU as competent to monitor compliance with Article 40 TEU and to review the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the CFSP provisions in the TEU. This is a so-called "claw-back" provision. This provision implies that the Lisbon Treaty has given the CJEU significant powers in the field of CFSP. In line with the stated provisions, the CJEU ruled that the EU system of judicial protection fully applies in relation to restrictive measures against natural and legal persons in the case C-72/15 *Rosneft* (ECLI:EU:C:2017:236).The CJEU's judgment in the *Rosneft* case confirms that the CFSP is an integral part of the EU legal order and, as a result, the EU's horizontal principles such as respect for the rule of law and the right to effective judicial protection apply to this specific area of EU law. For more see: Van Elsuwege, Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft case, URL: https://verfassungsblog.de/judicial-review-of-the-eus-common-foreign-and-security-policy-lessons-from-the-rosneft-case/.

[99] The CJEU already decided in the Opinion 1/09 that such approach is not acceptable.

in relation to the judicial control in the field of CFSP, the CJEU could decide differently, even more after it admitted that the ECtHR would be "merely" empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP (and notably of those whose legality the CJEU cannot, for lack of jurisdiction, review in the light of fundamental rights). It seems the CJEU somehow equated the judicial control of the ECtHR with its own, if it had one. As we already pointed out, the CJEU noticed that the Draft Agreement proposes that the ECtHR's judicial control would be limited to the control of the ECHR rights, but it appears the CJEU did not consider this fact as particularly important.[100] Yet, we believe it is since the ECtHR would not interpret the ECtHR as a part of EU law (neither if would interpret other sources of EU law) but simply as the international convention and a source of classical international law from which it draws jurisdiction. Thus, the CJEU disregarded that the control of the ECtHR is not based on EU law *per se*, but on the ECHR, and also ignored that the fact that ECHR would become a part of EU law does not change that. AG Kokott is also of the opinion that no conflict with the autonomy of EU law is present here and that the situation does not affect the special nature of the EU legal order.[101] She assesses that the lack of mechanisms inside the EU cannot be a reason to contradict the jurisdiction of an international court.[102] Besides, the CJEU ignores the fact that the EU's accession to the ECHR would give the ECtHR the power to check the compatibility of primary EU law with the Treaties anyway. Therefore, some scholars emphasised that such jurisdiction might result in an asymmetry between the control exercised by the CJEU and the ECtHR.[103]

Moreover, some scholars have stressed yet another reason for incompatibility of the Draft Agreement, which was not expressly stated in Opinion 2/13—apparently, the roles of national courts in the field of CFSP matters could be neglected.[104] The Lisbon Treaty obliges the Member States to ensure sufficient legal remedies in the field of EU law. The field of CFSP matters is also a part of EU law, and national courts have certain powers

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100 Opinion 2/13, para. 255.

101 View of AG Kokott, para. 192.

102 Ibid., para. 193.

103 Compare: Lock, End of an Epic? The Draft Agreement on the EU's Accession to the ECHR (2012); Lock, The Future of EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, URL: https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2616175, p. 24; Jacqué, The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms (2015); Shleina, Opinion 2/13: Some Further Reflections, URL: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=966#.XGqmCK3MyRs.

104 See: Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky, URL: http://www.jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky.

in this regard even in the absence of any powers of the CJEU.[105] The CJEU expressly stated in Opinion 1/09 that the structure of the EU legal system is based not only on the CJEU but also other national courts of the Member States.[106] That is why the CJEU's stance from Opinion 2/13 appears quite surprising. This intergovernmental character is a feature of the CFSP and all the Member States, or at least a number of them, were quite keen to keep the CJEU out of this area of policy-making, for fear of the CJEU's integrationists tendencies.[107] In light of the stated, it is also possible that the position in which the national courts have jurisdiction, and the CJEU does not, was created intentionally and the EU's accession should not be prevented because of that.[108]

Yet, the CJEU is the highest judicial authority for the interpretation and application of EU law, and it certainly has the power to "put on hold" the process of the EU's accession to the ECHR; one simply cannot ignore Opinion 2/13.[109] Finding a solution to this issue is significant, but of course, also in this case one can think of several more or less realistic solutions. One of the suggestions offers a possibility of complete exclusion of the ECtHR's jurisdiction, but this suggestion depends on the acceptance of the other side. Another possible solution is a variation of the prior involvement procedure, but a provision providing such a procedure would be hard to form and would also need to take account of the fact that most of the complaints against the Member States do not always comprise of the elements of EU law.[110] It would have to prevent that the ECtHR gets any power of deciding EU law since that would probably yet again present a breach of the autonomy of EU law as interpreted by the CJEU. There is also an option of the EU making a reservation to the ECHR regarding the CFSP matters and the area of freedom, security and rights. However, this option would not be in line with Article 6(2) TEU, which foresees the EU's accession to the ECHR in all fields.[111] In line with Article 2(1) of the Draft Agreement and Article 57(1) of the ECHR, the signatories have the option of making reservations. However, the reservations must be formed narrowly and as specific as possible, so it is questionable whether such a reservation from the EU would even be

[105] View of AG Kokott, paras. 96–100.

[106] Opinion 1/09, para. 83. The CJEU also uses the Opinion 1/09 as a reference in Opinion 2/13, para. 256.

[107] Compare further: Eeckhout, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky, URL: http://www.jeanmonnetprogram.org/paper/opinion-213-on-eu-accession-to-the-echr-and-judicial-dialogue-autonomy-or-autarky.

[108] View of AG Kokott, paras. 101–103.

[109] Article 218(11) TFEU.

[110] Ibid.

[111] Compare: Morano-Foadi, Andreadakis, Brieskova, Higgins, The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward, URL: http://www.europarl.europa.eu/cmsdata/104503/EP%20Hearing%20Contribution%20MoranoFoadi%20Andreadakis%20April%202016.pdf pp. 35, 36.

permitted.[112] A more radical option that might seem improbable at first sight could be a change of the primary EU law—the Treaties (more powers for the CJEU in the field of CFSP) or Protocol No. 8 (e.g. an explicit provision stating among special characteristics of the EU and its law, which has to be protected, there is no need to protect the CJEU's role in the field of CFSP).[113] This option, however, surprisingly seems to become more and more realistic since it is highly likely that the Lisbon Treaty will be amended or superseded by another Treaty capable of dealing with present and future challenges of the EU.

3. A Day After; What Next?

Opinion 2/13 is a fact we have to deal with in one way or the other. However, before we discuss some possible scenarios regarding the EU's accession to the ECHR, we would like to stress that in our opinion, the accession duty as defined in Article 6(2) of the TEU did not cease to exist. There is nothing neither in Article 6(2) of the TEU nor in Protocol No. 8 suggesting the cessation of the discussed duty, and the same goes for Article 218(11) of the TFEU which merely states that where the opinion of the CJEU is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised. Hence, the game, i.e. EU's accession to the ECHR, is definitely not over (yet), the show must go on, and Opinion 2/13 only presents a pit stop on the road to the EU's challenging accession.

We, therefore, conclude that all calls or initiatives for the termination of the accession procedure must be rejected.[114] Even if the termination in question would be an option, we believe it would still be worthy of continuing with the accession process. Mainly because of the improved protection of individuals since they could also submit applications before the ECtHR against the acts of the EU institutions. The accession would

[112] The ECtHR explained in para. 207 of the case *Grande Stevens and others v. Italy* (app. no. 18640/10, 18647/10, 18663/10, 18668/10): a reservation can only be valid it it is expressed at the time of the signature of the ECHR, is not of general nature and contains a short explanation.

[113] Compare: Lazowski, Wessel, When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR (2015), pp. 2, 3.

[114] Some scholars believe that it would not make any sense to proceed with the negotiation and the accession procedure, since an accession under the CJEU's conditions would not enable an effective external control of EU activity in connection to the fundamental rights. Similarly, some are of the opinion, that those, who would still support the accession, "do not even like human rights". Peers describes Opinion 2/13 as a "clear danger to the human rights protection", while Douglas-Scott agrees. See: Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, URL: http://eulawanalysis.blogspot.si/2014/12/the-cjeu-and-eus-accession-to-echr.html; Douglas-Scott, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the CJEU, URL: http://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

also contribute to achieving the great goal of creating a common international space of fundamental rights protection in Europe, in which all the key players, including the EU, would be obliged to respect the minimum standards from the ECHR, subject to the direct control of the ECtHR.[115] The EU's accession to the ECHR would most probably also assist in unifying the case law of the CJEU and the ECtHR. Additionally, since some friction between the courts already exists, a unification seems urgent and could also help clarify the state of play after the *Bosphorus* case. On a more symbolic level, the EU legal acts for the protection of fundamental rights being reviewed by external control would undoubtedly increase the legitimacy of the EU acts. A formal connection of the EU and the ECHR would demonstrate the EU's concern for the protection of fundamental rights and would show the EU as a better guardian of human rights and present the ECHR as a cultural and political heritage of the EU. Lastly, the accession could also answer the critiques of double standards of the EU, which demanded that all the Member States ratify the ECHR and failed to do the same.[116] It is true that Opinion 2/13 renders the accession more difficult and prolongs the whole process. However, the Treaties do not define any deadline in this regard and negotiations or/and other accession activities can last for years. In fact, this is very realistic scenario having in mind the complexity of the discussed issues and their delicate effects. Perhaps such a prolongation was even welcome, and it gives the EU more time to develop its internal mechanism for fundamental rights protection, particularly the ones, based on the Charter.

As we explained in section 2 of this article, the CJEU identified seven shortcomings of the Draft Agreement in Opinion 2/13. Although the CJEU was intensively criticised because of the content of Opinion 2/13, we do not share this predominant view. In our opinion, the criticism is exaggerated and unfounded in most cases. In fact, as explained above, we (at least partly) agree with five of the seven shortcomings as identified by the CJEU. Therefore, the draft Agreement should be amended, or other solutions should be provided, as discussed in section 2 of this article. We believe the negotiations for the

[115] As far as the EU in concerned, it is appropriate to point out once again that according to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law. Thus, all EU institutions, including the CJEU, are already obliged to respect ECHR although EU is not a contracting party of the ECHR, however, at the moment there is no body that could legally review the CJEU's application of the ECHR.

[116] For more see the opinions of some other authors, dealing with the accession issue: Gragl, A giant leap for European human rights? The final agreement on the European Union's accession to the European Convention on human rights (2014); Shleina, Opinion 2/13: Some Further Reflections, URL: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=966#.XGqmCK3MyRs; Tulkens, EU Accession to the European Convention on Human Rights URL: http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20and%20Access%20to%20Justice%20Seminar/Krakow_Tulkens_final.pdf, p. 8; and others.

modification of the envisaged agreement can be successful at least concerning some of the identified shortcomings. Yet, where this would not be the case, we must stress that the fault should not be attributed (only) to the CJEU. We have to keep in mind that the Member States did not merely lay down the duty of accession to the ECHR, but they also linked this duty to several accession conditions, which the CJEU simply had to take into account. Furthermore, the Member States can always remove or cancel the accession conditions by modifying the Treaties. This way they can "jump over" Opinion 2/13. After all, if all of them reach a consensus, they are the true master of the Treaties. Quite the opposite, the CJEU cannot modify the Treaties and shall not question them, similar to a mathematician who shall not challenge the axioms and a priest who shall not question the dogmas. We do not blame them, so why blame the CJEU?

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LXXIX. letnik, 2019, Perspektive prava Evropske unije, strani 49–77

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Mnenje 2/13: konec ali le nov postanek?

V kontroverznem Mnenju 2/13 je Sodišče EU zavzelo jasno in nedvoumno stališče – osnutek sporazuma o pristopu Evropske unije (EU) k Evropski konvenciji o človekovih pravicah (EKČP) ni združljiv z drugim odstavkom 6. člena Pogodbe o EU oziroma s Protokolom št. 8 k EKČP. Zato načrtovani sporazum ne more začeti veljati, razen če je ustrezno spremenjen ali sta spremenjeni Pogodbi. Mnenje 2/13 je sicer precejšen izziv na poti pridružitve EU k EKČP, vendar v nobenem primeru ne odpravlja in tudi ne onemogoča pridružitvene obveznosti. Zato bo treba najti pot, ki bo vodila k pridružitvi, kar najbrž ne bo preprosto, je pa izvedljivo. Če se bo postopek pridruževanja udejanjal v strokovnih okvirih, s strokovnimi argumenti, ter ne bo prevladalo politikantstvo, meniva, da bodo mogoče nekatere spremembe pridružitvenega sporazuma v smeri, kot je nakazalo Sodišče EU. Če in kolikor pa do tega ne bo prišlo, to ne bi smelo biti pripisano (zgolj) Sodišču Evropske unije. Ne pozabimo, da države članice v Pogodbah niso le določile obveznosti pridružitve EU k EKČP, temveč so na to pridružitev vezale določene pogoje, ki jih je Sodišče EU preprosto moralo upoštevati. Prav tako je treba opozoriti, da imajo države članice, če dosežejo konsenz, kot »gospodarice Pogodb« zmeraj možnost Pogodbi ustrezno spremeniti (kar je zdaj, ko je bolj ali manj jasno, da je revizija Lizbonske pogodba nujna, še bolj realno, kot je bilo v času izdaje Mnenja 2/13). Na drugi strani Sodišče EU možnosti revizije Lizbonske pogodbe seveda nima, temveč mora Pogodbi sprejeti kot objektivno danost.

Ključne besede: Mnenje 2/13, Sodišče EU, Evropska konvencija o človekovih pravicah, avtonomija prava EU.

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Opinion 2/13: Game Over or Just Another Pit-Stop?

In a controversial Opinion 2/13, the Court of Justice of the European Union (CJEU) took a clear and unequivocal position—the Draft Agreement on the EU's accession to the European Convention on Human Rights (ECHR) is incompatible with Article 6(2) of the Treaty on EU or with Protocol No. 8 to the ECHR. Consequently, the agreement envisaged cannot enter into force unless it is amended accordingly or amended in the Treaties. Opinion 2/13 presents a significant challenge on the path of the EU accession to the ECHR, but in no case does it eliminate or undermine any association obligations. Therefore, the key to Opinion 2/13 will be to find a path that will lead to joining, which is not likely to be easy, but it is feasible. If the process of association is to be implemented in a professional manner, with expert arguments, and everyday politics do not prevail, it is considered that some changes to the Draft Agreement will be possible in the direction indicated by the CJEU. If and to the extent that it does not occur, this should not be attributed (only) to the CJEU. Let us not forget that in the Treaties, the Member States have not only set the EU's obligation to join the ECHR, but have joined the association with certain conditions that the CJEU simply had to take into account. It should also be noted that the Member States, if they reach a consensus, as the "master of the Treaties", always have the option to amend the Treaty accordingly (currently, it is more or less clear that the revision of the Treaty of Lisbon is necessary, even more realistically than at the time Opinion 2/13 was delivered). On the other hand, the CJEU does not, of course, have the possibility to review the Treaty of Lisbon, but it must accept the content of the Treaties.

Keywords: Opinion 2/13, Court of Justice of the European Union, European Convention on Human Rights, autonomy of EU law.