

Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13

By Christoph Krenn *

A. Introduction

*Opinion 2/13*¹ is a sweeping blow. After four years of negotiations, it took the Court of Justice of the European Union (CJEU or the Court) only a few paragraphs to pick to pieces the draft accession agreement on the EU's accession to the European Convention on Human Rights (ECHR), finding a conflict with the EU Treaties on ten grounds. The Court's message is clear: Accession, under the terms of the draft agreement, would risk undermining the very essence of the EU's constitutional system.

Critics of the Court are abundant.² To many, the Court did not only frustrate the prospects of enhancing the protection of human rights in Europe—it did so on highly dubious grounds, building a façade of spurious, if not bogus arguments, considering minor and immaterial threats to the autonomy and effectiveness of EU law as adversely affecting the constitutional basis of the Union. Behind this seems to be the CJEU's selfish concern for its own power and position in the European legal area—"judicial politics of the playground," as Steve Peers put it.³ These critical analyses come hand in hand with a grim outlook regarding the future of the EU's accession to the ECHR. It is unlikely, the argument goes,

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¹ Opinion Pursuant to Article 218(11) TFEU, CJEU Case C-2/13 (Dec. 18, 2014), <http://curia.europa.eu/> [hereinafter *Opinion 2/13*].

² See only Sionaidh Douglas-Scott, *Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice*, U.K. CONST. L. BLOG (Dec. 24, 2014), <http://ukconstitutionallaw.org>; Steve Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection*, EU L. ANALYSIS BLOG (Dec. 18, 2014), <http://eulawanalysis.blogspot.de>; Mattias Wendel, *Mehr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt*, VERFASSUNGSBLOG (Dec. 21, 2014), www.verfassungsblog.de; for a different view: Ulrich Haltern, *Die Quittung für Verfassungsneid* (Jan. 29, 2015), NEUE ZÜRCHER ZEITUNG, 21.

³ Peers, *supra* note 2.

that the non-EU Member States of the Council of Europe will reopen discussions on the many substantial issues the Court raised.⁴

In this article, I propose an alternative, more sympathetic reading of *Opinion 2/13*. I will argue that, if we analytically split the discussion into considering the Court's concerns and addressing them, the Court's Opinion as well as the prospects of ECHR accession appear in a brighter light.

The first part of the article explores the Court's concerns. I will suggest that, if we zoom closer, the CJEU's arguments are more than an argumentative façade to protect the CJEU's position in the European legal area. In fact, in *Opinion 2/13* the Court exposes some of the most fragile features in the current constitutional design of the EU. To be sure, on many points the Court is overly protective. Some threats might even seem negligible. Nevertheless, this overprotective attitude has contributed to making the EU what it is and has put the Court at the heart of the process of EU constitutionalization.

While we should take the Court seriously for voicing its concerns, it is a different question how they should be addressed. In *Opinion 2/13*, the Court demands that all its concerns be accommodated in an accession agreement because they are specific to the EU, reflecting the Union's *sui generis* character. The CJEU's argument is based on Protocol No. 8 to the Lisbon Treaty,⁵ which holds that an EU-ECHR accession agreement needs to preserve the "specific characteristics of the EU and EU law".⁶

Yet, on closer inspection, none of the Court's concerns about the effects of ECHR accession on the EU constitutional system are what the Court suggests: EU-specific. Quite to the contrary. All Contracting Parties to the ECHR care about the autonomy of their legal system, about the effectiveness and uniformity of domestic law and the prerogatives of their highest courts. Accordingly, there exist legal mechanisms in the Convention system to account for these common concerns. They range from making reservations pursuant to Article 57 ECHR to the exhaustion of remedies rule laid down in Article 35 paragraph 1 ECHR. What Protocol No. 8 demands of an accession agreement is to bring the EU at level-playing field as regards the effectiveness of these mechanisms.

Based on this analysis, the second part of this article sketches a path to ECHR accession that values autonomy and effectiveness, not as EU *sui generis*, but as constitutional

⁴ See only, *Editorial Comments: The EU's Accession to the ECHR – a "NO" from the ECJ!*, 52 COMMON MARKET L. REV. 1, 14 (2015).

⁵ 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, Oct. 26, 2012, 2012 O.J. (C 326/273).

⁶ *Id.* art. 1.

concerns common to all ECHR Contracting Parties. This allows to accommodate the Court's objections, providing a feasible and generally acceptable way forward.

B. Exploring the Court's Concerns

In this section, I will present the arguments the Court advances for the draft accession agreement to conflict with EU law. To be clear, my purpose is not to defend the Court for claiming these points into an accession agreement—how they should be accommodated will be addressed later.⁷ Rather, I aim to show that they are not merely a façade of spurious arguments. From the perspective of the Court's genealogy and constitutional role as guardian of the autonomy, effectiveness, and uniformity of EU law, the issues raised speak to sensitive matters.

A first set of concerns directly affects the central pillars of the accession agreement, the co-respondent mechanism, the rules on attribution of responsibility, and the prior involvement procedure.⁸ Here, the CJEU's prerogative to rule on the division of competences in the EU and the possibility for the Court to check the compatibility of EU law with the Convention, before the European Court of Human Rights (ECtHR) does so, are at stake. On these points, Advocate General Kokott also demanded that the draft accession agreement be altered.⁹

Nonetheless, the Court goes beyond that, raising issues that are essentially new to the debate. They do not address what the draft accession agreement regulates but rather what it does not: the fragility of the cooperative relationship between the CJEU and domestic apex courts in the context of the preliminary reference procedure;¹⁰ the issues of overriding EU primacy through domestic human rights and the concept of mutual trust between the Member States;¹¹ as well as the jurisdiction of the Court in the field of the Common Foreign and Security Policy (CFSP).¹²

I. The Co-Respondent Mechanism, Joint Responsibility, and Prior Involvement

⁷ See *infra* Part C.

⁸ See *infra* Part B.I.

⁹ Opinion 2/13 at paras. 229–334; See View of Advocate General Kokott at paras. 175–79, 180–84, 130–41, Opinion Procedure 2/13, CJEU Case C-2/13 (June 13, 2014), <http://curia.europa.eu/>.

¹⁰ See *infra* Part B.II.

¹¹ See *infra* Part B.III.

¹² See *infra* Part B.IV.

Unlike states, the EU cannot accede to the ECHR by merely depositing its ratification instruments.¹³ On important points, the EU does not fit into the Convention system. This starts with rather straightforward issues like money¹⁴ and semantics.¹⁵ More fundamentally, the Convention rules regulating the defense before the Strasbourg court, the exhaustion of remedies, and the attribution of responsibility need to be adapted for the EU. Accession is a complex endeavor.¹⁶ Hence, the rationale of the accession agreement will be briefly recalled, before we turn to the Court's concerns.

1. *The Need for an Accession Agreement: A Brief Recap*

The principle reason for a draft accession agreement can be explained by reference to two facts. The first is a novelty in the history of human rights protection. For the first time, a federal system¹⁷ submits itself to an external human rights control in a way that the Union and its Member States accede *alongside* each other. For the purpose of illustration, picture the German *Länder* or the Swiss cantons joining the ECHR alongside the German Bund or the Swiss Federation. The second fact is linked to the regulatory functioning of the Union. In the EU's legal system, most of its regulatory acts are implemented by the EU Member States. The EU's public authority hence confronts the citizen in general through Member State authorities.

The combination of the parallel membership of the EU and its Member States and the modus of indirect implementation make it highly complicated to disentangle the responsibility for a potential human rights violation in situations where EU law is

¹³ See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 59, para. 4 [hereinafter ECHR].

¹⁴ Because the EU will not accede to the Council of Europe, from whose budget the Convention system is financed, but only to the ECHR, the EU's financial contribution has to be negotiated. See Council of Europe, *Draft Agreement on the Accession of the EU to the European Convention on Human Rights*, FIFTH NEGOTIATION MEETING BETWEEN THE CDDH AD HOC NEGOTIATION GROUP & THE EUR. COMM'N ON THE ACCESSION OF THE EUR. UNION TO THE EUR. CONV. ON H.R. app. 1, art. 8 (2013) [hereinafter Draft Agreement].

¹⁵ Moreover, a number of provisions' formulations have to be altered to also apply to the European Union. See *id.* art. 1.

¹⁶ In detail, see PAUL GRAGL, THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 138–73, 209–56 (2013); Tobias Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48 COMMON MKT. L. REV. 1025, 1034–37 (2011); Jean-Paul Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 COMMON MKT. L. REV. 995, 995–1023 (2011).

¹⁷ Decoupling the notion of federalism from the federal state and applying it to the EU, CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER. EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT 6–12 (2005); see also ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 47–97 (2012).

potentially involved. Hence, if a citizen perceives her rights under the ECHR to be infringed by a Member State implementing EU law, it could well happen that she directs, after having exhausted all local remedies, an application against the implementing Member State only, while the potential infringement is actually rooted in the EU's legal act.

But the root of an alleged human rights violation could neither be properly addressed nor remedied if the EU and the Member States were not both parties to the proceedings.¹⁸ As the explanatory report to the draft accession agreement explains, it is the concern for gaps in participation, accountability, and enforceability that need to be addressed.¹⁹ This is why the draft accession agreement foresees the *co-respondent mechanism*.²⁰ This mechanism would allow the EU to become, alongside a Member State, a party to ECtHR proceedings and vice versa. In the case of applications notified to one or more Member States of the EU, but not to the EU itself, the co-respondent mechanism is triggered if it appears that an alleged violation of the ECHR calls into question the compatibility of a provision of EU law with the Convention, notably where it appears that the violation could have been avoided only by disregarding an obligation under EU law.²¹

Closely connected to the co-respondent mechanism is the principle of *joint responsibility*.²² If, in a co-respondent procedure, a violation of the ECHR is established, the EU and the Member State(s) shall be jointly responsible. It is for the CJEU to later disentangle the respective responsibilities of the EU and its Member States for a human rights violation.

2. The CJEU's Prerogative to Rule on the EU's Division of Competences

In *Opinion 2/13*, the Court raises two concerns with regard to the co-respondent mechanism and the principle of joint responsibility as they are currently set up in the draft accession agreement. Both points center on the exclusive competence of the CJEU to decide on the division of competences between the EU and its Member States. The first point concerns an exception to the principle of joint responsibility.²³ While it is the very

¹⁸ On the complexities, in detail, Andrés Delgado Casteleiro, *United We Stand: The EU and its Member States in the Strasbourg Court*, in *THE EU ACCESSION TO THE ECHR* 105, 106-111 (Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos eds., 2014).

¹⁹ See Council of Europe, *Draft Agreement on the Accession of the EU to the European Convention on Human Rights*, FIFTH NEGOTIATION MEETING BETWEEN THE CDDH AD HOC NEGOTIATION GROUP & THE EUR. COMM'N ON THE ACCESSION OF THE EUR. UNION TO THE EUR. CONV. ON H.R. app. 5, para. 39 (2013) [hereinafter Draft Explanatory Report].

²⁰ Draft Agreement art. 3.

²¹ Draft Agreement art. 3, para. 2.

²² Draft Agreement art. 3, para. 7.

²³ Opinion 2/13 at paras. 229–35.

purpose of joint responsibility to treat the attribution of responsibility for a human rights breach between the EU and its Member States as an EU internal matter, Article 3 paragraph 7 of the draft accession agreement provides an exception to this principle. According to this rule, the ECtHR may attribute responsibility “on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant”²⁴

For the Court, such possibility is incompatible with the principle of autonomy. The Court’s concerns spring in particular from the vague formulation of both the draft accession agreement and the draft explanatory report, specifying the exception.²⁵ One could read these texts either as demanding that the ECtHR only attribute responsibility if the parties agree thereto. This would mean that the agent representing the Union before the Strasbourg court could always veto an attribution of responsibility by the ECtHR. Yet, one could also understand them as granting the Strasbourg court the competence to decide whose views on responsibility should prevail. This would indeed mean that the Strasbourg court would need to interpret the EU Treaties’ principles on division of competences.

The second objection the Court raises is closely related and concerns the trigger for the co-respondent mechanism.²⁶ For the CJEU, it is paramount that it rests within the EU’s sole discretion whether it wishes to join the proceedings as a co-respondent, either by way of accepting an invitation by the Court or by applying for participation on its own. The reason is, again, the concern that the ECtHR might need to interpret the EU’s rules on the division of competences. The current draft accession agreement grants the ECtHR the right to check whether an application as co-respondent is plausible. The ECtHR acts as a final gatekeeper for co-respondent applications. This implies that the Strasbourg court would need to evaluate whether indeed a violation of the ECHR calls into question the compatibility of EU law with the Convention and not only with domestic implementing measures.

The Court’s concerns might seem exaggerated. Why should the ECtHR be keen to mingle with the EU’s division of competences in the first place? Arguably, the Strasbourg court will in general be both pleased to accept applications for co-respondentship, which enhance the scope of its rulings, and little inclined to engage in the complex matter of attributing responsibility EU internally. But, this might not always be the case. For the sake of an expedient procedure and protecting the interests of individual applicants, the ECtHR might be inclined to distribute responsibility itself. For EU Member States, the ECtHR might also

²⁴ Draft Agreement art. 3, para. 7.

²⁵ Draft Agreement art. 3, para. 233.

²⁶ Draft Agreement art.3, paras. 215–25.

be an interesting alternative forum to the CJEU to push for their understanding of the EU's division of competences.

The imminence of these scenarios needs to be seen in light of two facts: The responsibility, in a federal system, on the one hand, to decide on competences is one of the key prerogatives of a federal Supreme Court. In the EU, on the other hand, the CJEU's respective role was and will rest contested.²⁷ The recent preliminary reference by the German Federal Constitutional Court on the ECB's OMT decision is a case in point. Discussions on the creation of a specialized "Constitutional Council"²⁸ or "subsidiarity court"²⁹ that could take the place of the CJEU on questions of competences further manifest the constitutional significance of the issue and possible challenges to the CJEU's authority. Certainly, there are good constitutional reasons why this issue remains unsettled and contested. Nonetheless, there is no reason why the Strasbourg court should be involved in what is a sensitive—but sure enough—inter-EU question.

3. *The CJEU's Involvement Before the ECtHR Decides*

Two further objections the CJEU raises in *Opinion 2/13* against the draft accession agreement center on the second pillar of the draft accession agreement, namely the *prior involvement procedure*.³⁰ This procedure was set up to ensure that the CJEU gets a chance to have a say on the compatibility of EU law with the ECHR before the ECtHR decides. As an expression of the local remedies rule, the prior involvement procedure is central to the subsidiary nature of the Strasbourg system.³¹ The exhaustion of remedies rule—guaranteed to all ECHR Contracting Parties under Article 35 paragraph 1 ECHR—might, in the EU context, be rendered ineffective. Applicants before the highest domestic courts do not have, in general, a right to a preliminary reference. Hence, Article 267 in the Treaty on the Functioning of the European Union (TFEU) cannot be considered a local remedy that needs to be exhausted for a case to be admissible before the Strasbourg court.³² Therefore, in cases where the CJEU has not assessed the compatibility of EU law with the

²⁷ See in general, Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L. J. 262 (2005).

²⁸ Joseph Weiler, *The Autonomy of the Community Legal Order: Through the Looking Glass, in THE CONSTITUTION OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR?* 286, 322 (1999).

²⁹ Roland Vaubel, *Constitutional Courts as Promoters of Political Centralization: Lessons for the European Court of Justice*, 28 EUR. J. OF L. & ECON. 203, 218 (2009).

³⁰ Draft Agreement art.3, para. 6.

³¹ For a detailed explanation, see Gragl, *supra* note 16, at 209–11.

³² Draft Explanatory Report at para 65.

ECHR, the draft accession agreement provides that “sufficient time shall be afforded to the Court” to do so.³³

In *Opinion 2/13*, the Court underlines that it is crucial *when* and *how* it will be involved. It holds that the prior involvement procedure should not only be triggered in cases where the interpretation of EU primary law and the validity of secondary law is at stake, as is currently foreseen, but also when the interpretation of secondary law is concerned.³⁴ On the question as to how the prior involvement procedure shall be triggered, the Court insists that it must be for EU institutions alone to assess whether the CJEU has already assessed the compatibility of EU law with the ECHR.³⁵ The draft accession agreement leaves the possibility open that this might not be guaranteed. In practice, the Court seems to suggest that an EU institution will scrutinize all applications concerning EU Member States before the ECtHR to determine when an application for co-respondentship and/or the prior involvement of the CJEU are necessary.

As the highest court of a legal order, subject to ECtHR review, the CJEU demands what all other highest courts in Europe are granted—a say on the compatibility of domestic, i.e. EU law with the ECHR before the Strasbourg court decides. To some extent, this is a question of constitutional pride but also of the legitimate functioning of the Convention system—in particular because a dialogue between the highest domestic courts and the ECtHR is seen as essential for its proper working and the acceptance of the ECtHR’s rulings.

Putting the decision whether a prior involvement procedure is triggered into the hands of the ECtHR might indeed not be the best choice. For the sake of an expedient procedure—a persisting problem in Strasbourg—the ECtHR might feel tempted to be rather liberal in finding that the CJEU has already pronounced itself on the compatibility of EU law with the ECHR.

II. Threats to Article 267 TFEU Through Protocol No. 16

Protocol No. 16 to the ECHR has not entered into force yet. If it does, it will allow the highest courts of those EU Member States who ratify the Protocol to request an advisory opinion from the ECtHR on questions of principle relating to the interpretation or application of ECHR rights. The Court believes that this presents a risk of circumventing Article 267 TFEU, the preliminary reference procedure. It demands that the two procedures be coordinated.³⁶

³³ Draft Agreement art. 3, para. 6.

³⁴ *Opinion 2/13* at paras. 242–48.

³⁵ *Opinion 2/13* at paras. 236–41.

³⁶ MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE 235–59 (2d ed. 2014).

The Court's concerns need to be seen against the backdrop of the preliminary reference procedure being the most important—and yet the most fragile—procedural venue in the EU judicial system. Article 267 TFEU allows the Luxembourg court to directly engage with national judges in a dialogue on the interpretation and application of EU law. It represents one of the cornerstones of ensuring the effectiveness and supranational quality of EU law.³⁷ Pierre Pescatore has coined the narrative of the procedure as birthed in a committee of jurists who prepared the 1958 Rome Treaty, where only a few sensed the procedure's future significance for the success of EU integration.³⁸ Hjalte Rasmussen has underscored the 1970s promotion campaign of the Court to make the preliminary reference procedure known among national judges.³⁹ These accounts document the central feature of Article 267 TFEU: its dependence on the willingness of domestic judges to cooperate and send a reference to the Court. Recent studies show how fragile this cooperative link is.⁴⁰ Although there is a legal obligation for last instance courts to send a reference on the interpretation or validity of EU law,⁴¹ its respect is difficult to police.⁴²

In light of the fragility of the cooperative relationship with domestic courts, the Court in *Opinion 2/13* seems to fear that Protocol No. 16 might lead to a tendency of Member States' highest courts to turn towards the ECtHR rather than to seek a preliminary ruling from the CJEU. Reports from the oral hearing suggest that the Court has a specific scenario in mind.⁴³ Because the ECHR will become an integral part of EU law,⁴⁴ domestic courts can directly apply the Convention within the scope of EU law. If, for instance, an EU regulation's conformity with the ECHR is at stake, a Member State apex court might engage in "forum shopping," turning to the ECtHR for advice by relying on Protocol No. 16. In cases where a lower court has asked the CJEU for a preliminary ruling on this question,

³⁷ Joseph Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

³⁸ Pierre Pescatore, *Les Travaux du 'Groupe Juridique' dans la Négociation des Traités de Rome*, 34 STUDIA DIPLOMATICA 159 (1981).

³⁹ HJALTE RASMUSSEN, THE EUROPEAN COURT OF JUSTICE 118 (1998).

⁴⁰ LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 209–10 (2002).

⁴¹ Consolidated Version of the Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 47, art. 267, para. 3 [hereinafter TFEU].

⁴² See Michal Bobek, *Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice through the Eyes of National Courts*, in JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED 197–234 (Maurice Adams, Johan Meeusen, Gert Straetmans & Henri de Waele eds., 2013).

⁴³ See Stian Øby Johansen, *Some Thoughts on the ECJ Hearing on the Draft EU-ECHR Accession Agreement*, ØBY-KANALEN (May 6–7, 2014), <https://obykanalen.wordpress.com> (describing how President Skouris pushed the agent representing the Commission on this point).

⁴⁴ See TFEU art. 216, para. 2.

not even the CILFIT doctrine might help, as it does not prevent domestic last instance courts from seeking a “second” answer from the Strasbourg court.

One might argue that the CJEU will be involved through the prior involvement procedure in any case. However, for the Court—and indeed the functioning of the preliminary reference procedure—it is important that there is a strict chronological order between Article 267 TFEU and the procedure before the ECtHR. The prior involvement procedure comes under time constraints. As Article 3 paragraph 7 of the draft accession agreement demands, the CJEU should rule as quickly as possible. This is neither conducive to the deliberation process within the CJEU nor helpful concerning the broader discussion and involvement of Member States and other actors in the proceedings. To make an exceptional procedure, the rule is indeed not desirable. This might illustrate why the CJEU regards Protocol No. 16 skeptically.

III. Preserving Melloni and N.S.

*Melloni*⁴⁵ and *N.S.*⁴⁶ constitute two of the most important and constitutionally significant cases of the last few years. *Melloni* centers on the possibilities and limits of overriding EU primacy through domestic constitutional rights. *N.S.* concerns the question of how to balance the principle of mutual trust and the protection of fundamental rights in the context of the Dublin asylum system. Both cases can be refuted on good grounds. Still, for the Court, they are central elements to the constitutional structure of the EU, worthy of being defended.

Regarding these two cases, ECHR accession poses two very distinct risks for the Court, one stemming from its own Member States and the other from the judicial actions of the ECtHR. As regards *Melloni*, the Court fears that ECHR accession might give EU Member States incentives and argumentative grounds to reopen a debate that the Court had hoped to have closed, at least for the time being. *N.S.* manifests a disagreement between the Strasbourg and the Luxembourg courts on the balance of effectiveness and human rights in the interpretation of Article 3 ECHR (and respectively Article 4 of the Charter)—the prohibition on torture and inhuman and degrading treatment.

1. Melloni: Protecting the Effectiveness of EU Law Against the Member States

Melloni can be inserted into a line of cases on the primacy of EU law that roots back to the 1970 decision in *Internationale Handelsgesellschaft*. In this case, the Court held that “rules

⁴⁵ Stefano Melloni v. Ministerio Fiscal, CJEU Case C-399/11 (Feb. 26, 2013), <http://curia.europa.eu/>.

⁴⁶ Joined Cases, N. S. v. Sec’y of State for the Home Dep’t und M. E. and Others v. Refugee Applications Comm’n and Minister for Justice, Equal. and Law Reform, CJEU Cases C-411/10 & C-493/10, 2011 E.C.R. I-13905.

of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State.”⁴⁷ The principle that the primacy of EU law also trumps constitutional provisions of the Member States was never fully accepted.⁴⁸ For those who challenge it, the introduction of Article 53 of the Charter provided fresh argumentative ground.⁴⁹ Article 53 of the Charter explains that the Charter does not restrict or adversely affect human rights as recognized, in their respective fields of application, *inter alia* by the Member States’ constitutions.

The matter is intricate and delicate. The context of the *Melloni* decision, the first preliminary reference from the Spanish Constitutional Court, illustrates this well. Mr. Melloni, an Italian national and suspect of bankruptcy fraud, had been sentenced to ten years of imprisonment. The trial before an Italian court had proceeded *in absentia*, as Mr. Melloni had fled before it could start. After being arrested in Spain, the Italian authorities requested his surrender to Italy for the execution of the sentence, on the basis of a European arrest warrant (EAW). Mr. Melloni challenged his surrender, relying on the right to fair trial in the Spanish Constitution that indeed, in the reading of the Spanish Constitutional Court, provided that a review of a judgment *in absentia* is a condition for surrender.

Yet, the legal framework of the EAW—namely Article 4a paragraph 1 of the EAW Framework Decision—provides that a trial *in absentia* is not a hindrance to surrender, as long as the person that did not appear knows of the trial and is represented by counsel. Both of these conditions were given in the case of *Melloni*. In light of the conflict between EU law and the Spanish Constitution, the Spanish Constitutional Court asked the CJEU whether Article 53 of the Charter allows a national constitutional provision to depart from the framework decision.

The Court was brief and restrictive. Higher domestic standards in the field of application of EU law are only allowed if they do not compromise “the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.”⁵⁰ In the case of the EAW, the purpose of Article 4a paragraph 1 of the EAW Framework Decision was to adopt a

⁴⁷ *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, CJEU Case C-11/70, 1970 E.C.R. I-1125.

⁴⁸ Nik de Boer, *Addressing Rights Divergences Under the Charter: Melloni*, 50 COMMON MARKET L. REV. 1083–1103 (2013) (inserting the case into the larger picture).

⁴⁹ See Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?* 38 COMMON MARKET L. REV. 1181 (2001) (describing the discussions in the Convention that elaborated the Charter).

⁵⁰ *Melloni*, CJEU Case C-399/11 at para. 60.

common understanding of the fundamental rights at stake and to thereby ensure the effectiveness of the framework decision.⁵¹

Melloni touches upon a sensitive issue: The preservation of national identity expressed in domestic constitutional rights. Indeed, a look at the Spanish situation manifests that the acceptance of the Court's decision is precarious. In the Spanish Constitutional Court's decision on the compatibility of the European Constitutional Treaty with the Spanish Constitution,⁵² the Constitutional Court explicitly referred to Article 53 of the Charter as a guarantee that the basic principles and fundamental values of the Spanish Constitution are protected.

Arguably, in *Opinion 2/13*, the Court wants to avoid the fact that ECHR accession tenders argumentative ammunition for the Member States to challenge *Melloni*. Such ammunition could be provided through the sister provision of Article 53 of the Charter: Article 53 ECHR. The latter holds that "nothing in this Convention shall be construed as limiting domestic fundamental rights." While seemingly expressing a similar concept, the two articles follow a very different logic. In the context of the ECHR, there is no need to care for a uniform standard.⁵³ The ECHR functions truly as a minimum level guarantee. In the EU, however, in fields where the EU legislator has engaged in harmonization, a uniform understanding of fundamental rights protection in the harmonized field is crucial to guarantee the primacy and uniformity of EU law.

Since the Convention will, pursuant to Article 216 TFEU, become an integral part of EU law, Member States could rely on Article 53 ECHR—with its very different rationale—to insist on a different level of fundamental rights protection. *Melloni* could need to be revisited by the Court. More importantly, Article 53 ECHR could be employed by domestic courts as an argument to apply higher domestic standards, deviating from EU law, while not referring a preliminary question to the Luxembourg court. Accordingly, the Court in *Opinion 2/13* demands a coordination of the two articles so as to align them in light of the Court's reading of Article 53 Charter.

⁵¹ See *id.* at para. 63.

⁵² S.T.C., Dec. 13, 2004, Declaration 1/2004 concerning the existence or inexistence of contradiction between the Spanish Constitution and Articles I-6, II-111 and II-112 of the Treaty which lays down a Constitution for Europe, signed in Rome on 29 October 2004; an unofficial translation is available at: www.tribunalconstitucional.es.

⁵³ Accept in multipolar rights constellations; see CHRISTOPH GRABENWARTER & KATHARINA PABEL, EUROPÄISCHE MENSCHENRECHTSKONVENTION 13–14 (5th ed. 2012).

2. N.S.: *Disagreeing with the ECtHR on Article 3 ECHR/Article 4 of the Charter*

N.S. is of comparable constitutional significance. It concerns exceptions to the principle of mutual trust—a key EU constitutional principle—in the context of the European asylum system. Under the rules of the Dublin system, the country in which an asylum seeker first sets foot on EU soil is responsible for treating the asylum application. In principle, if an asylum seeker moves to another EU Member State, the latter will transfer her back to the state where the first application was lodged. The critical background of this practice is well known: Asylum seekers have good reasons to leave entry states such as Greece or Italy, where housing and living conditions for asylum seekers and their families are often untenable.

The ECtHR actively aimed to remedy this situation. It established a line of case law in which it set up conditions under which such transfer between the members of the Dublin system is in conflict with the Convention, in particular with Article 3 ECHR. The first milestone in this case law was *M.S.S. v. Belgium and Greece*,⁵⁴ where the Strasbourg Court found that the transfer of an Afghan asylum seeker from Belgium to Greece violated Article 3 ECHR due to systematic deficiencies in the Greek asylum system. The notion of systemic deficiency has continued to permeate the discussion.

The CJEU, a few months later, largely followed the ECtHR and held that the presumption that Member States respect fundamental rights—a central principle for the effectiveness of the Dublin system—is rebutted when there are systematic deficiencies in asylum procedures and in the reception conditions of asylum seekers. Otherwise, Article 4 of the Charter—which is, in substance, identical to Article 3 ECHR—would be violated. Minor, i.e. non-systemic violations of refugee protection rules, would not suffice for a prohibition of transfer. The presumption that EU Member States comply with fundamental rights recognized by the Charter can only be rebutted under exceptional circumstances.⁵⁵

While the CJEU had followed the ECtHR's lead, in its recent case law, the Strasbourg court went a step further in protecting asylum seekers' rights. *Tarakhel v. Switzerland*⁵⁶ concerns a family of Afghan nationals seeking asylum in Switzerland, who challenged a decision by Swiss authorities to transfer the family back to Italy, the country through which they entered the Union. In this case, the Strasbourg court held that, although the Italian asylum system was not systemically deficient,⁵⁷ the Swiss authorities had to examine the

⁵⁴ *M.S.S. v. Belgium and Greece*, ECHR App. No. 30696 (Jan. 21, 2011).

⁵⁵ See *N.S.*, CJEU Cases C-411/10 at paras. 78–80.

⁵⁶ *Tarakhel v. Switzerland*, ECHR App. No. 29217/12 (Nov. 4, 2014).

⁵⁷ *Id.* at paras. 114–15.

applicant's individual situation and obtain individual guarantees from the Italian authorities to secure the proper protection.⁵⁸ The ECtHR held that, in light of the vulnerability of a family with small children and the insecure housing situation in Italy, a transfer would have been in breach of Article 3 ECHR. The ECtHR has thereby left the shared understanding of the Article 3 ECHR and Article 4 of the Charter between Strasbourg and Luxembourg, further reconfiguring the balance between the rights of individuals and the effectiveness of the asylum system.⁵⁹

In *Opinion 2/13*, the Court insists that such departure from common ground needs to be remedied before ECHR accession is compatible with the Treaties. It would "upset the underlying balance of the EU and undermine the autonomy of EU law"⁶⁰ were the EU Member States obliged to further depart from the principle of mutual trust.

From the perspective of the individual, the Court's position is indeed problematic, frustrating *Tarakhe's* rationale to stronger focus on the individual situation of a highly vulnerable group of people. Yet, the Court's position is not unfounded. For the Court, the principle of mutual trust is crucial, not only in the field of asylum law but also in other areas such as the mutual recognition of judgments and judicial decisions. It is a balance that needs to be struck between systemic considerations and individual rights, between an individualized and a systematic approach to human rights protection. There can be reasonable disagreement on where to draw the line. In the end, it needs to be considered that it is the line drawn by the European legislator that the CJEU is advocating; a legislator who set up the Dublin system and reformed it several times to include the systemic deficiency exception into the Dublin III Regulation.⁶¹

IV. Jurisdiction in the Field of the CFSP

The most controversial point of *Opinion 2/13* is the Court's argument in relation to judicial review in Common Foreign and Security Policy (CFSP) matters.⁶² The Court holds that because its own jurisdiction in this field is restricted, pursuant to Article 275 TFEU, the Strasbourg court may not have jurisdiction either. It would be in conflict with the autonomy of EU law if judicial review of EU acts would be exclusively entrusted to a non-EU body.

⁵⁸ *Id.* at paras. 116–22.

⁵⁹ See Valsamis Mitsilegas, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, 31 Y.B. EUR. L. 319 (2012).

⁶⁰ *Opinion 2/13* at para. 194.

⁶¹ EU Regulation 604/2013, June 26, 2013, 2013 O.J. (L 180/31).

⁶² See Peers, *supra* note 2.

Indeed, *prima facie*, it is difficult to see how the ECtHR's jurisdiction in the field of the CFSP should negatively affect the autonomy of EU law. As Advocate General Kokott pointed out, in comparable cases on the creation of a court for the European Economic Area, the goal of autonomy-protection was to avoid conflicting case law and threats to the supranational structure of the EU. Both of these threats do not apply because neither will arise conflicts, since the CJEU has no jurisdiction, nor is there a supranational structure in place that needs to be preserved.⁶³

Is it hence only constitutional pride that prompts the CJEU to outlaw exclusive jurisdiction for the ECtHR in CFSP matters? Arguably there is more to the Court's concerns. First of all, one needs to recall, that it is an important constitutional desideratum to extend the CJEU's competences in the field of the CFSP, to strengthen the Rule of Law and the supranational character of EU law in a sensitive and dynamic field of law.⁶⁴ But more importantly, as Daniel Halberstam has convincingly argued, it does pose a challenge for the uniformity and authority of EU law if a court, different than the CJEU, provides final guidance to domestic courts.⁶⁵

C. Addressing the Court's Concerns

While the Court's concerns should be taken seriously it is a very different question how they should be addressed. Should all of them be accommodated in an accession agreement as the CJEU suggests or do alternative routes exist that should rather be pondered? The answer to this question essentially depends on the interpretation of Protocol No. 8 to the Lisbon Treaty.

I. Sui Generis or Common Concerns?

Protocol No. 8 to the Lisbon Treaty outlines the conditions for the EU's accession to the ECHR.⁶⁶ An accession agreement needs to preserve the "specific characteristics of the EU and EU law."⁶⁷ It sets out which concerns should be protected and how this should happen.

⁶³ Opinion 2/13 at paras. 192–95.

⁶⁴ See generally MATTHIAS KOTTMANN, INTROVERTIERTE RECHTSGEMEINSCHAFT. ZUR RICHTERLICHEN KONTROLLE DES AUSWÄRTIGEN HANDELNS DER EUROPÄISCHEN UNION 153–231 (2014).

⁶⁵ See the contribution in this issue by Daniel Halberstam, *It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*.

⁶⁶ 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, Oct. 26, 2012, 2012 O.J. (C 326/273).

⁶⁷ *Id.*

The Court's argument is simple. For the Court, autonomy, primacy, mutual trust, and other constitutional features are all specific characteristics of the EU; part of its *sui generis* character. Hence, all the concerns it raises need to be incorporated into such an agreement.

However, one merely needs leaf through European newspapers or highest court decisions,⁶⁸ to see that autonomy in the context of the ECHR is hardly limited to the EU. Rather, it is a common concern to all Contracting Parties.⁶⁹ Domestic systems are autonomous,⁷⁰ and they care about the interpretative monopoly of their highest courts and the effectiveness of their legal rules. This has never been clearer than it is today. In the UK and Switzerland, significant groups propose to leave the Convention system. Domestic constitutional courts view their position as unifying and coherence-creating institutions imperiled by the ECHR's interpretative authority.⁷¹ Moreover, federal states have principles that equip federal laws with direct effect and primacy; federal states also have institutions that seek to ensure the consistency and uniformity of the law.⁷² On a closer look, none of the Court's "specifics" are in fact specific to the EU. They may have a particular twist and constitutional significance in the EU context—but arguably any constitutional court would say that its understanding of autonomy, its constitutional principles, and its judicial system are particularly worth preserving.

In fact, the Court's reasoning is based on a cunning argumentative trick. While the CJEU, when interpreting Protocol No. 8, begins by underscoring that the EU is specific because it is not to be considered a state,⁷³ the Court continues by reciting its case law in which it had emancipated the EU from international law. It opens with *Van Gend en Loos* and the famous *dictum* that "the founding treaties of the EU, *unlike ordinary international treaties,*

⁶⁸ See only Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. BVerfGE 111, 307, 317 or *Manchester City Council v. Pinnock*, [2010] UKSC 45, para. 48.

⁶⁹ As is well known, the ECHR and the judicial activity of the ECtHR have profoundly impacted these concepts in many European states. See Alec Stone Sweet & Helen Keller, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 677 (2009); MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTIONS IN THE COURTS OF EUROPE* (2009).

⁷⁰ See ANNE PETERS, *ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS* 242–43 (2001).

⁷¹ On the German Federal Constitutional Court, see Christoph Schönberger, *Anmerkungen zu Karlsruhe*, in *DAS ENTGRENZTE GERICHT. EINE KRITISCHE BILANZ NACH SECHZIG JAHREN BUNDESVERFASSUNGSGERICHT* 9, 59–65 (Matthias Jestaedt, Oliver Lepsius et al. eds., 2011).

⁷² Joseph H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, in *THE FEDERAL VISION. LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 54, 56 (Kalypso Nicolaidis & Robert Howse eds., 2001).

⁷³ Opinion 2/13 at paras. 153–59 (paying particular attention to para. 156).

established a new legal order, the nature of which is peculiar to the EU⁷⁴ and ends with the *trias* of autonomy, primacy, and direct effect, generally considered to constitute the *supranational*—in contrast to *international*—nature of EU law.

Precisely because autonomy, effectiveness and similar constitutional principles are common concerns, the Convention system has prescribed common rules to protect them. The ECHR is permeated by procedural and substantive mechanisms to safeguard and to regulate them under a common scheme. These mechanisms range from the exhaustion of local remedies rule, pursuant to Article 35 ECHR, to the possibility of reservations, Article 57 ECHR. But there exist also—and this is crucial—a common understanding on what effects of ECHR membership need to be accepted or taken care of internally, namely all those for which no common rules exist.

How should we, then, understand Protocol No. 8 and its demand to preserve the specific characteristics of the EU and EU law? Strikingly, the Court itself has proposed an alternative reading of “specific characteristics” in a discussion document on ECHR accession published in 2010.⁷⁵ In this paper the Court defines as specific characteristics within the meaning of Protocol No. 8 the specific regulatory set-up of the EU, namely the fact that individuals are, in general, affected by EU action only through national measures of implementation or application.⁷⁶ The Court then relates this to the preservation of the Convention’s key principle for protecting autonomy, namely subsidiarity.⁷⁷ Because the specific regulatory system of the Union creates challenges for the effective guarantee of subsidiarity, a draft accession agreement should bring the EU to a level playing field with the other Contracting Parties.

II. A Path to Accession: Rearranging the Court’s Concerns

The common understanding of the legitimate effects of ECHR accession on autonomy, effectiveness and similar constitutional principles, as reflected in the ECHR, can provide an analytical matrix both to analyze and to address the Court’s concerns. The final section of this article regroups the Court’s concerns accordingly and discuss their remedies.

⁷⁴ Opinion 2/13 at para. 157 (emphasis added).

⁷⁵ 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 para. 5 (2010), http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf.

⁷⁶ 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, Oct. 26, 2012, 2012 O.J. (C 326/273).

⁷⁷ *Id.*

1. *Bringing the EU to Level-Playing Field: Re-negotiating the Accession Agreement*

The concerns the CJEU raises in regard to the procedural pillars of the accession agreement, namely that the ECtHR could potentially decide on the division of competences between the EU and the EU Member States, and that the Court will not be effectively involved to rule on the compatibility of EU law with the Convention before the ECtHR decides, are well known to the ECHR Contracting States and have been addressed in the Convention.

The exhaustion of local remedies rule, enshrined in Article 35 paragraph 1 ECHR, ensures that Contracting Parties will not have to confront a procedure before the Strasbourg court unless all domestic remedies have been exhausted. The ECtHR ensures the exhaustion of local remedies as an admissibility criterion.⁷⁸ Moreover, the principle that the ECtHR shall not interpret domestic law is deeply enshrined in the case law of the Strasbourg court. The ECtHR generally treats domestic law as part of the facts that it accepts as true.⁷⁹

Due to the EU's specific situation where it accedes alongside its Member States and generally on indirect implementation of its policies, the EU faces distinct problems regarding the effectiveness of these two mechanisms. Federal states such as Germany and Switzerland will never enter into a situation where the ECtHR could potentially decide on the division of competences between the German *Länder* and the *Bund* or the Swiss cantons and the federation, respectively. A violation of the Convention always entails the responsibility of the state as such.⁸⁰ Moreover, for other Contracting Parties the exhaustion of remedies rule is always guaranteed as an admissibility criterion.⁸¹ Thus, good reasons exist to reopen the negotiations with the Council of Europe on these points. The prospects of such re-negotiations should be favorable. Leveling the playing field between the EU and other Contracting Parties is precisely what has been set out as the goal of accession negotiations.⁸²

2. *Addressing Substantive Disagreement: Making a Reservation*

The Court's concern regarding the principle of mutual trust in the EU legal order is of a very different nature. It is a substantive disagreement between the CJEU and the ECtHR

⁷⁸ ECHR art 35, para. 1.

⁷⁹ On this principle, in detail, see Tobias Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48 COMMON MARKET L. REV. 1025, 1034–37 (2011).

⁸⁰ See for instance Scozzari and Giunta v. Italy, App no. 39221/98 and others (Jul. 13, 2000), para 249.

⁸¹ ECHR art 35, para. 1.

⁸² See Draft Explanatory Report, at para. 7.

stemming from the reading of Article 3 of the ECHR.⁸³ The concern to preserve a specific domestic reading of a right enshrined in the ECHR is well known to the Contracting Parties to the ECHR. In fact, it is part of the daily business of the Strasbourg court.⁸⁴ That particular constitutional principles as significant and specific to a certain constitutional system as the EU's principle of mutual trust are at stake is not rare.⁸⁵

These substantive disagreements can also be addressed before the Convention is ratified through reservations in respect to a particular provision of the ECHR. Article 57 of the ECHR establishes two conditions for a reservation to be valid: First, it may not be of general character, and second, it shall contain "a brief statement of the law concerned."⁸⁶ Both points could easily be met with regard to the Court's concern on the interpretation of Article 3 of the ECHR in the case of asylum procedures. The reservation would concern Article 3 ECHR, a specific provision. Moreover, Article 3 paragraph 2 of the Dublin III Regulation⁸⁷ has codified the CJEU's jurisprudence on systemic deficiency and would allow precise targeting of the object of the EU's reservation. Arguably, such a reservation could be extended to Article 8 of the ECHR and could encompass other codified expressions of the principle of mutual trust in EU secondary legislation.

Certainly, whether such a reservation is desirable or whether the Strasbourg court is right in further strengthening the human rights of asylum seekers to the detriment of the principle of mutual trust is debatable. However, this is the task of the political process. As it stands, the EU Member States have codified *N.S.* and the principle of mutual trust in EU secondary law. The CJEU would certainly accept an alteration in the name of a better protection of human rights or even the withdrawal of a reservation.

3. EU-internal Issues I: Pledging Loyalty

Two further concerns of the Court are again of a very different kind: The concerns that highest Member State courts could feel inclined by Protocol No. 16 to degrade the preliminary reference procedure,⁸⁸ and that Article 53 of the Charter might serve Member

⁸³ See *supra* Part B.III.2.

⁸⁴ See only the contributions in SPYRIDŌN I. PHLOGAITĒS, TOM ZWART, JULIE FRASER (eds.) *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH* (2013).

⁸⁵ See, for instance *Vajnai v. Hungary*, ECHR App no 33629/06 (Jul. 8 2008) (on the principle to ban symbols representing Hungary's totalitarian past).

⁸⁶ See *Belilos v. Switzerland*, ECHR App. No. 10328/83 (Apr. 29, 1988).

⁸⁷ EU Regulation 604/2013, June 26, 2013, 2013 O.J. (L 180/31).

⁸⁸ See *supra* Part B.II.

State courts to destabilize the CJEU's *Melloni* doctrine,⁸⁹ are based on the idea that EU Member State organs might act differently because they seek the argumentative options ECHR accession affords them. The threat to the autonomy of EU law does not stem from an obligation the Convention or its organs impose but from a shift in the incentive structure for the EU Member States. The concerns, rather, are EU-internal problems.

Quite understandably, the Convention's system does not offer any safeguard here because it is only indirectly the root of the problem. However, remedy for the CJEU's concerns can be found with the Member States. A joint declaration before accession⁹⁰ combined with rules in the implementing measures after accession would suffice.

4. EU-internal Issues II: Altering the EU Treaties

One could argue that the Court's concern that the ECtHR could have exclusive jurisdiction in the field of the CFSP is an expression of the demand to ensure the exhaustion of local remedies rule. After a closer look, though, this argument appears empty. As Advocate General Kokott has emphasized, domestic courts may check the compatibility of the EU's actions with the ECHR in the field of the CFSP. Thus, local remedies are available. Otherwise, judicial protection in this field would be highly problematic from the perspective of Articles 6 and 13 of the ECHR.⁹¹

The way to go is straightforward: granting the CJEU full jurisdiction in this field. This would demand that Article 275 TFEU be changed through the ordinary treaty amendment procedure pursuant to Article 48 TEU. While treaty amendment is generally burdensome, the specific ratification requirements in the context of ECHR accession should significantly lower the hassle. Given that ECHR accession would require the ratification of the accession agreement by all EU Member States, the respective treaty amendment could be passed at one go.

D. Conclusion

To be sure, the EU's accession to the ECHR is an important endeavor worth pursuing. Apart from the often recalled arguments that accession will foster the EU's credibility and the coherence of human rights protection in Europe, it potentially provides a noteworthy innovation to the EU's constitutional system: an external review and deliberative

⁸⁹ See *supra* Part B.III.1.

⁹⁰ Also, Advocate General Kokott has proposed this solution. See *View of Advocate General Kokott, supra* note 9, at para. 120.

⁹¹ *Id.* at paras. 82–103.

contestation of the CJEU's interpretation of fundamental rights, for many of which the CJEU acts as a first and last instance court.⁹²

However, being part of the Strasbourg system is not a one-way street. The legitimacy of the Strasbourg court and its effects on domestic legal systems is a recurring and heatedly debated topic, in particular in recent times.⁹³ Contracting Parties have experienced only gradually, through the course of their ECHR membership, the transformative power of the Convention system. In hindsight, *Opinion 2/13* might therefore not be the dramatic blow to ECHR accession as perceived by many, but rather an important element in a reflection process on how to interlock supranational human rights protection in Europe. The CJEU might be overly protective but its concerns are not spurious. They can be accommodated in a manner to reflect the notion that autonomy and effectiveness, are not EU *sui generis*, but constitutional concerns common to all ECHR Contracting Parties.

⁹² On this problem see Joseph Weiler, *Epilogue: Judging the Judges – Apology and Critique*, in *JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE EXAMINED* 235, 253 (Maurice Adams, Johan Meeusen, Gert Straetmans & Henri de Waele eds., 2013).

⁹³ See, Janneke Gerards, *The scope of ECHR rights and institutional concerns*, in *SHAPING RIGHTS IN THE ECHR. THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS* 84, 86-89 (Eva Brems and Janneke Gerards eds., 2013).