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ARTICLES

EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS IN THE AREA OF CLIMATE CHANGE: WHY THE EUROPEAN UNION SHOULD TAKE THEM SERIOUSLY

CHIARA TEA ANTONIAZZI*

TABLE OF CONTENTS: I. Introduction. – II. EU climate policy and its impacts on third countries and persons living therein. – II.1. EU climate policy and its impacts on the sovereignty and economies of third countries. – II.2. Climate action and inaction and their impacts on human rights. – II.3. EU climate policy and its impacts on the human rights of persons living in third countries. – III. From impacts to legal obligations: extraterritorial human rights obligations in the context of climate change. – III.1. Extraterritorial human rights obligations: a primer. – III.2. Recent judicial and quasi-judicial developments in the area of climate change. – IV. Pulling the threads together: the extraterritorial human rights obligations of the EU in the area of climate change. – IV.1. Does the EU have extraterritorial human rights obligations? – IV.2. Enforcing the extraterritorial human rights obligations of the EU in the area of climate change: obstacles and ways forward. – V. Conclusion.

ABSTRACT: While it is by now recognised that climate change is having and will increasingly have a devastating impact on human rights and that ill-conceived climate action can also have adverse repercussions, the legal implications of these dynamics are still debated. This is particularly the case for the apparent incompatibility between the global nature of climate change and the primarily territorial nature of States' human rights obligations. In this context, the potential human rights obligations of the European Union (EU) towards persons living in third countries when it acts – or refrains from acting – to counter climate change have been particularly neglected, notwithstanding the major role played by the EU in both contributing to and mitigating climate change. Accordingly, the *Article* aims to shed light on the existence and extent of EU extraterritorial human rights obligations in the area of climate change. After exploring the wide array of EU climate measures and their extensive impacts on third countries and persons living therein, the *Article* offers an overview of the historical evolution and current state of extraterritorial human rights obligations in general and in the context of climate change specifically, paying special attention to recent judicial and quasi-judicial developments. The *Article* then points to a number of peculiarities of the EU legal framework and EU climate

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policy to conclude that, notwithstanding potentially significant enforcement obstacles, the EU legal order could be readier than others to recognise extraterritorial human rights obligations when EU institutions act (or not) in the area of climate change.

KEYWORDS: European Union – EU climate policy – extraterritoriality – extraterritorial human rights obligations – climate litigation – Court of Justice of the European Union.

I. INTRODUCTION

Since the 1992 Rio Conference, the European Union (EU) has striven to portray itself as a global leader in the fight against climate change.[1] This adds to the strengthening of the role of the EU in the promotion of human rights worldwide after the entry into force of the Lisbon Treaty.[2] Nevertheless, these two areas of strategic interest appear to have mainly run on parallel tracks, to the extent that human rights considerations have not featured prominently in the climate policy of the EU. This is not surprising considering that, until the late 2000s, the interactions between climate change and human rights have hardly been addressed holistically within international organisations and multilateral fora. However, such state of affairs is rapidly changing, also in light of an ever-growing wave of human rights-based climate change litigation.

These developments raise the question of whether the EU, in devising and implementing its climate action, which has wide-ranging effects on third countries, is promoting and protecting the human rights of those living in such countries; and whether the EU has any legal obligation to do so.[3] International lawyers have increasingly scrutinised the external dimension of EU climate measures against its international obligations – specifically, obligations deriving from multilateral climate agreements, World Trade Organization's (WTO) rules, and customary norms on State jurisdiction. However, comparatively less attention has been devoted to whether and how EU climate measures (or lack

[1] S Oberthür and C Dupont, 'The European Union's International Climate Leadership: Towards a Grand Climate Strategy?' (2021) Journal of European Public Policy 1095.

[2] J Wouters and M Ovádek, 'Human Rights in EU External Action' in J Wouters and M Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 539; and T King, 'The European Union as a Human Rights Actor' in M O'Flaherty, Z Kędzia, A Müller and G Ulrich (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff 2011) 77. For a critical appraisal: G de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) AJIL 649.

[3] This *Article* focuses on the potential extraterritorial human rights obligations of the EU rather than those of its Member States, as this topic has been comparatively less explored. The two aspects are of course related, as climate policies are increasingly agreed upon at the EU level and implemented by the Member States. Equally, the *Article* does not focus on corporate actors, as potential international responsibility for their harmful activities would lie – at most – with the Member States in which they are domiciled or under whose jurisdiction they can otherwise be considered, and not with the EU. It is a different question whether the EU has an obligation to regulate corporate responsibility including in light of the UN Guiding Principles on Business and Human Rights: Commission Staff Working Document of 15 July 2015 on Implementing the UN Guiding Principles on Business and Human Rights – State of Play.

thereof) are compatible with the negative and positive human rights obligations of the EU as stemming from both international law and its own "constitutional law", in particular to the extent that such measures (or lack thereof) can have a harmful impact on the rights of "distant strangers" living in third countries.[4] In other words, the thorny issue of extraterritorial human rights obligations arises.

Accordingly, the *Article* aims to shed light on the extraterritorial human rights obligations of the EU when taking action – or when omitting to take action – against climate change. To do so, it highlights how the wide array of climate measures that the EU has put in place over time can have extensive impacts on third countries and persons living therein (Section II). While EU unilateral climate measures with external effects (such as the EU Emissions Trading System and, more recently, the Carbon Border Adjustment Mechanism) have attracted extensive scholarly interest, together with EU trade agreements with third countries containing environment- and climate-related clauses, there is a need for more comprehensive scrutiny of how EU climate policy in all its manifestations can negatively affect third countries. More specifically, using a human rights lens to examine EU climate policy allows to open up largely underexplored research avenues on the impacts of EU climate action and inaction on persons living in third countries, as opposed to impacts on third countries' sovereignty and economies.

To ascertain whether the EU is under any legal obligation to prevent, mitigate and remedy such negative human rights impacts, Section III retraces the historical evolution and current state of extraterritorial human rights obligations in general, as (divergently) interpreted by regional human rights courts and United Nations (UN) human rights treaty bodies. Zooming in on the context of climate change, special attention is paid to the much-debated recent pronouncements by the Inter-American Court of Human Rights (IACtHR),[5] the Committee on the Rights of the Child (CRC Committee),[6] and the European Court of Human Rights (ECtHR)[7] – and their opposite outcomes. The analysis of this case-law is considered relevant in light of the increasing trend of cross-fertilisation and dialogue among international courts and quasi-judicial bodies addressing human rights (including in the area of climate change). Additionally, the case-law of the ECtHR is considered of particular importance for the purposes of this *Article* in light of the special relationship between the EU Charter of Fundamental Rights (CFREU) and the European Convention on Human Rights (ECHR) on the basis of art. 52(3) CFREU; and in light of recent progress in the process of EU accession to the ECHR.

Section IV pulls the threads and adds a further piece by emphasising the peculiarities of the EU legal framework and particularly of the CFREU, which would seem to apply to

[4] A Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' (2016) MichJIntlL 475.

[5] IACtHR advisory opinion OC-23/17 on the environment and human rights [15 November 2017].

[6] CRC Committee decisions of 22 September 2021 *Sacchi and Others v Argentina and Others* CRC/C/88/D/104-108/2019.

[7] ECtHR *Duarte Agostinho and Others v Portugal and 32 Others* App n. 39371/20 [9 April 2024].

all EU acts, regardless of any territorial consideration. Taken together with further special features of the EU legal order and EU climate policy, section IV points out the comparative ease with which extraterritorial human rights obligations could be recognised as incumbent on EU institutions when they act (or not) in the area of climate change. While acknowledging the significant enforcement issues connected to the restrictive approach by the Court of Justice of the European Union (CJEU) to the standing of individuals and non-governmental organisations (NGOs), it is shown how the topic could nonetheless soon reach the CJEU through different avenues; and, in light of the above, how the outcome could be conducive to stronger climate action. Section V concludes on the enduring relevance of human rights in tackling climate change and on the significant role that the EU legal order and the CJEU can potentially play in this regard.

II. EU climate policy and its impacts on third countries and persons living therein

In the last 30 years, the EU has built an increasingly sophisticated climate policy – *i.e.*, a policy "ecompass[ing] measures aimed at preventing climate change, especially by reducing GHG emissions and by alleviating the consequences of global warming through adaptation strategies".[8] Different measures have been characterised as forming internal, external and international EU climate policy, but they are frequently difficult to disentangle. Indeed, in the area of climate change, the multi-level governance defining the vast majority of EU action is particularly intricate;[9] and the most effective measures are those that tackle the whole carbon footprint and thus reach beyond territorial boundaries.[10] The mainstreaming of climate considerations in a wider range of EU policies[11] adds to this complexity and makes attempts at defining what constitutes climate policy and at distinguishing between internal and external policy increasingly challenging and, in many ways, artificial. Nevertheless, as it will be shown, these distinctions have little significance when the impact of climate-related measures on human rights is considered. Accordingly, for this *Article*, a purposefully broad and loose notion of EU climate policy is adopted, which also includes the decision by EU institutions *not* to act in certain areas.

[8] F Stangl and R Mauger, 'EU Climate Policy' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* (Edward Elgar 2022) 10, 12.

[9] H Vedder, 'Multi-Level Governance in EU Climate Law' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* cit. 237.

[10] NL Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law* (Hart 2023) 2; and Z Hausfather, 'Mapped: The World's Largest CO2 Importers and Exporters' (5 July 2017) Carbon Brief www.carbonbrief.org.

[11] European Commission, *Climate Mainstreaming* commission.europa.eu; K Rietig and C Dupont, 'Climate Policy Integration and Climate Mainstreaming in the EU Budget' in T Rayner, K Szulecki, AJ Jordan and S Oberthür (eds), *Handbook on European Union Climate Change Policy and Politics* (Edward Elgar 2023) 246.

II.1. EU CLIMATE POLICY AND ITS IMPACTS ON THE SOVEREIGNTY AND ECONOMIES OF THIRD COUNTRIES

To further complicate the picture just painted, especially since the mid-2000s, the EU has increasingly gone in its climate policy beyond what was agreed in multilateral climate negotiations[12] by autonomously experimenting paths to climate mitigation and thereby exercising considerable intellectual and exemplary leadership.[13] While this approach has promoted the spread of new climate measures, it has also met with significant resistance in a context – that of international climate regulation and governance – where multilateralism is generally preferred.[14]

Accordingly, the devising and implementation of EU climate policy have raised several issues from an international law perspective. First among such issues is respect for the principle of sovereign equality of States and for the limitations on extraterritorial jurisdiction, which generally prevent States from exercising their prescriptive, adjudicative and enforcement authority over conducts and events taking place beyond their territories.[15] While instances of extraterritorial jurisdiction are increasingly accepted in a globalised world[16] and while EU unilateral climate measures with significant extraterritorial impacts generally pursue goals broadly shared by the international community,[17] such measures have nonetheless often been vehemently opposed by third countries, lamenting a violation of their sovereignty.

Among the most controversial examples of such approach is the EU Emissions Trading System (ETS) – namely the world's biggest carbon market, whose unilaterally planned extension to the aviation and navigation sectors was rejected by several third countries and even led to the institution of judicial proceedings, which challenged the inclusion of emissions connected to entirely foreign conduct in the schemes (*i.e.*, those parts of flights

[12] This is the case for the environmental field more generally: I Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Bloomsbury 2019).

[13] S Oberthür and M Pallemaerts, 'The EU's Internal and External Climate Policies: An Historical Overview' in S Oberthür and M Pallemaerts (eds), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy* (VUB Press 2010) 27; E Pander Maat, 'Leading by Example, Ideas or Coercion? The Carbon Border Adjustment Mechanism as a Case of Hybrid EU Climate Leadership' European Papers (European Forum Insight of 29 April 2022) www.europeanpapers.eu 55.

[14] This is true for global environmental issues more generally: JE Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment' in N Bhuta (ed.), *The Frontiers of Human Rights* (Oxford University Press 2016) 177, 179 ff.

[15] International Bar Association (IBA), *Report of the Task Force on Extraterritorial Jurisdiction* (IBA 2008).

[16] International Law Commission, Report on the work of its fifty-eighth session (2006), Annex V, UN Doc A/61/10; MT Kamminga, 'Extraterritoriality' (2020) Max Planck Encyclopedia of Public International Law.

[17] On the "international orientation" characterising the "territorial extension" of EU law, see J Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) AmJCompL 87. Relatedly, on unilateralism in pursuance of the common good, see C Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford University Press 2020).

taking place outside EU territory).[18] Incidentally, the EU subsequently decided to limit the application of its ETS to flights within the European Economic Area and facilitated the creation of a global carbon market within the International Civil Aviation Organization (ICAO);[19] whereas, regarding maritime emissions, the inclusion in the EU ETS has been established from 1 January 2024 and covers 50 per cent of emissions from voyages starting or ending outside the EU.[20]

More recently and relatedly, the creation of the Carbon Border Adjustment Mechanism (CBAM) has caused a similar furore. Through the CBAM, the EU intends to lead the way in combatting so-called carbon leakage, namely the increase in greenhouse gas (GHG) emissions that is expected from asymmetries in the climate policies of different countries, which can encourage companies to move production to countries with a more relaxed regulation of emissions.[21] The CBAM, adopted by the EU in the absence of any real progress in the international discussions over carbon border measures, is also seen by many countries as interfering with their sovereign rights.[22]

The lawfulness of the CBAM and EU ETS under international law has also been debated with respect to WTO law, particularly its most-favoured-nation and national treatment principles.[23] Similarly, the EU Deforestation Regulation,[24] which aims to block the entry and consumption in Europe of products that contribute to deforestation and forest degradation and thus to climate change, has been criticised by developing countries as

[18] Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864. In this preliminary ruling concerning the validity of Directive 2008/101/EC, which included aviation activities in the ETS, the Grand Chamber found that the Directive did not apply extraterritorially and was, therefore, valid. In the literature, see C Voigt, 'Up in the Air: Aviation, the EU Emissions Trading Scheme and the Question of Jurisdiction' (2011-2012) CYELS 475; NL Dobson and C Ryngaert, 'Provocative Climate Protection: EU "Extraterritorial" Regulation of Maritime Emissions' (2017) ICLQ 295.

[19] Decision No 377/2013/EU of the European Parliament and of the Council of 24 April 2013 derogating temporarily from Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community; and ICAO, Assembly Resolution A39-3 of October 2016.

[20] European Commission, *Reducing Emissions from the Shipping Sector* climate.ec.europa.eu.

[21] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism.

[22] For an overview of the main issues raised by the CBAM under international law: NL Dobson, '(Re)framing Responsibility? Assessing the Division of Burdens Under the EU Carbon Border Adjustment Mechanism' (2022) Utrecht Law Review 162.

[23] I Espa, J Francois and H van Asselt, 'The EU Proposal for a Carbon Border Adjustment Mechanism (CBAM): An Analysis under WTO and Climate Change Law' (WTI working paper 06-2022); I Venzke and G Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)' in M den Heijer and H van der Wilt (eds), *Netherlands Yearbook of International Law 2020* (Asser 2022) 187. With respect to the ETS: L Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation' (2012) EJIL 429.

[24] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

erecting discriminatory trade barriers.[25] In their view, the Regulation would generate disproportionately high compliance costs for their producers and exporters (although the Regulation was considered an encouraging step by many environmental NGOs[26]).

Finally and more generally, EU unilateral climate measures have been decried as infringing upon international climate change law as agreed upon in the dedicated multilateral fora. In this respect, a tenet of the international climate change regime which the EU has particularly struggled to comply with in the enactment of its climate action is the principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDRRC).[27] The absence in the EU ETS and CBAM of any differentiation in favour of developing countries and least developed countries in particular (which have contributed minimally to global emissions and lack the resources to decarbonise efficiently) has been highlighted as problematic – and disappointing in light of the alternative proposals that had emerged during the respective adoption processes.[28]

But it is not only unilateral measures that risk hindering EU compliance with its international climate commitments. Notwithstanding the emphasis put by the EU on the inclusion, since 2011, of Trade and Sustainable Development chapters in its bilateral trade agreements with third countries,[29] the effectiveness of these provisions has been limited to date due to several factors and much remains to be done in terms of mainstreaming climate objectives into trade agreements.[30]

Overall, the potentially negative impacts of EU climate policy on the sovereignty and economies of third countries (which are interests protected by the above-mentioned international norms and regimes) are at the centre of a wide and lively political and academic debate. On the other hand, the potentially negative impacts of EU climate action –

[25] WTO – Committee on Trade and Environment, European Union Regulation on Deforestation and Forest Degradation-Free Supply Chains: Communication from Argentina, Brazil, Colombia, Ecuador, Guatemala, Honduras, Mexico, Paraguay and Peru of 10 November 2023, WT/CTE/GEN/33.

[26] WWF, *EU Leaders Seal Deal for Groundbreaking Law to Stop Deforestation* www.wwf.eu; Greenpeace, *Greenpeace's Views on the Commission Proposal for an EU Regulation on Deforestation-Free Products* (Greenpeace 2022).

[27] On the content and legal status of the principle, see L Rajamani, 'Common but Differentiated Responsibilities' in M Faure (ed.), *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2023) 291.

[28] With respect to the application of the EU ETS to aviation: J Scott and L Rajamani, 'EU Climate Change Unilateralism' (2012) EJIL 469. With respect to the CBAM: NL Dobson, '(Re)framing Responsibility?' cit. 172; I Venzke and G Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities?' cit.; J Bednarek, 'Is the EU Realizing an Externally Just Green Transition? A Short Analysis of The Carbon Border Adjustment Mechanism from the Perspective of the CBDR Principle and the Right to Development of LDCs' (31 October 2022) EJIL: Talk www.ejiltalk.org.

[29] European Commission, *Sustainable Development in EU Trade Agreements* policy.trade.ec.europa.eu.

[30] M Bronckers and G Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) JIEL 25; CAN Europe, *CAN Europe's Position on Trade and Trade Policy* (CAN Europe 2020). M Dupré and S Kpenou, *Making Trade Agreements Conditional on Climate and Environmental Commitments* (Veblen Institute 2023) analyses outstanding issues following a review completed by the European Commission in 2022.

or lack thereof – on the human rights of individuals and groups living in third countries has been the subject of more limited scrutiny.

II.2. CLIMATE ACTION AND INACTION AND THEIR IMPACTS ON HUMAN RIGHTS

Today it appears somewhat trite to state that climate change is already having and will increasingly have devastating impacts on most – if not all – human rights all over the world, with disproportionately severe consequences for most vulnerable countries and individuals.[31] Nevertheless, discussion of the relationship between climate change and human rights in international legal terms has come relatively late, if one considers that the UN Human Rights Council first addressed the nexus in 2008;[32] while in the context of the international climate change regime, human rights-related references emerged in the 2010 Cancun Agreements[33] and culminated in the much-publicised mention in the preamble of the Paris Agreement.

Thereafter, virtually all UN human rights mechanisms have dealt with the negative impacts of climate change on human rights – from the Office of the UN High Commissioner for Human Rights (OHCHR) to Special Procedures, human rights treaty bodies and the Universal Periodic Review – through a wide array of instruments, including thematic and country reports, studies, debates, resolutions, statements, concluding observations, general comments, and decisions on individual cases.[34] At the same time, the increasingly broad participation of human rights experts and NGOs, as well as of stakeholder groups such as indigenous people, youth and women, in the Conferences of the Parties to the UN Framework Convention on Climate Change (UNFCCC COPs) and in other international fora devoted to the regulation of climate change has considerably contributed to the mainstreaming of human rights in the debates shaping international climate change law.[35]

The growing integration of the two international legal regimes has been compounded by litigation: against the explosion of climate-related cases (by now in the

[31] S Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press 2010); S McInerney-Lankford, M Darrow and L Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (The World Bank 2011); United Nations Environment Programme (UNEP), *Climate Change and Human Rights* (UNEP 2015). See also the dedicated webpage of the Office of the United Nations High Commissioner for Human Rights (OHCHR) www.ohchr.org; and the reports by the Intergovernmental Panel on Climate Change (IPCC), especially the one on *Impacts, Adaptation and Vulnerability* (2022).

[32] Human Rights Council Resolution 7/23 of 28 March 2008 on Human rights and climate change, UN Doc A/HRC/RES/7/23.

[33] Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC COP), Decision 1/CP.16. The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention of 10-11 December 2010, UN Doc FCCC/CP/2010/7/Add.1.

[34] For an overview of the engagement of the UN human rights machinery with climate change, see OHCHR, *Human rights mechanisms addressing climate change* www.ohchr.org.

[35] On the participation of NGOs in UNFCCC COPs, see the statistics published at unfccc.int. On the work of UN human rights mechanisms, see OHCHR, *Integrating human rights at the UNFCCC* www.ohchr.org.

hundreds) before national, regional and international courts and quasi-judicial bodies,[36] a significant trend of human rights-based complaints is emerging.[37] Moreover, human rights-based proceedings are proving to be among the most successful ones – *e.g.*, the cases of *Leghari* in Pakistan,[38] *Urgenda* in the Netherlands,[39] *Neubauer and Others* in Germany,[40] *Generaciones Futuras* in Colombia,[41] and *Billy and Others v Australia* before the UN Human Rights Committee.[42]

Both in multilateral fora and in the context of litigation, the main focus has been on the alleged inaction or insufficient action of States – both in preventing the negative impacts of climate change on human rights through mitigation and, less often, in addressing the impacts bound to materialise nonetheless through adaptation. In other words, the omissive conduct of States in the face of the climate crisis has been at the heart of political and expert debates and court decisions.

Yet, climate action – in the sense of positive conduct by States aimed at mitigating or adapting to climate change – can also have adverse repercussions on human rights. This already emerges clearly from the preamble of the Paris Agreement, which is more well-known as the first reference to human rights in a binding climate change agreement than for its actual content, according to which: "[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights […]".[43]

More generally, there is increasing awareness about the need for the green transition to be a "just" one – *i.e.*, a transition that is fair and inclusive and leaves no one behind.[44] Human rights evidently have a fundamental role to play in this respect, as it is also made clear by the rising trend of so-called just transition litigation, referring to those "cases that

[36] Sabin Center for Climate Change Law, *Climate Change Litigation Databases* climatecasechart.com.

[37] UNEP, 'Global Climate Litigation Report: 2023 Status Review' (UNEP 2023); J Peel and HM Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) Transnational Environmental Law 37.

[38] Lahore High Court order of 4 September 2015 *Leghari v Federation of Pakistan*.

[39] Supreme Court of the Netherlands judgment of 20 December 2019 *State of the Netherlands v Stichting Urgenda.*

[40] German Constitutional Court order of 24 March 2021 1 BvR 2656/18 and others.

[41] Colombian Supreme Court decision of 5 April 2018 STC4360-2018.

[42] Human Rights Committee views of 21 July 2022 *Daniel Billy and Others v Australia* CCPR/C/135/D/3624/2019.

[43] On the significance and limitations of the human rights dimension of the Paris Agreement, see B Mayer, 'Human Rights in the Paris Agreement' (2016) Climate Law 109; and C Antoniazzi, 'What Role for Human Rights in the International Climate Change Regime? The Paris Rulebook Between Missed and Future Opportunities' (2021) Diritti umani e diritto internazionale 435, 439 ff.

[44] United Nations Development Programme, 'What is Just Transition? And Why is it Important?' (3 November 2022) UNDP Climate Promise climatepromise.undp.org. For an overview of the current state of the academic debate on just transition, see X Wang and K Lo, 'Just Transition: A Conceptual Review' (2021) Energy Research & Social Science 102291; and H Müllerová, E Balounová, OC Ruppel and LJH Houston, 'Building the Concept of Just Transition in Law: Reflections on its Conceptual Framing, Structure and Content' (2023) Environmental Policy and Law 275.

rely in whole or in part on human rights to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net zero emissions".[45]

Accordingly, both climate inaction and climate action can negatively affect human rights. This suggests, first of all, that the examination of the EU climate policy's compatibility with the organisation's human rights obligations should extend beyond those climate measures that are generally considered in the literature (*i.e.*, unilateral climate regulations and EU trade agreements with climate clauses). Additionally, a number of factors determine that, particularly in the case of the EU, the negative impacts of its climate action and inaction should be considered with respect not only to those individuals living in the EU territory,[46] but also to those living in third countries. Such factors include the considerable EU global environmental footprint[47] (which makes the consequences of inaction or insufficient action particularly severe), the extensive extraterritorial reach of several EU climate measures, and the peculiarities of the EU human rights legal framework (analysed in greater detail in Section IV).

Before delving into the characteristics and implications of extraterritorial human rights obligations in the context of climate change in Section III, the following sub-section shows how EU climate policy specifically can, in practice, negatively affect the rights of individuals and groups living in third countries.

II.3. EU climate policy and its impacts on the human rights of persons living in third countries

Based on the foregoing, it can preliminarily be said that both EU climate inaction and EU climate action can have harmful human rights consequences outside EU borders. Furthermore, with regard to climate action, this can take the form of both legislative and administrative acts, as well as of acts that are not climate-related in a strict sense but should nonetheless include climate and human rights considerations. Examples taken from the practice are shown for each category with a view to making the illustration more concrete and showing how EU climate action and inaction are already threatening or harming the rights of distant strangers.

It is first of all clear that insufficient climate action by the EU can infringe on multiple human rights of persons living not only in its Member States, but in third countries as well. This is due to the "mismatch" between a country's contribution to climate change,

[45] A Savaresi and J Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) Journal of Human Rights and the Environment 7. See also MA Tigre, L Zenteno, M Hesselman and others, *Just Transition Litigation in Latin America: An Initial Categorization of Climate Litigation Cases Amid the Energy Transition* (Sabin Center for Climate Change Law 2023).

[46] More precisely, the territory of its Member States.

[47] J Scott, 'The Global Reach of EU Law' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019) 21.

the extent to which it experiences climate change impacts, and its vulnerability to them;[48] something that is particularly apparent in the case of the EU, whose Member States collectively remain among the largest GHG emitters but also among those countries best prepared for climate change negative effects.

These considerations were at the heart of one of the most well-known climate cases brought before the CJEU, the so-called *People's Climate* case, which argued that the EU "grossly inadequate" target of emissions reduction was violating the Union's human rights obligations.[49] The complaint was rejected at first instance and on appeal in light of the restrictive interpretation given by the CJEU to the requirements of "direct and individual concern" (or "direct concern" in the case of acts not entailing implementing measures), which individuals and NGOs need to demonstrate to bring annulment proceedings against EU acts (in accordance with art. 263(4) TFEU).[50] Notwithstanding the rejection of the *People's Climate* case on admissibility grounds, it is noteworthy that among the complainants were a family of Kenyan herders and a family from Fiji relying on farming and fishing, whose livelihoods stand to be gravely affected by climate change.

But it is not only the lack of ambitious action by the EU that can have negative repercussions on persons living in third countries. Ill-conceived climate action can also be the source of adverse human rights impacts, with far-reaching geographical extent. This applies, first and foremost, to EU legislative acts. It has been alleged that the above-mentioned Deforestation Regulation has failed to adequately take into account the rights and interests of smallholder producers and local communities in third countries, who will likely not be able to meet the demanding compliance costs and therefore lose their main source of income.[51] As a further example, the 2018 recast of the Renewable Energy Directive[52] was challenged before the CJEU because of its qualification of forest biomass as a source of renewable energy.[53] The complaint, which failed once again on admissibility grounds, mostly focused on the violation of multiple fundamental rights of EU citizens, but it also included among the applicants a US citizen whose right to property would be infringed by logging activities. Besides, the negative human rights impacts of the emissions produced by bioenergy are not limited to EU citizens.

[48] G Althor, JEM Watson and RA Fuller, 'Global Mismatch between Greenhouse Gas Emissions and the Burden of Climate Change' (2016) Nature (Scientific Reports) 20281.

[49] Case C-565/19 P *Carvalho and Others v Parliament and Council* ECLI:EU:C:2021:252.

[50] L Hornkohl, 'The CJEU Dismissed the People's Climate Case as Inadmissible: The Limit of Plaumann is Plaumann' (6 April 2021) European Law Blog europeanlawblog.eu. For further details on the so-called *Plaumann* test, see below sub-section IV.2.

[51] E Zhunusovaa, V Ahimbisibwea, LTH Senc and others, 'Potential Impacts of the Proposed EU Regulation on Deforestation-free Supply Chains on Smallholders, Indigenous Peoples, and Local Communities in Producer Countries Outside the EU' (2022) Forest Policy and Economics 102817.

[52] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast).

[53] Case C-297/20 P *Sabo and Others v Parliament and Council* ECLI:EU:C:2021:24.

In addition to EU acts of a general nature, EU climate policy can also take the form of administrative acts of individual scope, whose compliance with human rights should also be scrutinised. For instance, the European Investment Bank (EIB) has increasingly sought to position itself as "the EU climate bank" and to, *inter alia*, finance climate change mitigation projects both within Europe and in developing countries.[54] However, some projects supported by the EIB (such as the construction of dams and of geothermal and biomass power plants) have been accused of causing forced displacement, job losses and multiple violations of indigenous peoples' rights.[55]

Acts adopted by the EU in pursuance of its climate policy might also infringe on its procedural human rights obligations in the environmental area – namely the obligations to guarantee access to information, participation in decision-making and access to justice in environmental matters, as deriving from the Aarhus Convention.[56] In this respect, the CJEU has recently found that the Aarhus Regulation (implementing the Aarhus Convention for EU institutions) applies to a decision by the EIB to finance a biomass power plant and, therefore, that the EIB unlawfully refused a request for internal review of that decision submitted by an environmental NGO.[57] While the complaint in question did not include an explicit extraterritorial dimension, the non-discrimination clause of the Aarhus Convention (art. 3(9)) significantly extends the procedural rights that it protects to natural and legal persons in third countries.

Finally, it could also be the case that both climate and socio-economic considerations are not mainstreamed by EU institutions in areas of policy other than the climate one – something which can in turn lead to human rights violations as well as undesired environmental and climate outcomes. In this respect, sustainability impact assessments are expected to play a crucial role; which is why the inability of the European Commission to finalise such an assessment before the conclusion of the negotiations for the EU-Mercosur trade agreement was denounced by several NGOs and censored by the European Ombudsman.[58] Similarly, the European Ombudsman had already found that the lack of

[54] D Mertens and M Thiemann, 'The European Investment Bank: The EU's Climate Bank?' in T Rayner and others (eds), *Handbook on European Union Climate Change Policy and Politics* cit. 68.

[55] CEE Bankwatch Network and Counter Balance, *The EIB's Empty Promises on Human Rights* (CEE Bankwatch Network and Counter Balance 2020).

[56] The EU ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [1998] (so-called Aarhus Convention) in 2005.

[57] Joined cases C-212/21 P and C-223/21 P *EIB v ClientEarth* and *Commission v ClientEarth* ECLI:EU:C:2023:546. The so-called Aarhus Regulation is Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. As mentioned below in sub-section IV.2, the Regulation has been amended in October 2021.

[58] European Ombudsman, Decision of 17 March 2021 in case 1026/2020/MAS concerning the failure by the European Commission to finalise an updated "sustainability impact assessment" before concluding the EU-Mercosur trade negotiations. Among NGOs' reports critical of the agreement, see T Fritz, *EU-*

consideration of human rights impacts in the European Commission's impact assessment concerning a free trade agreement with Vietnam constituted maladministration.[59]

III. From impacts to legal obligations: extraterritorial human rights obligations in the context of climate change

It has been shown that, in general terms, climate action and inaction can have negative impacts on human rights all over the world; and, more specifically, that EU climate action and inaction can impinge on the human rights of individuals and groups living in third countries.[60] The recognition of such factual negative impacts raises complex legal questions and, more specifically, brings forth the thorny issue of whether the EU bears any negative or positive human rights obligation towards distant strangers who are adversely affected by its omissive or positive conduct in the area of climate change.

To answer this question, it is first of all appropriate to give a brief overview of the evolution and current state of the debate regarding extraterritorial human rights obligations in general (sub-section III.1). Thereafter, recent judicial and quasi-judicial developments about the existence and extent of extraterritorial human rights obligations in the area of climate change are analysed, together with outstanding issues and potential obstacles in the way of a wider recognition of these obligations (sub-section III.2). While the case-law examined is premised on legal instruments that are not, as such, binding on the EU, this analysis is considered relevant for the purposes of this *Article* for at least three reasons: *a)* an increasing cross-fertilisation is taking place among international judicial and quasi-judicial bodies, within and without the area of human rights, and the CJEU is not extraneous to this trend;[61] *b)* the ECtHR case-law is of particular significance for the EU legal order, in light of the special relationship between the ECHR and the CFREU on the basis of art. 52(3) CFREU,[62] as well as in light of the obligation for the EU to accede to the ECHR (as enshrined in art. 6(2) of the Treaty on European Union) and of the progress

Mercosur Agreement: Risks to Climate Protection and Human Rights (MISEREOR, Greenpeace and CIDSE 2020); and ClientEarth, *EU-Mercosur Association Agreement: Governance issues in the EU trade decision making process* (ClientEarth 2021).

[59] European Ombudsman, Decision of 26 February 2016 in case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement.

[60] On EU climate policies and human rights in general, not focusing on the rights of persons living in third countries, see M Hesselman, 'Human rights and EU climate law' in E Woerdman, M Roggenkamp and M Holwerda (eds), *Essential EU Climate Law* cit. 259.

[61] E Kassoti, 'Fragmentation and Inter-Judicial Dialogue: The CJEU and The ICJ at the Interface' (2015) European Journal of Legal Studies 21.

[62] Art. 52(3) reads as follows: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

that is being made in that direction;[63] and *c)* the EU is bound by customary international law,[64] including in the area of human rights, and the decisions by international courts are "subsidiary means" for the determination of norms of customary international law.[65] The EU (including the CJEU) can, in turn, contribute to the development and identification of customary international law.[66]

III.1. Extraterritorial human rights obligations: a primer

At the outset, it is useful to highlight that "extraterritorial jurisdiction" has different meanings in general international law and in international human rights law. Whereas in the former context reference is made to the *right* of a State (or international organisation) to govern conducts and events taking place abroad, in the latter what is at stake is the arising of a State's *obligation* in relation to conducts and events taking place beyond its borders.[67] While the two notions are not unrelated and can be both considered an exception to the territorial rule,[68] they have different functions and do not necessarily go hand in hand, as States (and international organisations) can be found to have extraterritorial human rights obligations even when they do not have a legal basis for exercising extraterritorial jurisdiction under general international law.[69]

Indeed, extraterritorial human rights jurisdiction has traditionally been based on the exceptional factual circumstance of a State exercising some form of control over a territory or person outside its borders – the so-called "spatial" and "personal" models of

[63] CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, Report to the CDDH of 30 March 2023, 46+1(2023)35FINAL.

[64] As confirmed by the CJEU itself: *Air Transport Association of America and Others* cit. para. 101. In the literature, see T Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilization Route?' (2016) Yearbook of European Law 513; and T Ahmed and I de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) EJIL 771. In this respect, reference is frequently made to art. 3(5) of the Treaty on European Union: "In its relations with the wider world, the Union shall [...] contribute [...] to the strict observance and the development of international law".

[65] General Assembly Resolution 73/203 of 20 December 2018 UN Doc A/RES/73/203.

[66] F Lusa Bordin, AT Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022).

[67] W Vandenhole, 'The "J" Word: Driver or Spoiler of Change in Human Rights Law?' in S Allen, D Costelloe, M Fitzmaurice and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford University Press 2019) 413, 415-416; and M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2013) 19 ff.

[68] On the reasons for the historically territorial approach to human rights obligations, S Skogly and M Gibney, 'Introduction' in M Gibney and S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 1.

[69] M den Heijer and R Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in M Langford, W Vandenhole and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge University Press 2013) 153.

jurisdiction.[70] Typical examples include, respectively, control over a territory which is militarily occupied; and the authority exercised over specific individuals by diplomatic and consular agents, or during military or police operations abroad.

The ECtHR has arguably developed the most extensive jurisprudence on extraterritorial human rights jurisdiction, when interpreting art. 1 of the European Convention on Human Rights (ECHR), which establishes that States parties "shall secure to everyone *within their jurisdiction* the rights and freedoms" enshrined in the Convention (emphasis added). However, the ECtHR case-law on the matter has been decried as incoherent from various quarters, including by some of its own judges.[71] For all its inconsistencies and constant evolution, the ECtHR case-law on extraterritoriality can be summarised at present as: *a)* being premised on the notion that States' human rights jurisdiction is "primarily territorial"; *b)* recognising that extraterritorial human rights jurisdiction can arise in instances of effective control over an area or physical control over specific individuals abroad (see the examples above of 'spatial' and 'personal' control); and *c)* cautiously carving out further, limited extensions of extraterritorial jurisdiction by referring to alleged "special features" (*e.g.*, with respect to the procedural obligation to investigate uses of lethal force abroad[72]), while steering clear of (re-)statements of principle and political controversies (as seen with respect to situations of active conflict[73]).

The ECtHR is not, at any rate, the only international judicial or quasi-judicial body to have grappled with the legal basis and extent of States' extraterritorial human rights obligations. First and foremost, it should be noted that not all human rights treaties include a "jurisdictional clause" along the lines of art. 1 ECHR – something which prompted the respective monitoring bodies to adopt a rather expansive reading of States parties' extraterritorial human rights obligations, while not completely dispensing with notions of control.

[70] For the view that the ECtHR and the Human Rights Committee have relied on both a factual and legal relationship in interpreting jurisdiction, see H King, 'The Extraterritorial Human Rights Obligations of States' (2009) HRLRev 521. As is shown in this sub-section, extraterritorial human rights jurisdiction is a particularly controversial topic, with respect to which scholars have provided different readings of the – often unsystematic – decisions by regional human rights systems and UN human rights treaty bodies.

[71] ECtHR *Al-Skeini and Others v the United Kingdom* App n. 55721/07 [7 July 2011], concurring opinion of judge Bonello; and ECtHR *Georgia v Russia (II)* App n. 38263/08 [21 January 2021], partly dissenting opinion of judge Pinto de Albuquerque. In the literature, see, among many, C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) QuestIntlL Zoom-in 31; R Lawson, 'Life after *Bankovic* – On the Extraterritorial Application of the European Convention on Human Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83; and M Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) EJIL 121. For a different appraisal of the evolution of the ECtHR jurisprudence on extraterritoriality, which denies its incoherence: I Karakaş and H Bakırcı, 'Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 112.

[72] See, for instance, ECtHR *Güzelyurtlu and Others v Cyprus and Turkey* App n. 36925/07 [29 January 2019]; and ECtHR *Hanan v Germany* App n. 4871/16 [16 February 2021].

[73] M Milanović, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (25 January 2021) EJIL: Talk www.ejiltalk.org.

This is the case, *inter alia*, for the Committee on Economic, Social and Cultural Rights, which oversees a treaty where the international dimension of the realisation of rights is particularly pronounced.[74] And it is also the case for the African Commission on Human and Peoples' Rights, which, among others, established that States imposing an embargo could be found responsible extraterritorially in case of disproportionate actions.[75]

But the presence of a "jurisdictional clause" has not prevented other international courts and quasi-judicial bodies from embracing a broader notion of extraterritorial human rights jurisdiction as well. Both the UN Human Rights Committee and the Inter-American system of human rights (with its Commission and Court)[76] have come to establish extraterritorial "personal jurisdiction" whenever an act of State authority has a negative impact on the rights of a person. More precisely, in the words of the Human Rights Committee with respect to the right to life:

> "a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, *all persons over whose enjoyment of the right to life it exercises power or effective control*. This includes persons located outside any territory effectively controlled by the State whose *right to life is nonetheless affected* by its military or other activities *in a direct and reasonably foreseeable manner*".[77]

[74] As evidenced in the reference to "international assistance and co-operation" in art. 2(1) of the International Covenant on Economic, Social and Cultural Rights: see F Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* cit. 183; and R Künnemann, 'Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* cit. Conversely, the Optional Protocol to the Covenant refers to jurisdiction when establishing the admissibility conditions for individual communications: "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation [...]" (art. 2).

[75] For an overview of the approaches adopted by the judicial and quasi-judicial bodies of the African human rights system, see L Chenwi and TS Bulto, 'Extraterritoriality in the African Regional Human Rights System from a Comparative Perspective' in L Chenwi and TS Bulto (eds), *Extraterritorial Human Rights Obligations from an African Perspective* (Intersentia 2018) 13; and A Oloo and W Vandenhole, 'Enforcement of Extraterritorial Human Rights Obligations in the African Human Rights System' in M Gibney, G Erdem Türkelli, and others, *The Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2022) 140.

[76] On the interpretation of extraterritorial jurisdiction in the Inter-American human rights system, see CM Cerna, 'Extraterritorial Application of the Human Rights Instruments of the Inter-American System' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* cit. 141; and C Burbano-Herrera and Y Haeck, 'Extraterritorial Obligations in the Inter-American Human Rights System' in M Gibney, G Erdem Türkelli, and others, *The Routledge Handbook on Extraterritorial Human Rights Obligations* cit. 110.

[77] Human Rights Committee, General comment no. 36 of 3 September 2019 on Article 6: right to life, UN Doc CCPR/C/GC/36, para. 63 (emphasis added).

This "control over rights' approach"[78] – as opposed to control over the individual – broadens the scope of extraterritorial human rights jurisdiction and appears to conflict with the much-criticised *Banković* judgment by the ECtHR;[79] although the ECtHR has also on occasion come closer to a more functional concept of extraterritorial jurisdiction by stating that "[the jurisdictional clause] cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[80]

The "control over rights" or "impact" test has been further applied and refined by UN treaty bodies and – to a certain extent – the Inter-American Court and Commission, which have increasingly focused on the "*cause-and-effect*" relationship between the control by a State over a harmful activity and the reasonably foreseeable injury caused by that activity extraterritorially; as well as on the reasonable *capacity* of the State to intervene.[81] While this approach has been criticised by some commentators on the basis that it would conflate jurisdiction with the content of obligations (of due diligence),[82] the relevant monitoring bodies do not appear to have reneged on it. It has also been suggested that the ECtHR itself has applied in essence a "cause-and-effect" test on a few occasions, while in principle holding that effective control over territory or person is required.[83]

It is undeniable that these novel tests centred around control over the source of harm and the capacity to prevent or remedy the harm are much more promising for the recognition of extraterritorial human rights obligations in the area of climate change, as opposed to traditional approaches to human rights jurisdiction. Indeed, when climate-related complaints are brought against the EU or developed States, what is argued is that they, as major GHG emitters and in light of their financial resources, have both control over the main sources of harm and the capacity to act to prevent or reduce the harm. It is therefore no surprise that the "cause-and-effect" approach, which has been applied to contexts as different as search and rescue operations at sea and the repatriation of

[78] B Çali, 'Has "Control Over Rights Doctrine" for Extra-Territorial Jurisdiction Come of Age? Karlsruhe, too, has Spoken, Now it's Strasbourg's Turn' (21 July 2020) EJIL:Talk www.ejiltalk.org.

[79] ECtHR *Banković and Others v Belgium and Others* App n. 52207/99 [12 December 2001].

[80] ECtHR *Issa and Others v Turkey* App n. 31821/96 [16 November 2004] para. 71.

[81] As examples of this trend, see IACtHR advisory opinion on the environment and human rights, cit.; *Sacchi and Others v Argentina* cit. (which "endorsed" the IACtHR advisory opinion, see below); and Human Rights Committee views of 4 November 2020 *AS and Others v Italy* CCPR/C/130/D/3042/2017 (and the "twin" case against Malta).

[82] S Besson, 'Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!' (28 April 2020) ESIL Reflections; and A Ollino, 'The "Capacity-Impact" Model of Jurisdiction and Its Implications for States' Positive Human Rights Obligations' (2021) QuestIntlL Zoom-in 81.

[83] V Tzevelekos and A Berkes, 'Guest Post: Turning Water into Wine – The Concealed Metamorphosis of the Effective Control Extraterritoriality Criterion in Carter v. Russia' (9 November 2021) ECHR Blog www.echrblog.com.

foreign fighters' children from Syria,[84] has recently been referred to in cases related to transboundary environmental harm and climate change.

III.2. Recent judicial and quasi-judicial developments in the area of climate change

On 15 November 2017, the IACtHR delivered a pioneering advisory opinion on the applicability of the American Convention on Human Rights to environmental harm. While the opinion broke new ground in different areas, its discussion of extraterritorial human rights obligations is of particular importance and relevance to this *Article*:

> "When transboundary harm or damage occurs, a person is under the jurisdiction of the State of origin if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises *effective control over the activities that caused the damage* and the consequent human rights violation".[85]

This is arguably the clearest application by an international judicial or quasi-judicial body of a "cause-and-effect" model of extraterritorial human rights jurisdiction. The relevance of such a test to the context of climate change was readily apparent and soon confirmed by the CRC Committee. While rejecting on admissibility grounds the complaints by a group of young people against five States based on the States' failure to prevent and mitigate the effects of climate change, the Committee "noted" the IACtHR advisory opinion and found the "cause-and-effect" test applied there to be the "appropriate test" for the case before it.[86] It further elaborated that "the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location"[87] and that the harm caused through GHG emissions was "reasonably foreseeable" by the defendant States.[88]

The ECtHR has, however, recently rejected such an approach explicitly in *Duarte Agostinho and Others*, one of three much-awaited decisions delivered by the Grand

[84] *AS and Others v Italy* cit. (on search and rescue operations); and CRC Committee decisions of 30 September 2020 *LH and Others v France* CRC/C/85/D/79/2019 and CRC/C/85/D/109/2019 (on the children of foreign fighters in Syrian camps).

[85] IACtHR advisory opinion on the environment and human rights, cit. para. 104(h) (emphasis added). On the innovative jurisdictional test developed by the IACtHR, see ML Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' (10 May 2018) ASIL Insights www.asil.org; A Berkes, 'A New Extraterritorial Jurisdictional Link Recognised by the IACtHR' (28 March 2018) EJIL:Talk www.ejiltalk.org.

[86] *Sacchi and Others v Argentina* cit. paras 10(5) and 10(7).

[87] *Ibid*. para. 10(10).

[88] *Ibid*. para. 10(11).

Chamber of the Court on 9 April 2024.[89] The complaint was brought by six Portuguese children against 33 States parties and was thus premised on the responsibility of States other than the State of residence of the applicants, while remaining within the "European legal space". The ECtHR first excluded the existence of extraterritorial jurisdiction in that case based on its long-established spatial and personal models; it further ruled out that the "special features" of climate change invoked by the applicants would justify an expansion of extraterritorial jurisdiction.[90] Among others, the Court expressly refused to apply a "control over rights" approach[91] and, with respect to the pronouncements by the IACtHR and CRC Committee referred to by the complainants, maintained that "both are based on a different notion of jurisdiction, which, however, has not been recognised in the Court's case-law".[92] The complaint was therefore declared inadmissible for lack of jurisdiction and, with respect to Portugal, for lack of exhaustion of domestic remedies.

Two pending cases, which have been modelled on *Duarte Agostinho* (as they have been brought by youth against over 30 governments), are bound to meet the same fate.[93] It should also be noted that a case already decided by the Court was centred around the violations of human rights allegedly suffered by individuals with personal ties to the Global South, where the calamitous effects of climate change are already being felt more strongly;[94] but the complaint was dismissed by a committee of three judges on admissibility grounds, without public statement of reasons.

It can therefore be derived that the ECtHR is not willing to change its jurisprudence on extraterritorial jurisdiction in light of the special characteristics of climate change.[95] Those peculiarities where, nonetheless, at the heart of the landmark judgment in the *Klimaseniorinnen* case, which was issued on the same day as *Duarte Agostinho* and found that the Swiss Government had violated art. 8 ECHR (protecting the right to respect for private and family life) because of several deficiencies of the regulatory framework for climate change policy and its implementation.[96] By means of that judgment, the Court

[89] *Duarte Agostinho* cit. The other two cases are ECtHR *Carême v France* App n. 7189/21 [9 April 2024], and ECtHR *Verein Klimaseniorinnen Schweiz and Others v Switzerland* App n. 53600/20 [9 April 2022].

[90] *Duarte Agostinho* cit. paras 180 ff.

[91] *Ibid*. paras 205 ff. The ECtHR referred to this test as "control over the applicants' Convention interests".

[92] *Ibid*. para. 212.

[93] ECtHR *Uricchio v Italy and 31 Other States* App n. 14615/21 pending; and ECtHR *De Conto v Italy and 32 Other States* App n. 14620/21 pending.

[94] ECtHR *Plan B.Earth and Others v the United Kingdom* App n. 35057/22 [13 December 2022].

[95] Contrary to the CRC Committee, which explicitly recognised that "The authors' communication raises novel jurisdictional issues of transboundary harm related to climate change" (*Sacchi and Others v Argentina* cit. para. 10(4)). In the literature, see H Duffy, 'Global Threats and Fragmented Responses: Climate Change and the Extra-Territorial Scope of Human Rights Obligations' in NM Blokker, D Dam-de Jong and V Prislan (eds), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development* (Brill 2021) 62.

[96] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. The Court also found a violation of art. 6 ECHR, as the applicant association's complaint had never been examined on the merits by a domestic court. For some initial comments on the Grand Chamber's trio of decisions, see M Milanović, 'A Quick Take

considerably innovated its jurisprudence on victim status and legal standing and it demonstrated its readiness "to further adapt the approach to [causation] matters, taking into account the special features of the problem of climate change".[97] In so doing, it has likely spurred a new wave of climate litigation within States parties to the ECHR.

Incidentally, the *Klimaseniorinnen* case also tangentially dealt with an extraterritorial aspect – *i.e.*, the so-called "embedded emissions" generated abroad for the production of goods imported to Switzerland;[98] whereas, somewhat symmetrically, the *Greenpeace Nordic and Others* case, also pending before the ECtHR and challenging the decision of the Norwegian government to grant new oil licences, refers extensively to the negative effects of the export of oil from Norway.[99] The fact remains that both cases, while having an extraterritorial dimension, do not engage the responsibility of States towards distant strangers, as all applicants are residents of States parties to the ECHR.

Therefore, at present, different courts and quasi-judicial bodies have offered widely divergent interpretations of the conditions for the extraterritorial human rights jurisdiction of States to arise in the context of climate change. Future guidance from the International Court of Justice and the IACtHR, which have both been asked to issue advisory opinions clarifying States' human rights obligations with respect to climate change,[100] as well as potential developments in national case-law, will provide new insights and hopefully foster inter-court dialogue, although differences are likely to remain given the distinct legal bases.

Certainly, irrespective of the restrictive approach adopted by the ECtHR, a number of issues hinder the definition of States' human rights obligations towards distant strangers in the area of climate change. Even in those contexts that are more open to the recognition of State responsibility in such instances, a first problem relates to the risk of excessive expansion of States' obligations. To assuage these concerns and delimit States' obligations, States themselves in their arguments and courts in their reasoning could rely on the criteria of "reasonable foreseeability" of harmful consequences on the enjoyment of human rights; of "proximity" (in causal terms) between the activity (or omission) and the injury; and of "reasonableness" of the measures required to prevent or mitigate the

on the European Court's Climate Change Judgments' (9 April 2024) EJIL:Talk www.ejiltalk.org; and A Buyse and K Istrefi, 'Climate Cases Decided Today: Small Step or Huge Leap?' (9 April 2024) ECHR Blog www.echrblog.com.

[97] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. para. 440. See paragraphs above and below in the judgment for, respectively, an illustration of the issues related to causation and the application of the "adapted approach" to the circumstances of the case.

[98] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. paras 275 ff.

[99] ECtHR *Greenpeace Nordic and Others v Norway* App n. 34068/21 pending.

[100] General Assembly, Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change of 29 March 2023, UN Doc A/RES/77/276; and Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile [9 January 2023]. The request to the International Court of Justice refers to several potential legal bases for States' obligations, including human rights treaties.

harm.[101] While these criteria are neutral per se and have as such been used by individual applicants as well, they can and should be used in order not to stretch the causal link too much or extend States' obligations unfeasibly.

Causation remains particularly problematic in the context of climate change, whose aggregate, non-linear and long-term nature does not sit well with causality tests traditionally applied in judicial proceedings. Nevertheless, progress in attribution science can potentially be a game-changer in this respect[102] and alternative causality tests are being proposed that are more suitable for a situation of collective causation.[103] As mentioned, the ECtHR itself has recently shown flexibility in this respect.

Relatedly, an issue that is crucial in instances where the responsibility of States other than the territorial State (generally, the primary bearer of human rights obligations) is engaged regards concurrent responsibility and the apportionment of reparation. Admittedly, the law of international responsibility is not well-developed as regards the separate conducts of several States contributing to the same indivisible harm.[104] If to this are added the complications of establishing extraterritorial human rights jurisdiction and the unique challenges of climate change (for instance, in terms of the cumulative nature of States' contributions to the injury and of the number of States contributing to the injury), the situation becomes particularly intricate and the relevant practice is very limited.[105]

[101] *Sacchi and Others v Argentina* cit. paras 10(6) ff.; General comment No. 36 cit. paras 7, 22 and 63 (speaking of "direct and reasonably foreseeable impact"); *AS and Others v Italy* cit. para. 7(8) ("the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable"). See also Principles 9(b) and 13 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights of 28 September 2011.

[102] S Marjanac, L Patton and J Thornton, 'Acts of God, Human Influence and Litigation' (2017) Nature Geoscience 616.

[103] N Nedeski and A Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation' (15 December 2022) EJIL:Talk www.ejiltalk.org; and JH Knox, 'Human Rights Principles and Climate Change' in CP Carlarne, KR Gray and R Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 213, 225 ff.

[104] As opposed to the responsibility of multiple States for the same wrongful act, to which art. 47 of the Articles on Responsibility of States for Internationally Wrongful Acts (2001) is devoted. But see Principle 4 of the Guiding Principles on Shared Responsibility in International Law, drafted by a group of academics: A Nollkaemper, J d'Aspremont, C Ahlborn and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15.

[105] On the ECtHR jurisprudence on concurrent responsibility, referring to the special difficulties raised by cases involving extraterritorial jurisdiction: S Besson, 'Concurrent Responsibilities under the European Convention on Human Rights. The Concurrence of Human Rights Jurisdictions, Duties, and Responsibilities' in A van Aaken and I Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 155. On the peculiar challenges that the law of shared responsibility faces in the area of climate change, see J Peel, 'Climate Change' in A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2017) 1009.

Some elements were provided by the Dutch Supreme Court in the *Urgenda* case, when, in response to the Dutch Government's argument that the Netherlands only minimally contributes to climate change, it held that:

> "Each country is [...] responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The State is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. This obligation of the State to do 'its part' is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands".[106]

The ECtHR essentially confirmed this interpretation in the *Klimaseniorinnen* case;[107] and the CRC Committee also came to a similar conclusion in the *Sacchi and Others* case – significantly, in the context of extraterritorial human rights obligations as well.[108]

However, neither the ECtHR (whose judgment was a declaratory one) nor the CRC Committee (due to the findings of inadmissibility) addressed what is arguably the most problematic aspect of concurrent responsibility, namely the allocation of (duties of) reparation. The applicability of the model of "joint and several responsibility", which is common in domestic legal systems and entails that each responsible party can be asked to remedy the whole injury on behalf of all responsible parties, is debated in international law[109] and could lead to unfair (and impossible) outcomes in the area of climate change. Indeed, on that basis, a defendant State (or other entity) could be held responsible for the entire damage caused by climate change, irrespective of the extent of its contribution and without clear avenues of recourse against the other responsible parties.[110] In light of this, in the case of *Lliuya v RWE*, brought by a Peruvian farmer against the German utility giant, the applicant asked the defendant to contribute to the costs that his municipality is going to incur to adapt to the melting mountain glaciers by 0.47 per cent of total costs, namely the estimated contribution of RWE to global historic GHG emissions (the case is

[106] *Urgenda* cit. para. 5(8) (English translation available at climatecasechart.com).

[107] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* cit. paras 441 ff.

[108] *Sacchi and Others v Argentina* cit. para. 10(10).

[109] JE Noyes and BD Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) YaleJIntlL 225. The ECtHR appears to favour an approach based on proportionality, although no principle has been clearly spelt out: M Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) Journal of International Dispute Settlement 361, 378 ff.

[110] On the difficulties of reparation for human rights violations in the context of climate change, see M Wewerinke-Singh, 'Remedies for Human Rights Violations Caused by Climate Change' (2019) Climate Law 224; and O Quirico, 'Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation' (2018) Netherlands International Law Review 185, 199 ff.

still pending).[111] Arguably also with a view to avoiding such problems, several human rights-based climate cases filed to date have not asked for reparation.

National and international courts and quasi-judicial bodies will increasingly be confronted with these issues. In this author's view, solutions to them cannot escape a clarification of the relationship between States' obligations under international environmental law (IEL) and international climate change law on the one hand and (extraterritorial) human rights obligations on the other.[112] This is necessary to ensure a harmonious interpretation of different legal regimes and to allow States to comply with all their international obligations. International human rights monitoring bodies have time and again referred to general international law or to other sectors of international law (*e.g.*, international humanitarian law, or the international law of the sea) in interpreting the respective human rights treaties. With specific regard to IEL, the ECtHR has made multiple references to its principles, including the principle of "no harm", the "polluter pays" principle, and the precautionary principle; to the Aarhus Convention; and to EU directives and Council of Europe's conventions on liability for environmental damage.[113] Admittedly, the ECtHR has not consistently done so.[114] Nevertheless, in the *Klimaseniorinnen* case, the Court heavily relied on, among others, UNFCCC-related legal instruments, the Aarhus Convention and the CBDRRC principle to interpret the scope of States parties' obligations as well as the applicants' legal standing. On its part, the IACtHR, with its 2017 advisory opinion, has paved the way for the "systemic interpretation" of States' IEL and human rights obligations.[115] On the other hand, at present, it does not seem that a "rights turn" can be discerned in the abundant case-law of the CJEU addressing environmental matters.[116]

In any case, all these developments and open questions have an important bearing on the potential responsibility of the EU for the negative human rights impacts produced by its climate action and inertia. This is due, in particular, to the influence that the case-law of international courts can have on the interpretation of the CFREU (in relation to which the ECtHR jurisprudence has special value) and of other EU acts, as well as on the

[111] Regional Court of Hamm (Germany), *Lliuya v RWE AG* pending.

[112] On the connection between the IEL-based prevention principle and extraterritorial human rights obligations, see JE Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection?' cit.

[113] For an overview of the references to IEL principles and standards in the ECtHR case-law, see Council of Europe, *Manual on Human Rights and the Environment (3rd edition)* (Council of Europe 2022) Appendix IV in particular.

[114] E Lambert, *The Environment and Human Rights: Introductory Report to the High-Level Conference Environmental Protection and Human Rights* (Council of Europe 2020).

[115] IACtHR advisory opinion on the environment and human rights, cit. para. 125. See paras 123 ff. for the analysis of IEL obligations relevant for the concretisation of human rights obligations in the context of (risk of) transboundary environmental damage. In the literature, see ML Banda, 'Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm' (2019) Minnesota Law Review 1879.

[116] J Krommendijk and D Sanderink, 'The Role of Fundamental Rights in the Environmental Case Law of the CJEU' (2023) European Law Open 616.

identification of possible norms of customary international law, to which the EU is also subjected. In turn, the EU legal framework and the CJEU jurisprudence can help fill some gaps and contribute to the further elaboration of the regime of extraterritorial human rights obligations in the area of climate change.

IV. Pulling the threads together: the extraterritorial human rights obligations of the EU in the area of climate change

The necessary premise of this Section is that the EU is the bearer of human rights obligations, on the basis of both its internal legal order and international law.[117] The issue is definitively settled by the Charter of Fundamental Rights of the European Union (CFREU). The Charter, which, since the entry into force of the Lisbon Treaty, has the same legal value as the EU treaties, is "addressed to the institutions and bodies of the Union" (and to Member States to the extent that they implement EU law; art. 51(1)).

It is submitted here that the EU legal order, as interpreted by the CJEU, has peculiar features that are of considerable significance when assessing the existence and extent of EU extraterritorial human rights obligations: such features include the extraterritorial applicability of the CFREU and the scope of "extraterritorial acts" (as opposed to "territorial acts with extraterritorial effects") (sub-section IV.1). These elements, combined with the contribution of EU Member States to GHG emissions and the characteristics of the EU climate action, give rise to interesting results in defining the EU extraterritorial human rights obligations in the area of climate change (sub-section IV.2).

IV.1. Does the EU have extraterritorial human rights obligations?

When discussing the possible existence of extraterritorial human rights obligations incumbent on the EU, reference is generally made to two primary sources of EU law – namely, the Treaty on European Union (TEU) and the CFREU. The first states, in its art. 3(5), that "[i]n its relations with the wider world, the Union [...] shall contribute to [...] the protection of human rights". Art. 21 TEU further includes human rights among the principles and objectives guiding the EU external action; and it stipulates that human rights shall also apply to the "external aspects of [EU] other policies". The CFREU, on its part, is notable for what it does *not* say – *i.e.*, for the fact that it does not include a "jurisdictional clause".

[117] See, among many, T Ahmed and I de Jesús Butler, 'The European Union and Human Rights' cit.; and S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) HRLRev 645. Views differ as to whether the EU can be said to exercise human rights "jurisdiction" in a proper sense or not, but there is agreement in the literature in concluding that human rights obligations are incumbent on the EU: compare S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution?' (2015) Social Philosophy and Policy 244; and O De Schutter, *The Implementation of the Charter of Fundamental Rights in the EU Institutional Framework* (European Union 2016) 57.

The legal value and implications of such provisions and omission remain contested. A majority of scholars read the relevant provisions of the TEU and art. 51 CFREU (coupled with the absence of a jurisdictional clause) as indicating that EU institutions and bodies are always bound by the human rights obligations enshrined in the Charter, whenever and wherever they act, including in situations where they act extraterritorially or where their territorial acts have extraterritorial effects.[118] Such a position would find at least indirect support in the CJEU jurisprudence, and specifically in *Front Polisario I*, regarding the validity of a trade agreement between the EU and Morocco to the extent that the agreement applied to the disputed territory of Western Sahara.[119] At first instance, the General Court annulled the decision adopting the agreement on the ground that the Council of the European Union had not examined the potential negative human rights impacts of the agreement on the Sahrawi people, thus *assuming* the application of the CFREU in such a situation.[120] The issue was not addressed on appeal by the Grand Chamber as the agreement in question was interpreted as not applying to Western Sahara.[121] Beyond the *Front Polisario* case, the CJEU has been confronted with actions for damages brought against EU institutions by residents of third countries alleging violations of their human rights. In various such instances, the CJEU did not question the potential responsibility of the EU for extraterritorial conduct or conduct with extraterritorial effects, even though the complaints ultimately failed on other grounds.[122]

Additionally, as far as the specific area of trade and investment is concerned, the 2015 *Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives* drafted by the European Commission recognise that "[r]espect for the Charter of Fundamental Rights in Commission acts and initiatives is a **binding legal requirement** in relation to both internal policies and external action" (bold in the original text).

[118] See, famously, V Moreno-Lax and C Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in S Peers, TK Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1657. See also E Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of the *Front Polisario* Saga' (2020) European Journal of Legal Studies 117; and V Kube, 'The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU?' (EUI Working Paper LAW 2016/10).

[119] On the relevance of the *Front Polisario I* jurisprudence for the extraterritorial application of the CFREU, see E Kassoti, 'The Extraterritorial Applicability of the EU Charter of Fundamental Rights' cit. The complaints in question are part of a broader judicial effort by Front Polisario; for the most recent developments of the '*Front Polisario* saga', see A Carrozzini, 'Working Its Way Back to International Law? The General Court's Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 *Front Polisario v Council*' (7 April 2022) European Papers www.europeanpapers.eu 31.

[120] Case T-512/12 *Front Polisario v Council of the European Union* ECLI:EU:T:2015:953.

[121] Case C-104/16 P *Council of the European Union v Front Polisario* ECLI:EU:C:2016:973. See, for a commentary: V Kube, 'The Polisario Case: Do EU Fundamental Rights Matter for EU Trade Policies?' (3 February 2017) EJIL:Talk www.ejiltalk.org.

[122] Case C-581/11 P *Mugraby v Council and Commission* ECLI:EU:C:2012:466; case C-288/03 P *Zaoui and Others v Commission* ECLI:EU:C:2004:633.

The opposing view was taken by Advocate General Wathelet in *Front Polisario I*, who supported the application of the restrictive ECtHR jurisprudence on extraterritorial human rights obligations. He arguably did so by implicitly relying on art. 52(3) CFREU, according to which "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention".[123]

This author shares the former view, also considering that art. 52(3) rather clearly refers to the interpretation of the content of *substantive* rights (as opposed to jurisdictional conditions); also, the same provision ends by stating that it "shall not prevent Union law providing more extensive protection". The significance attributed to the lack of a jurisdictional clause in other human rights treaties by their respective monitoring bodies and by several scholars would also point in the same direction. While it is true that the TEU and CFREU provisions in question have yet to be fully tested in practice and that appropriate limitations will need to be worked out so as not to burden EU institutions (and Member States) excessively, the EU legal order appears to be particularly supportive of the recognition of extraterritorial human rights obligations.

A related issue which should be also considered concerns the conditions for establishing "extraterritoriality". Indeed, the difference between "extraterritorial acts" and "territorial acts with extraterritorial effects" is far from clearcut in some circumstances. In this respect, the CJEU has shown a certain propensity for qualifying acts with a strong extraterritorial dimension as territorial – *e.g.*, when it found that the directive extending the EU ETS to flights arriving at or departing from EU airports did "not contain any extraterritorial provisions".[124] While referring to the notion of "extraterritorial jurisdiction" as the competence of the EU to regulate (see sub-section III.1 above), such a broad interpretation of what represents a "territorial act" of the EU is bound to have effects on the EU institutions' human rights obligations, also considering that art. 21(3) TEU explicitly extends respect for human rights to the external aspects of EU internal policies.[125]

[123] Case C-104/16 P *Council of the European Union v Front Polisario* ECLI:EU:C:2016:677, opinion of AG Wathelet, para. 271 ("since in this case neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable, there can be no question of applying the Charter of Fundamental Rights there").

[124] *Air Transport Association of America and Others* cit. paras 145 ff. For a critique of the judgment: C Voigt, 'Up in the Air' cit.

[125] L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' cit. The extraterritorial protection of data ensured by EU law can be of inspiration, even though in that area the focus is on the protection of the rights of EU citizens: see M Taylor, 'The EU's Human Rights Obligations in Relation to its Data Protection Laws with Extraterritorial Effect' (2015) International Data Privacy Law 246. But see the groundbreaking judgment by the German Constitutional Court on the right to privacy of non-German citizens abroad in the context of telecommunications surveillance activities: German Constitutional Court judgment of 19 May 2020 1 BvR 2835/17 (for a comment: B Reinke, 'Rights Reaching Beyond Borders: A Discussion of the BND-Judgment, dated 19 May 2020, 1 BvR 2835/17' (30 May 2020) Verfassungsblog verfassungsblog.de).

Accordingly, in the EU context, it might be easier to establish human rights obligations with respect to territorial acts having extraterritorial effects (*e.g.*, the conclusion of trade agreements, the adoption of carbon border policies), as opposed to the ECHR context. Indeed, while the ECtHR did find in the past that it had jurisdiction in instances where territorial acts of the State had extraterritorial effects, the relevant jurisprudence is rather contradictory.[126] The fact remains that a broader notion of 'territorial conduct' does not solve all the issues highlighted in sub-section III.2 above in the area of human rights-based climate litigation; nevertheless, it can potentially defuse the radical exclusion of responsibility based on extraterritoriality.

IV.2. Enforcing the extraterritorial human rights obligations of the EU in the area of climate change: obstacles and ways forward

The analysis above suggests that the EU context might provide a fertile ground for the recognition of human rights obligations towards distant strangers when designing and implementing climate policies. Firstly, the lack of territorial limitations in the CFREU, coupled with the human rights references in the TEU, would seem to remove the obstacles placed by traditional approaches to human rights jurisdiction. While the CJEU has yet to comprehensively address the issue, the case remains that the CJEU never questioned the extraterritorial applicability of the Charter even though the issue was at stake.

Secondly, notwithstanding their significant extraterritorial effects, the acts that make up the EU climate policy have little in common with the kind of extraterritorial conduct which is at the heart of the ECtHR case-law on spatial and personal control. In this sense, the mentioned trend towards a "territorialisation" of EU acts with an extraterritorial dimension is particularly relevant in the area of climate change. A majority of scholars, the European Ombudsman and the European Commission itself agree that EU institutions have a due diligence obligation to take into account the impacts that trade agreements (and international agreements more generally) with third countries can have on the human rights of persons living in those countries.[127] Such an obligation is essentially centred on territorial

[126] The following two cases are generally mentioned as exemplary of the difficulty to reconcile ECtHR cases on territorial acts with extraterritorial effects: *Kovačić, Mrkonjić and Golubović v Slovenia* App n. 44574/98, 45133/98 and 48316/99 [9 October 2003], admissibility decision; and *Ben El Mahi and Others v Denmark* App n. 5853/06 [11 December 2006], admissibility decision. See L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) EJIL 1071, 1077-1078; *contra*, for an interpretation that reconciles the two cases: A Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' cit. 527 ff. *Non-refoulement* cases have not been mentioned as they concern individuals who are in the territorial State and therefore, in the view of the ECtHR, clearly fall within that State's jurisdiction.

[127] In addition to the Commission's Guidelines mentioned above in sub-section IV.1 and to the European Ombudsman's decisions mentioned in sub-section II.3, see, in the literature: C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial to Territorial Obligations' (2018) ICLR 374; P Van Elsuwege, 'The Nexus between the Common Commercial Policy and Human Rights: Implications of the Lisbon

conduct – namely, the decision by the competent EU institutions to conclude the agreement. This model would apply to most EU climate acts mentioned in section II – from the adoption of legislation on deforestation or renewable energy with extraterritorial effects to the decision by the EIB to fund climate projects abroad, to the setting of certain GHG emissions reduction targets or to the decision to contribute to multilateral climate funds.

The example of the due diligence obligation with respect to trade agreements shows that, should EU human rights obligations be recognised by the CJEU towards individuals and groups living in third countries, those obligations would not extend to all aspects of all human rights, whose full enjoyment can only be guaranteed by the territorial State. It has been suggested in the literature that extraterritorial human rights obligations be limited to negative obligations to respect human rights and/or positive obligations of a procedural nature;[128] or to serious violations.[129] In *Neubauer*, a case which alleged the inadequacy of Germany's Climate Protection Act and which included among the applicants individuals residing in Bangladesh and Nepal, the German Constitutional Court held that: "[a] duty of protection vis-à-vis the complainants living in Bangladesh and in Nepal would not in any case have the same content as that vis-à-vis people in Germany. In general, the content of fundamental rights protection vis-à-vis people living abroad may differ from the content of fundamental rights protection vis-à-vis people living in Germany. Under certain circumstances, modification and differentiation are required".[130]

Along similar lines, the ECtHR itself has concluded, with respect to extraterritorial human rights obligations, that ECHR rights can be "divided and tailored" (on the point notably reversing its *Banković* judgment).[131] Accordingly, the content of the obligations incumbent on EU institutions towards distant strangers whose rights are negatively affected by EU climate (in)action can be adapted to the peculiar context and the specific relationship between the individual and the EU; and to what can be *reasonably* required, in such

Treaty' in M Hahn and G Van der Loo, *Law and Practice of the Common Commercial Policy: The First 10 Years after the Treaty of Lisbon* (Brill Nijhoff 2021) 416; and C Macchi, 'With Trade Comes Responsibility: The External Reach of the EU's Fundamental Rights Obligations' (2020) Transnational Legal Theory 409.

[128] Distinguishing between negative and positive obligations: M Milanović, *Extraterritorial Application of Human Rights Treaties* cit. 209 ff. Focusing on procedural standards: V Kube, 'The European Union's External Human Rights Commitment' cit.; and A Berkes, 'The Extraterritorial Human Rights Obligations of the EU in its External Trade and Investment Policies' (2018) Europe and the World: A law review. *Contra*, for the view that the whole spectrum of obligations (both negative and positive) should apply: A Ganesh, 'The European Union's Human Rights Obligations Towards Distant Strangers' cit.

[129] C Ryngaert, 'EU Trade Agreements and Human Rights' cit.

[130] German Constitutional Court order 1 BvR 2656/18 and others cit. paras 176. See paras 173 ff. for the examination of the existence of a duty of protection based on fundamental rights towards applicants living abroad.

[131] *Al-Skeini and Others v the United Kingdom* cit. para. 137; compare with *Banković and Others v Belgium and Others* cit. para. 75. For a criticism of *Banković* on this point and in support of a "gradual approach" to extraterritorial human rights jurisdiction, see R Lawson, 'Life after Bankovic – On the Extraterritorial Application of the European Convention on Human Rights' cit. 120.

circumstances, from the EU.[132] Specifically in the EU context, the CJEU jurisprudence on the protection of the "essence" of CFREU rights (referred to in art. 52(1) CFREU) might play a role in cases with an extraterritorial dimension, as it is happening in data protection cases.[133]

In addition to the relatively "a-territorial" approach of the EU legal order as regards human rights and to the territorial anchoring of EU climate acts, further factors support the recognition of EU human rights obligations with respect to persons living in third countries in the context of the design and implementation of EU climate policy. The expanding tendency of the EU to adopt unilateral climate acts with broad extraterritorial effects strengthens the nexus between the EU act and the potential human rights violations in third countries. In other words, the extension of the EU climate jurisdiction (*i.e.*, its regulation of climate-related conducts and events taking place abroad) can, to a degree, be accompanied by an extension of its human rights obligations, insofar as the causal proximity between the act and the injury is stronger.[134] Also concerning causation, complaints against EU climate acts or inaction could overcome the (already weak) "drop in the ocean" argument,[135] as EU Member States collectively are responsible for a rather well-defined and significant share of GHG emissions. Relatedly, such complaints would also pose less problems in the apportioning of responsibility. Finally, the place that specific principles and rules occupy in the EU legal order and jurisprudence could be interpreted as requiring more decisive climate action – *e.g.*, the precautionary principle[136] and the provision on environmental protection included in the CFREU (art. 37).[137]

That said, a considerable obstacle currently exists to the actual enforcement of these obligations – namely, the stringent admissibility test applied by the CJEU with respect to

[132] "Reasonableness" and assessment *in concreto* are likely to play a role in this "tailoring" operation: C Ryngaert, 'Jurisdiction: Towards a Reasonableness Test' in M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties* cit.

[133] For a critical commentary: M Tzanou, '*Schrems I* and *Schrems II*: Assessing the Case for the Extraterritoriality of EU Fundamental Rights' in F Fabbrini, E Celeste and J Quinn (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2021) 99.

[134] On the connection between the exercise of a lawful extraterritorial competence and the arising of extraterritorial human rights obligations, see H King, 'The Extraterritorial Human Rights Obligations of States' cit. The issue has also been put in terms of legitimacy, with specific reference to the EU and the extraterritorial reach of its prescriptive jurisdiction: "the issue that needs to be addressed is whether it is *legitimate* for the EU to regulate at home with extraterritorial effect without accepting commensurate human rights responsibilities towards those individuals in third countries affected by these regulations" in D Augenstein, 'The Human Rights Dimension of Environmental Protection in EU External Relations after Lisbon' in E Morgera (ed.), *The External Environmental Policy of the European Union EU and International Law Perspectives* (Cambridge University Press 2012) 263, 286.

[135] See above notes 87 and 106 for examples of this argument.

[136] P Craig, *EU Administrative Law* (Oxford University Press 2018, third edn) 694 ff.

[137] Which is, however, formulated as a principle and not as a right: E Morgera and G Marín Durán, 'Article 37 – Environmental Protection' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021, 2nd edn) 1041.

the standing of individuals and NGOs in annulment proceedings pursuant to art. 263(4) of the Treaty on the Functioning of the European Union. The so-called *Plaumann* test, which interprets the requirement of "individual concern" in art. 263(4), was originally elaborated in 1963 and reads as follows: "[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed".[138]

Notwithstanding scholarly criticism and findings of non-compliance by the Aarhus Convention Compliance Committee with respect to environmental cases,[139] the CJEU continues to apply this test, which has so far thwarted attempts at human rights-based climate litigation before the CJEU.[140] In light of this, several commentators have concluded that the CJEU is not, as things stand, a promising forum for eliciting stronger climate action from the EU and its Member States;[141] and complainants have been exploring other avenues (mostly relying on the ECHR and national constitutions), which, however, present their own set of obstacles, especially to individuals and groups living in third countries.

Not all roads to Luxembourg appear to be closed, however. First, it should be recalled that, in October 2021, the Aarhus Regulation was amended and the scope of internal review of administrative acts at the initiative of individuals and NGOs considerably broadened.[142] This has resulted in an increase of requests for review of EU climate-related acts – from the European Commission's delegated acts qualifying economic activities as

[138] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17.

[139] Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 Concerning Compliance by the European Union; Part I was adopted on 14 April 2011, while Part II was adopted on 17 March 2017. In the literature, see, among many, A Barav, 'Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court' (1974) CMLRev 191; A Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?' (2003) CLJ 72; and P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2020, 7th edn) 540 ff. With specific regard to environmental matters, see M van Wolferen and M Eliantonio, 'Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-Compliance with the Aarhus Convention' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 148; and I Hadjiyianni, 'Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies' (2021) CMLRev 777.

[140] See *Carvalho and Others* cit., and *Sabo and Others* cit.

[141] L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' cit. 1087 ff.; L Hornkohl, 'The CJEU Dismissed the People's Climate Case as Inadmissible' cit.; and J Hartmann and M Willers, 'Protecting Rights through Climate Change Litigation before European Courts' (2022) Journal of Human Rights and the Environment 90.

[142] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006. See, for an analysis of the amendments and their significance: M Hedemann-Robinson, 'Access to Environmental Justice and European Union Institutional Compliance with the Aarhus Convention: A Rather Longer and More Winding Road than Anticipated' (2022) European Energy and Environmental Law Review 175.

"environmentally sustainable" to EIB decisions financing projects. Such requests, in turn, are already giving rise to CJEU proceedings, as complainants whose requests for review were refused by the competent EU institutions and bodies turn to the CJEU for annulling these rejection decisions.[143] Significantly, requests for internal review and related access to the CJEU under the Aarhus Regulation are open to persons living in third countries, although their concrete situation might entail additional barriers in practice.[144] Following the recent heavy reliance by the ECtHR on the Aarhus Convention in *Klimaseniorinnen* and its related extension of NGOs' legal standing in climate change cases, one may also wonder whether the CJEU could take note and finally amend its *Plaumann* test in environment-related cases – but this might be too much of a stretch.

Second, human rights-based climate complaints could be examined by the CJEU through the preliminary reference procedure (art. 267 of the Treaty on the Functioning of the European Union). While representing an indirect and tortuous avenue, essentially dependent on the assessment by national courts, the preliminary reference procedure should not be discarded too easily, considering the remarkable growth of national climate litigation. Such a procedure could, as opposed to actions for annulment brought under art. 263(4), concern legislative acts and acts of general application. Admittedly, this procedure is even less ideal for persons living in third countries. Nevertheless, much will depend on the rules of standing in EU Member States and their openness towards applicants from third countries; as well as on the concrete drafting of the submission. Accordingly, a submission referring, more or less prominently, to the extraterritorial effects of a EU climate act and to the EU "a-territorial" human rights obligations deriving from the CFREU could benefit persons living in third countries, even if the original complaint was not brought by them.

Third, the possibility should not be ruled out that third countries themselves (as opposed to their residents) bring an action for annulment under art. 263(4). While equally non-privileged applicants, and thus having to satisfy the "direct and individual concern" requirement (or "direct concern" requirement in case of regulatory acts not entailing implementing measures), the recent *Venezuela* case confirms that third countries can successfully challenge regulatory acts of general application (in that case, a sanctions regime),[145] although legislative acts would remain out of reach.

[143] In accordance with art. 12(2) of the Aarhus Regulation. See, for a selection of cases, climatecasechart.com. Among cases that have led to the lodging of actions for annulment before the CJEU, see case T-579/22 *ClientEarth v Commission* pending; *Greenpeace and Others v Commission* pending; and *EIB v ClientEarth* and *Commission v ClientEarth* cit.

[144] For an overview of the obstacles encountered by persons living in third countries in challenging EU environmental acts: I Hadjiyianni, 'The Extraterritorial Reach of EU Environmental Law and Access to Justice by Third Country Actors' (2017) European Papers www.europeanpapers.eu 519.

[145] Case C-872/19 P *Venezuela v Council* ECLI:EU:C:2021:507. For a comment on the significance of the judgment: T Vandamme, '"Practice What you Preach": EU Law Extends to Third Countries the Right to an Effective Legal Remedy' (12 January 2022) European Law Blog europeanlawblog.eu.

Fourth and finally, Member States and EU institutions can bring wide-ranging actions for annulment, including of legislative acts, as privileged applicants. While this avenue has long been considered unlikely in the area of climate action, Austria has recently asked for the annulment of the Commission's delegated regulation that qualifies certain activities relating to nuclear energy and gas as "environmentally sustainable".[146] Austria based its submission, among others, on the lack of impact assessment and public consultation as well as on the precautionary principle. It is not implausible that, also depending on the outcome of the case, further complaints might be submitted by more climate-sensitive Member States and EU institutions. Whereas this kind of cases would only indirectly benefit persons living in third countries, they have the advantage of being able to address legislative acts as well and giving the CJEU a role in scrutinising the EU climate policy, including based on human rights.

A further possibility in the future might be for individuals and NGOs to bring human rights-based proceedings against EU climate action or inaction not to Luxembourg, but to Strasbourg – once the EU finally accedes to the ECHR. However, while this avenue might circumvent the current obstacles to the legal standing of individuals and NGOs in actions for annulment before the CJEU, as it has been shown the ECtHR has to date maintained its restrictive stance on extraterritorial human rights jurisdiction, so that it cannot be considered a useful forum for distant strangers at present. The matter is different for persons living in EU countries (although further issues might arise): a situation that can potentially benefit distant strangers as well, should more ambitious climate action be required from the EU and its Member States.

V. Conclusion

It has long been argued that human rights would not represent the most appropriate means to address the insufficient or ill-conceived climate action of States and international organisations. Among the main reasons is precisely the misalignment between traditionally territorial human rights obligations and the global nature of climate change negative effects, with the most devastating of such effects being felt primarily by persons living in developing countries. In this respect, climate change is clearly one of those global challenges that put to the test long-established distinctions between territoriality and extraterritoriality, making them essentially obsolete.[147] Accordingly, human rights scholars have come up with more or less radical proposals for overcoming paradigms centred on

[146] Case T-625/22 *Austria v Commission* pending.

[147] H Duffy, 'Global Threats and Fragmented Responses' cit.; and SL Seck, 'Moving Beyond the E-Word in the Anthropocene' in DS Margolies, U Özsu, M Pal and N Tzouvala, *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019).

territory and physical control, by referring to notions such as universality and "common concern of humankind".[148]

The practice is, as it often happens, steering a middle course between the irrelevance of human rights and their overhaul. Undeterred by the difficulties inherent in using human rights to tackle climate change and States' responses to it, individuals and NGOs (as well as, notably, States themselves through advisory opinions) have given rise to an ever-growing trend of human rights-based climate litigation. Courts and quasi-judicial bodies are, on their part, finding novel ways to apply human rights to new phenomena, thus testifying to human rights' enduring relevance and ability to evolve, as well as to the accessibility of the related mechanisms compared to other avenues.

In this context, the human rights obligations of the top State emitters towards individuals and groups living in developing countries are increasingly put to the fore of the public debate and even of multilateral climate negotiations; and they have also found their way in judicial and quasi-judicial proceedings. The decisions on the subject by the IACtHR and CRC Committee have significant potential in innovating one of the shakiest pillars of the human rights framework (*i.e.*, jurisdiction) and making it suitable to today's challenges, building on – rather than revolutionising – past decisions. However, the ECtHR has recently refused to embrace such an approach in the handling of its climate docket. The state of affairs risks leaving an accountability gap in Europe, a continent whose climate action and inaction still has a considerable impact on the rest of the world.

Against this background, this *Article* has shed light on the extraterritorial human rights obligations of EU institutions in the area of climate change – a topic which has received very little consideration to date. On the one hand, the significance of EU climate action and inaction is undeniable: EU Member States collectively remain among the largest GHG emitters; the primary climate targets and measures are being adopted at the EU level; and the measures in question increasingly have an extraterritorial reach (in other words, the prescriptive jurisdiction of the EU in the area of climate change is expanding). On the other hand, the protection of human rights in the EU legal order has special features, which are particularly significant with respect to the EU external action and its internal action with external effects. Accordingly, human rights obligations would seem to accompany the exercise of EU competences, rather than the being limited by territorial boundaries. While the CJEU has yet to comprehensively address the human rights obligations of the EU towards persons living in third countries, including in the area of climate

[148] V Bellinkx, D Casalin, GE Türkelli and others, 'Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind' (2022) Transnational Environmental Law 69; W Scholtz, 'Human Rights and Climate Change: Extending the Extraterritorial Dimension via the Common Concern' in W Benedek, K De Feyter, MC Kettemann and C Voigt (eds), *The Common Interest in International Law* (Intersentia 2014) 127; and D Palombo, 'Extraterritorial, Universal, or Transnational Human Rights Law?' (2023) Israel Law Review 92 (referring, in addition to universality, to transnationality).

change, the promise that the EU legal order holds in removing increasingly anachronistic distinctions based on territory does not appear to have been sufficiently highlighted.

Well aware of the difficulties that individuals and NGOs still experience in accessing the CJEU, this *Article* has identified ways in which the CJEU might still be called upon to scrutinise EU climate action. It has also shown how the outcome could be favourable to the extension of EU human rights obligations beyond its Member States' territories and, consequently, to stronger climate action; and why, therefore, EU institutions should take extraterritorial human rights obligations seriously.

ARTICLES

EXECUTIVE MIGRATION GOVERNANCE AND LAW-MAKING IN THE EUROPEAN UNION: TOWARDS A STATE OF EXCEPTION

AIDA HALILOVIC*

TABLE OF CONTENTS: I. Introduction. – II. The rise of executive migration governance in the EU. – III. Emergency: when soft law creates law. The example of the hotspots. – IV. From emergency to exception: on the abnormal normalisation of executive governance. – V. Conclusion.

ABSTRACT: In the name of effectiveness, European Union (EU) governance has long departed from the traditional approach of governing through law, venturing onto new paths of making and discharging policies across different policy fields. Through new and creative governance, networked governance, and governance through agencies, flexibility and functionalism have become the new paradigms of EU governance. This is particularly striking in the interiors area, including internal security and migration, where the fuzziness of the constitutional framework leaves wide margins to new governance approaches to intervene to "fill the gaps". Failing to achieve harmonization through law (because of the high sovereign sensitivity and politicization), EU governance turned to harmonization through practices, trying to increase trust and boost cooperation on a practical level playing field. While legislative production regulating the core of EU asylum and migration is still scarce (i.e., regulating the substance of migration), hard law provisions mushroom when it comes to empowering agencies, regulating operational cooperation, or harmonizing practices across the EU (i.e., regulating the administration of migration). The actual management of migration occurs then within this latter executive/administrative dimension. Analysing (executive) migration governance in terms of whether it achieved its original intents (effectiveness and depoliticization) would only tell something about its goodness of fit, and little about its goodness. In light of the incessant crises that have hit the EU, this *Article* reflects on the close-to-Schmittian state of exception, that is fuelling an increasingly creative governance in the Union.

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I. INTRODUCTION

The lack of an exhaustive EU legislative framework addressing migration substantively, even in the aftermath of the 2015 migrant crisis, has left ample manoeuvre to the executive to intervene to regulate the area with new governance approaches. The measures proposed by the Commission not only lacked legal determination, perpetrating legal uncertainty at the time of operationalizing common actions, but also side-lined the legislative branch of government by taking on to create new norms that are progressively gaining the force of law.

The first part of the *Article* relies on (new) governance scholarship and retraces the empowerment of the EU executive in the area of migration due to endemic strenuousness in legislative intervention and ensuing gaps in legislation. It moves on to examine how crises exacerbate such dynamics though the example of the hotspot approach proposed, among other measures, by the European Commission to tackle the migration crisis. Based on a distinction between states of emergency and states of exception derived from Carl Schmitt's political philosophy, the *Article* finds that hotspots constitute not only an emergency measure, but also an exceptional measure in Schmittian terms. The last section of the *Article* builds on the hotspot example to make the case of an exercise of (executive) public power that is hardly compatible with the rule of law fundamentals of liberal democracies.

The *Article* concludes with a normative argument that calls for reinforcing (the substance of) political deliberation processes within the legislative branch of government.

II. THE RISE OF EXECUTIVE MIGRATION GOVERNANCE IN THE EU

The intricate institutional architecture of the Area of Freedom, Security and Justice (AFSJ) projects a series of conflicting instances at the background of border management activities, being not only influenced by the tension between supranationalism and intergovernmentalism, but also perturbed by clashing political agendas (e.g. securitization v. civil liberties and global justice) and governance choices (e.g. technocracy v. politically represented management). At intergovernmental level, the different national and subnational interests introduce an additional layer of political complexity, while, at supranational level, the variety of actors involved contribute to an ever-increasing fuzziness of the institutional landscape. Next to Member States with their territorial sovereignty and political independence prerogatives, EU institutions and increasingly EU agencies put forward a wide set of goals, ranging from policy implementation to reformative aims, from community integration and coordination to strategic and diplomatic aspirations.

The institutionalization of border, migration and security cooperation among EU Member States and the creation of a constitutional dimension to the AFSJ exacerbated some trust and cooperation difficulties derived from the sensitivity of the matters at stake. The everlasting tension between integrative fervours and sovereign reservations resulted in an unclear attribution of competences at source and left unanswered the practical question of how to develop a common freedom, security, and justice action, when the core of law-and-order stems directly from the sovereignty – i.e., the exclusive competence and sole responsibility – of the Member States. Competence-allocation issues,[1] amplified by the increase in actors and structures involved, not only create a fuzzy constitutional architecture at source, but also perpetrate legal uncertainty at the time of operationalizing common actions.

At input level, although the Union and the Member States share competences in the Area of Freedom, Security and Justice, several aspects of border and migration management are still largely controlled by Member States in an intergovernmental fashion. The legislative architecture of the EU migration policy, in fact, limits shared competence in matters relating to passports, IDs, determination of volumes of admission of third-country nationals, family law with cross-border implications, operational police cooperation,[2] and other areas in which – due to sovereignty implications and political sensitivity – supranationalization is perceived to run contrary to Member States' interests.[3] In addition, the Council retains its prerogatives to adopt measures to ensure administrative cooperation between the relevant departments of the Member States and to issue strategic guidelines relating to legislative and operational planning in the Area of Freedom, Security and Justice,[4] signalling an extensive Member States' presence also in the implementing phases of migration and border control policies. Next to the many aspects pertaining to national law, EU legislation on migration and asylum is also framed by the pre-existing international and European regional law on the subject. Its development is thus bound by both infra-EU and supra-EU legal systems.

[1] For claims and examples of unclear competences see S Carrera, L den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' (2013) European Journal of Migration and Law 337; M Cremona, 'External Unity, Institutional Complexity and Structural Fragmentation: The Evolution of EU External Competence in the AFSJ' in M Telò and A Weyembergh (eds), *Supranational Governance at Stake*. *The EU's External Competences caught between Complexity and Fragmentation* (Routledge 2020).

[2] Arts 77(3), 79(5), 81(3), 87(3) TFEU.

[3] See, e.g., TA Börzel and T Risse, 'From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics' (2018) Journal of European Public Policy 83.

[4] TFEU, arts. 68, 74.

All the abovementioned constraints contributed to a scarce substantive legislation in EU asylum and migration.[5] Only few legislative measures adopted at EU level are of a substantive, normative, kind, i.e., introducing or regulating rights, obligations, and interests.[6] Whilst significant (and by some even considered remarkable[7]), these substantive legislative measures appear less substantive if one considers the watering down that they underwent in the Council, which impeded the comprehensive approach intended by the Treaty.[8] Finally, such legislative measures mainly set minimum, baseline, standards and intervene only on recast directives or small sectors of migration,[9] allowing for considerable national discretion in their implementation and leaving many substantive aspects unaddressed. The most recent legislative reform,[10] enacted at the time of writing after a decade long standstill, stepped up the use of legislative tools in the EU's governance of migration and asylum. The reform, however, introduces mainly procedural novelties and leaves again important substantive aspects unaddressed.[11]

While legislative production regulating the core of EU asylum and migration is still scarce (i.e., regulating the substance of migration), provisions mushroom when it comes to empowering agencies, regulating operational cooperation, or harmonizing practices across the EU (i.e., regulating the administration of migration). The actual management of migration occurs then within this latter executive/administrative dimension. Alongside "management legislation", the EU has made ample use of non-legislative, soft law,

[5] See, in addition, a thorough analysis of the dissensus pertaining to asylum and migration that constrains action in these areas in N Trimikliniotis, *Migration and the Refugee Dissensus in Europe: Borders, Security and Austerity* (Routledge 2019).

[6] This is for example the case of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, and, to a lesser extent, the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[7] G Menz, 'The promise of the Principal-Agent Approach for Studying EU Migration Policy: The case of External Migration Control' (2015) Comparative European Politics 307, 309.

[8] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' (2016) ELR 10.

[9] *Ibid.* 10.

[10] Comprised of the legislative measures envisaged in the 2020 Pact on Migration and Asylum, i.e., a new Asylum and Migration Management Regulation, a new Screening Regulation, a new Crisis and Force Majeure Regulation, as well as a recast Asylum Procedures Regulation, and a recast Eurodac Regulation.

[11] E.g., the situation of irregular migrants, or the situation in the hotspots. Note also that many other legislative proposals are stalemated or have stranded.

measures such as tools, guidelines, blueprints, pilots projects and the like. It is noted that "in recent years the Commission has put forward only very few concrete legislative proposals and even when migration is seen as a "crisis", the response has not been a legislative one".[12] In the name of effectiveness, EU governance has departed from the traditional approach of governing through law, venturing onto new paths of making and discharging policies across different policy fields. Through new forms of governance, networked governance, and governance through agencies,[13] flexibility and functionalism have become the new paradigms of EU governance, chiefly when justified as responses to crises.[14] This is particularly striking in the interiors area, including internal security and migration, where the fuzziness of the constitutional framework leaves wide margins to new governance approaches to intervene to fill the gaps.[15]

What consequences does this have? How can we evaluate the EU's "executive lawmaking" in the area of migration?[16] One immediate answer is to assess it against the intent behind its creation. Forms of governance that are less reliant on traditional law-making are generally considered desirable because they allow for flexibility and prompt responses to functional needs, less politically loaded decision-making and greater effectiveness. For instance, EU agencies were established with the declared aim of separating the technical/bureaucratic/regulatory decision-making from the central executive/political dimension. But analysing (executive) migration governance in terms of whether it achieved effectiveness and de-politicization would only tell something about its goodness

[12] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' cit. 10.

[13] R Dehousse, *The "Community Method": Obstinate or Obsolete?* (Palgrave Macmillan, 2011). For evidence of this in the area of asylum and migration, see: E Tsourdi, 'Beyond the 'Migration Crisis': The evolving role of EU agencies in the administrative governance of the asylum and external border control policies' in P Slominski, J Pollak (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Springer International Publishing 2020). L Karamanidou and B Kasparek, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (Respond Working Paper 59-2020). See also focused studies on soft law in the area of migration (among many: P Slominski and F Trauner, 'Reforming me softly–how soft law has changed EU return policy since the migration crisis' (2021) West European Politics 93. M Reviglio, 'The shift to soft law at Europe borders: Between legal efficiency and legal validity' (2023) Global Jurist, 23. F Casolari, 'The unbearable lightness of soft law: on the European Union's recourse to informal instruments in the fight against irregular immigration' in F Ippolito, G Borzoni, and F Casolari (eds), *Bilateral Relations in the Mediterranean* (Edward Elgar Publishing 2020).

[14] V Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (Queen Mary Law Research Paper 423-2024) forthcoming in European Papers, as part of a Special Section on Schengen and European Borders.

[15] J Scott and D M Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) ELJ 1.

[16] J Rossi, 'State Executive Lawmaking in Crisis' (2006) Duke Law Journal 237. Z Payvand Ahdout, 'Enforcement Lawmaking and Judicial Review' (2022) Harvard Law Review 937.

of fit, and little about its goodness. The latter is assessed below against the European liberal democratic orthodoxy.

III. Emergency: when soft law creates law. The example of the hotspots

In the wake of the 2015 migrant crisis, the European Commission published the European Agenda on Migration, proposing a set of short and long-term measures to address the shortcomings of the common European migration policy. Most measures were on non-legislative kind. Among these, the Commission envisioned the setting up of "a new 'Hotspot' approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. [...] Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks".[17] Conceived as an *immediate* response, the hotspots were regarded as a measure that would step up the application of existing legislation on asylum-seekers and irregular migrants' fingerprinting, i.e., the Eurodac Regulation.[18] Nine years later, at the time of writing, we know that the scope of the hotspots has extended well beyond that of *swift* fingerprinting and funnelling.

While endorsing the proposed actions, the European Council prompted the Commission to draw up "a roadmap on the *legal*, financial and operational aspects of these facilities",[19] signalling its awareness of the legal and policy vacuum in which the hotspots project was taking shape. Subsequent policy documents[20] by the Commission intervened to regulate the details of the functioning of the hotspots that were being set up in Greece and Italy. Hotspots were loosely inscribed under the legal framework of the relocation scheme established pursuant to art. 78(3) TFEU (allowing for provisional measures tackling migration-related emergencies), but it was not proposed to develop a self-standing legal instrument that would comprehensively regulate their functioning. The table below illustrates how far from the legislative level the hotspot approach was introduced.

[17] Communication COM(2015) 240 final from the Commission of 13 May 2015 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, p. 6.

[18] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac'.

[19] European Council Conclusions of 25-26 June 2015.

[20] "Explanatory Note" sent by Commissioner Avramopoulos to Justice and Home Affairs Ministers on 15 July 2015 www.statewatch.org, summarised in Communication COM/2015/0490 final from the Commission of 23 September 2015 to the European Parliament, the European Council and the Council on Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, Annex II.

	EU treaties					No link
	Secondary legislation					Only ex-post mentioning
→ Hard law	(non-legally binding) Politically binding policy documents (e.g., Council conclusions)		European Council Conclusions of 25-26 June 2015			
Soft law ←	(non-legally binding) General policy documents (e.g., green papers, agendas, etc.) and specific soft law (e.g., guidelines, handbooks, etc.)	2015 Agenda on Migration by European Commission			Commission Communication on managing the refugee crisis of 29 September 2015	
	Unofficial documents (e.g., inter-institutional correspondence)			Explanatory Note by JHA Commissioner of 15 July 2015		

TABLE 1. Positioning of the hotspots in a simplified classification of EU hard to soft law instruments.

These policy documents outlined that "an external border section should be considered to be a "hotspot" for the *limited period of time* during which the *emergency or crisis* situation subsists and during which the support of the "hotspot" approach is *necessary*".[21] The hotspots –established on the request of the hosting Member State and coordinated by an EU regional task force – would provide frontline Member States with operational support in the form of:

1. Registration and screening of irregular migrants by Frontex;

2. Debriefing of migrants (supported by Frontex) for criminal analysis (supported by Europol);

3. Stepping up investigations, information and intelligence exchange on facilitation of irregular transit and stay within the EU, as well as secondary movements;

4. Asylum support, in line with the joint processing concept;

5. Coordination of the return of migrants (supported by Frontex);

6. Interpretation.[22]

The Commission purported to base such activities on existing secondary legislation: fingerprinting according to the Eurodac Regulation; asylum support based on another emergency measure, i.e., the relocation scheme (adopted by the Council as a binding Decision based on art. 78(3) TFEU), and CEAS legislation; EU agencies' operational support

[21] Explanatory note cit.

[22] *Ibid.*

according to their respective governing legislation. On the ground, however, the hotspots could not function as a sum of the whole of the actors involved, operating according to their existing mandates. Soon after their set up, the fuzziness of the hotspots' regulatory framework gave rise to a number of legal (and political) issues, including the insufficiency of procedural safeguards and redress mechanisms, the lack of human rights-related incident reporting and predefined remedial procedures, as well as the unclear mandate delimitation of the participating entities which exacerbated responsibility, accountability and legitimacy issues.

The hotspots were a new concept, posing new challenges and thus necessitating new solutions. These, however, did not come in the form of legislative adjustments to the new reality, but as yet more collating and patch working functional responses. For instance, the 2016 European Agenda on Security expanded the scope of the hotspots from emergency mechanisms through which the EU would fight migrant smuggling and contain unauthorized secondary movements to structural checkpoints aimed at crime prevention and fighting. As envisaged by the Commission, the hotspot workflow would need to include "integrated and systematic security checks" aimed at identifying individuals posing a (terrorist) threat to EU security, i.e., physical and databases checks and, in some cases, through interviews and internet and social media.[23] Another change in the scope of the hotspots came with the infamous EU-Turkey Statement of March 2016. To implement its new return policy, the Commission called for a reconfiguration of the Greek hotspots "with the current focus on registration and screening before swift transfer to the mainland replaced by the objective of implementing returns to Turkey".[24] By the end of 2016, just a year after their establishment, the official language depicting the hotspots turned from humanitarian reception centres to detention and crime prevention facilities.

The concept of "hotspot" was included in subsequent migration and asylum related legislation, starting with the 2016 amendment of the Frontex Regulation.[25] However, a legal characterization of the hotspot still lacks. The hotspots are only vaguely 'defined' in Frontex Regulation as area of cooperation and management of disproportionate migration,[26] leaving wide margins of manoeuvre to repurpose the hotspots and redefine the procedures

[23] Communication COM(2016) 230 final from the Commission of 20 April 2016 to the European Parliament, the European Council and the Council delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union.

[24] Communication COM/2016/0166 final from the Commission of 16 March 2016 to the European Parliament, the European Council and the Council. Next operational steps in EU-Turkey cooperation in the field of migration. See commentary by European Council for Refugees and Exiles (ECRE), 'The implementation of the hotspots in Italy and Greece. A study' (2016).

[25] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

[26] Now Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, art. 2(23): "hotspot area' means an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union

governing them. It signals however a worrying trend whereby the soft law elaboration of legal norms by the executive later gains binding force.[27] Inserting the word "hotspots" in EU legislation *ex post* without delineating the legal rules regulating such centres achieves only to crystallise their existence, to acknowledge their legal reality, while leaving them void of any (legal) determination. This creates problems when trying to navigate the myriad of overlapping national, European, and international law provisions that interweave in individual cases in the hotspots, and forces to reflect on the *need* of having a comprehensive legal determination of the hotspots and their functioning. After all, the hotspots were set up with flexibility, immediateness and functionality in mind, and certainly, they did contribute to achieving some of the envisioned objectives (large-scale fingerprinting, relocation –although relatively unsuccessful, return). Originally a form of soft-law, the hotspot approach has also contributed to create law.[28] For instance, building on the hotspot experience, Italian law introduced the concept of "crisis points" in 2017,[29] starting to regulate (from 2018) the conditions for detention of migrants therein.[30] Until then, detention was arbitrary and unconstitutional.[31] The experience of the hotspots also informed the newly adopted Screening Regulation.[32]

The need for legal determination of the hotspot approach at EU level stems from the fact that it regulates constitutionally guaranteed interests –or in EU terminology, interests protected by primary law – or rights under international law. It has been remarked that international refugee law leaves "little room for manoeuvre and make use of the flexibility of modes of new governance. This view of what law should be accomplishing to meet the Treaty goals means that there is no "gap" to be filled by new governance or "shadow" of

agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders'.

[27] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' cit. 18. J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) CML Rev 330. C F Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) ELJ 274-5.

[28] See similar reflections by V Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: the Hard Implications of Soft Law' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022).

[29] Consolidated Act on Immigration (TUI) of Italy, as amended by Law 46/2017.

[30] Decree Law 113/2018 of Italy.

[31] ECRE, 'The implementation of the hotspots in Italy and Greece. A study' cit. 13 . Might not be unconstitutional anymore but still not fully compliant with the principle of legality as it leaves it to ministerial decrees to determine the structures and modalities of detention, see: Associazione per gli Studi Giuridici sull'Immigrazione, 'Country Report: Hotspots' (31 May 2023) asylumineurope.org

[32] Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders.

legislation to step in if alternative means are not found".[33] Yet, the hotspots *de facto* intervene in migrants' liberty of movement.[34] Detention might me functional and/or necessary, but it cannot derive from executive discretion, as only a *legal* norm can regulate or restrict fundamental rights. Such basic principle is recognised also under EU law:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".[35]

The provision is not only underlined by the principle of legality, which requires laws limiting individual rights and freedoms to be certain, i.e., to have a proper legal basis and clear legal effects, but also introduces a reservation to legislation,[36] as it is foreseen that *only the law* can limit the exercise of rights and freedoms. This is in line with the constitutional traditions of liberal democracies which uphold freedom and core human rights above most other rights, values, or priorities and in which limitations to individual freedom can only stem from primary sources, and only on strict conditions of necessity and proportionality. This precludes secondary rules such as administrative decrees or orders, political agendas, policy documents and the like, to regulate constitutionally guaranteed interests. However, what we observe is a contrary trend, whereby "emergency politics occasions the creation of new administrative powers and the redistribution of existing powers of governance from proceduralized processes to discretionary decision, from the more proceduralized domains of courts and legislatures to the more discretionary domains of administrative agency".[37]

IV. From emergency to exception: on the anomalous normalisation of executive governance

A vast body of literature has already explored and dissected the link between crises and executive empowerment.[38] Constructivist works have contributed by analysing the building

[33] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' cit. 9.

[34] And in other rights, such as the right to dignity, security, as well as the prohibition of degrading treatment and procedural rights.

[35] Charter of Fundamental Rights of the European Union [2012], art. 52(1).

[36] 'Riserva di legge', from Italian law: certain matters can only be regulated by primary laws and not by administrative decrees, government decrees, etc. See similar difference in US between norms and orders.

[37] B Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press 2009) 67.

[38] C Fatovic, *Outside the Law: Emergency and Executive Power* (Johns Hopkins University Press 2009); E A Posner and A Vermeule, *The executive unbound: after the madisonian republic* (Oxford University Press 2011); and, offering conflicting evidence: T Ginsburg and M Versteeg, 'The bound executive: Emergency powers during the pandemic' (2021) ICON, 1498. See also, for further literature on the issue, N Bolleyer and O Salát, 'Parliaments in times of crisis: COVID-19, populism and executive dominance' (2021) West European Politics, 1103. A

process and consequences of crisis narratives,[39] legal and political philosophy brought insights on the "state of exception" underlying migration (and other) policies,[40] while constitutionalist legal literature examined the effects of executive governance on rule of law and democratic fundamentals.[41] Engraining the different strands of literature allows to grasp the constructive, transformative potential of soft governance, which is both shaping and shaped by positive law.[42] Building on such scholarship, this section furthers the discussion on the increasing use of executive governance in the EU in the area of migration –and its aftereffects. These latter are appraised against Schmitt's idea of a state of exception, i.e., the suspension of the normal rule of law, as decided by the ruling authority.[43]

As seen with the example of the hotspots, the urgency and exceptionality of the migrant crisis justified, in the opinion of its proponents, the use of functional, innovative, ad hoc measures to cope with the unprecedented influx of migrants of 2015. The need for an *immediate* response, in turn, legitimised the designing (and operationalisation) of policy solutions by the executive branch, i.e., the Commission and the Council acting with its political hat on, rather than in its capacity of legislator (as well as specialised agencies for operational execution). The abnormality of the measure, however, does not lay in the fact that the executive took the lead in times of crisis *per se.* That, in fact, is what the executive is *normally* mandated to do. The abnormality of the hotspots approach derives from the distorting and moulding of what was an *emergency* into what has become an *exception*. In a state of emergency, the rules regulating public interests, rights and duties are suspended, derogated from, modified – for the duration of the emergency. The possibility of

Cozzolino, 'Reconfiguring the state: Executive powers, emergency legislation, and neoliberalization in Italy' in I Bruff and C B Tansel (eds), *Authoritarian Neoliberalism. Philosophies, Practices, Contestations* (Routledge 2020).

[39] M Stępka, *Identifying security logics in the EU policy discourse: the "migration crisis" and the EU* (Springer 2022); C Cantat, A Pécoud and H Thiollet, 'Migration as Crisis' (2023) American Behavioral Scientist; V Bello, 'The spiralling of the securitisation of migration in the EU: from the management of a 'crisis' to a governance of human mobility?' (2022) Journal of Ethnic and Migration Studies 1327.

[40] L Caraceni, 'Dalla "detenzione" al "trattenimento" dello straniero: un lessico giuridico spregiudicato per eludere le garanzie dell'habeas corpus' (2022) Cultura giuridica e diritto vivente 8; K Nordentoft Mose and V Wriedt, 'Mapping the Construction of EU Borderspaces as Necropolitical Zones of Exception' (2015) Birkbeck Law Review 278; M P A Murphy, 'The Double Articulation of Sovereign Bordering: Spaces of Exception, Sovereign Vulnerability, and Agamben's Schmitt/Foucault Synthesis' (2021) Journal of Borderlands Studies 1; D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' (2018) EJIL 1173; B Spengler, L Espinoza Garrido, S Mieszkowski and J Wewior, 'Introduction: Migrant Lives in a State of Exception' (2021) Parallax 115.

[41] R Schütze, 'Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's regime for legislative and executive law-making' (EIPA Working Paper 2005/W/01); D Curtin, 'Challenging Executive Dominance in European Democracy' (2014) ModLRev 1.

[42] G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Bloomsbury Publishing 2006), 6: 'On a constructivist analysis, soft law is understood as a transformative tool capable of changing behavior [and rules, I would add]'.

[43] As developed in 1922 by C Schmitt, *Political theology: Four chapters on the concept of sovereignty* (University of Chicago Press 2005).

introducing such extra-ordinary regime is normally[44] already foreseen in the legal order and the conditions for its use are usually predefined. In that sense, the resorting to emergency measures do not necessarily deviate from the normal democratic order, as these are included and foreseen in the *norm*, and as such, they are not exceptional. On the contrary, in a state of exception (of the Schmittian kind), measures *extra ordinem* would subvert the norm, superimpose over the established order, breaching its very foundational rules in a (more or less conscious) attempt to establish a new order. As such, these measures are ab-normal (in its etymological meaning, outside of the norm).

To exemplify in a comparative fashion, amongst the measures proposed to respond to the 2015 crisis, the relocation scheme adopted by the Council can be seen as an emergency measure, the hotspot approach as a measure of exception. The relocation scheme was adopted as a special legislative measure pursuant to art. 78(3) TFEU (allowing for provisional measures tackling migration-related emergencies), derogating from the normal legislative decision-making dynamics, but still within the confines of the modalities foreseen by the legal order in place (and by art. 78 TFEU specifically). In its substance, the relocation scheme derogated from the existing Dublin legislation, again, compatibly with the existing conditions regulating emergency measures. Among these conditions, of utmost importance is the fact that emergency legislation cannot derogate from primary law (while it can provisionally derogate from secondary legislation). The hotspots, on the other hand, were introduced as a policy/political initiative that indeed impinged on fundamental rights and interests protected by primary EU law as well as international law,[45] and as such should have stemmed from the legislator. It is ab-normal in the liberal democratic order that executive policy measures create legal concepts, legal situations, legal statuses and spaces, or otherwise regulate conflicting public interests, even more so when in tension with constitutionally guaranteed liberties. For the sake of accuracy, the hotspot approach might constitute a space of exception even if it had been codified and determined in a self-standing legal instrument –thereby satisfying the formal and procedural requirements of the democratic order-, as its substantive aspects may still be found in breach of foundational higher-rank rights, values, and freedoms.[46]

From their very establishment, some academic and policy commentators suggested that the hotspots should be regulated by targeted, self-standing legislation.[47] While there

[44] On the assumption of liberal democracy.

[45] And national law in liberal democracies.

[46] L Caraceni, 'Dalla "detenzione" al "trattenimento" dello straniero: un lessico giuridico spregiudicato per eludere le garanzie dell'habeas corpus' cit. 11: "Sul terreno delle migrazioni oggi, in nome proprio dell'emergenza – vera, presunta o indotta poco importa –, si emanano *leggi* che creano un diritto speciale, violano trattati internazionali, sovvertono regole che ci siamo impegnati a rispettare e diritti fondamentali su cui poggia l'intero sistema di valori democratici, primo fra tutti la libertà personale" (emphasis added).

[47] LA De Vries, S Carrera and E Guild, 'Documenting the Migration Crisis in the Mediterranean Spaces of Transit, Migration Management and Migrant Agency' (September 2016) CEPS Paper in Liberty and Security in Europe 94 aei.pitt.edu; D Neville, S Sy and A Rigon, 'On the frontline: the hotspot approach to

is no way to know if such legislation would have constructed those spaces as they are today, or if they would look completely different, what is certain is that they would be a *normal* fruit of the democratic deliberative process, they would be legally determined spaces that leave little space to contestation of legitimacy or constitutionality. And now that hotspots are being crystallised in law (although not yet determined), one could further wonder if such ex-post legal cover does not come as an acknowledgment of a situation that might be easier to legalise than to revert. The trend is particularly worrying considering that such non-legally determined situation sways individual rights-sensitive decisions.

The hotspots are not the sole example of the executive successfully creating legal concepts, situations, or regimes that are then slowly englobed in the legal order –a process where the executive branch discretionally creates the legal regime it will operate in and in which the legislative branch is increasingly relegated to an ex-post legitimising authority –a process that is gaining resemblance to the ex-post validating role of the judiciary vis-à-vis the activities of the executive.[48] Other examples from the area of migration include: the narrative around "facilitation" of illegal migration, whereby the Council distorts the legal distinction between solidarity and smuggling are now likely to be codified in law;[49] the use of non-legal categories such as "pre-frontier", "external border area" or "registration area" that *de facto* create a different legal regime in those spaces,[50] while de

managing migration' (2016) Study. European Parliament, Policy Department for Citizen's Rights and Constitutional Affairs www.europarl.europa.eu

[48] DR Stengle and JP Rhea, 'Putting the Genie Back in the Bottle: The Legislative Struggle to Control Rulemaking by Executive Agencies' (1993) Florida State University Law Review 415; J Abourezk, 'The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives' (1977) Indiana Law Journal 323.

[49] Economic profit differentiates smuggling, under international law, from other activities. The 2002 EU Facilitation Directive (Directive 2002/90/EC) uses the term 'facilitation', likely confused with humanitarian assistance or search and rescue. All facilitation is understood as a criminal activity, with depenalization in case of humanitarian exceptions left to the voluntary consideration of Member States. The Council's Presidency is now calling for a further narrowing of the distinction between facilitation and solidarity (see Statewatch, *EU: Council lowers threshold for migrant smuggling prosecutions* www.statewatch.org. For an academic analysis, see: V Mitsilegas, 'The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law' (2019) New Journal of European Criminal Law 68.

The distinction between smuggling/facilitating and trafficking is also increasingly blurred in the EU official narrative; see M Gkliati, 'Registering Humanity: The EU's Plan to Halt Citizen-led Response to the Migration Crisis' (21 March 2016) Border Criminologies www.law.ox.ac.uk. D Rodrik, 'Solidarity at the Border: How the EU and US Criminalize Aid to Migrants' (2021) Berkeley Journal of International Law 81; M Martin, 'Prioritising Border Control over Human Lives: Violations of the rights of migrants and refugees at sea' (June 2014) Euro-Mediterranean Human Rights Network (EMHRN) Policy Brief www.statewatch.org.

[50] See e.g. Associazione per gli Studi Giuridici sull'Immigrazione. Le zone di Transito e di Frontiera, *Commento al decreto del Ministero dell'Interno del 5 agosto 2019 (G.U. del 7 settembre 2019, n. 210)* www.asgi.it. This terminology effectively blurs the concept of border, and consequently of jurisdiction, enabling the application of the border procedure foreseen in the Screening Regulation to an undefined area. See also K S Follis, 'Vision and Transterritory: The Borders of Europe' (2017) Science, Technology, & Human Values 1003.

jure belonging to one territory and jurisdiction, hence to the *normal* legal regime applicable therein; and the mandate creep of specialised agencies that see new tasks conferred upon them during the operationalisation of crisis responses – tasks that are hardly compatible with their legal remit (again, just to be legalised ex-post).[51]

The absence of a robust legislative intervention at source leaves wide margins for executive experimentalism and governance through soft law to intervene to fill the gaps.[52] These measures tend to show their shortcomings in terms of compatibility with existing legal and democratic fundamentals, i.e., because of their ad hoc nature, narrow functional scope, or rushed through designing, they are often found to lack minimum safeguards, redress mechanisms, monitoring and accountability processes, or to be conflicting with other legislation (output legitimacy). But more importantly, executive governance is increasingly intervening in the space of regulation of public interests, creating the embryos of new legal situations, and leading the practice of what is later on locked in in law. In itself, such tipping of the balance of public powers towards the executive branch gives rise to issues of input legitimacy as it erodes the normal process of political deliberation that occurs within the legislative. It directly violates the principle of legality for it allows the legal norm to be integrated by a mechanism that leaves to the executive "the due to define completely the structure and the limits of the safeguard of the interests involved".[53]

While executive empowerment is a common trend to other liberal democratic regimes, when this occurs in the EU constitutional order it is even more problematic, as, on the one hand, the EU level of governance is more distant from its constituencies, and, on the other hand, the law and policy that derive therefrom are more "sticky" vis-a-vis their addressees.[54] Democratic deliberation is more cumbersome at the EU level, because it requires a wider consensus not only between political parties but also between different national political cultures. Where such deliberative process is rendered even more difficult by the sensitivity or politicisation of the matters at stake, like in the case of migration, we observe an even greater marginalisation of the legislative action to the benefit of executive dominance. To prove the point, suffice it to observe that other (less politically loaded) crises resulted in a peak of legislation enacted to tackle them,[55] while the migrant

[51] N Perkowski, M Stierl and A Burridge, 'The evolution of EUropean Border Governance through Crisis: Frontex and the Interplay of Protracted and Acute Crisis Narratives' (2023) Environment and Planning D: Society and Space 110.

[52] J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' cit.

[53] P Capoti, 'Il delitto di usura "bancaria"' (Doctoral thesis, University of Padua, 2010). Argument made on the integration of criminal law norms, but applies also in general.

[54] F de Witte, MCEL presentation (Maastricht 2023). Characterized EU law as 'sticky'.

[55] K Armstrong, 'New Governance and the European Union: An Empirical and Conceptual Critique' in G De Búrca, C Kilpatrick, J Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Hart Publishing 2013) 267. Also, T A Börzel and T Risse, 'From the euro to the Schengen crises: European integration theories, politicization, and identity politics' cit.

crisis has mostly been addressed by means of policy responses deemed *necessary*. But invoking necessity is an intrinsically "political claim, not an existential condition".[56]

I argue that *precisely* where political deliberation resulting in legislative measures is difficult, we should have more of it. The regulation of public interests, especially when sensitive and highly politicised, *should* stem from lengthy discussions, cumbersome deliberation processes, and an attentive ponderation of the interests involved. The resulting comprehensive legal determination would leave little gaps for different narratives of the (legal) situation, or undetermined norm shaping by the executive. Demarcating good politics, those deliberating with the aim of balancing different public interests, from an arbitrary use of public power is needed to live up to the rule of law standards of the European liberal democratic orthodoxy.

V. Conclusion

The hotspot approach is a novel and controversial policy tool that has been used by the EU to manage the migration crisis since 2015. However, the legal status and functioning of the hotspots remain unclear and contested, as they operate in a complex and dynamic legal framework that involves multiple actors and levels of governance. This *Article* highlights the need for a clear and comprehensive legal determination of the hotspots and their procedures. Without such a legal determination, the hotspots risk becoming sites of arbitrariness, insecurity and injustice.

The hotspots approach qualifies as a measure of exception that subverts the normal democratic order and infringes on fundamental liberties, the balance of public powers and the principle of legality. The executive branch effectively shapes new legal concepts, situations, and regimes that are later on validated by the legislative and judicial branches, thus bypassing the normal process of democratic deliberation and political accountability. A way forward for addressing these issues is to ensure that any future measures of emergency is subject to rigorous legal scrutiny and public debate, avoiding legal codification of norms that were not legally deliberated by the lawmaker –so not to become measures of exception.

The *Article* calls for more substantive legislative intervention and political deliberation in the regulation of public interests, especially when they are sensitive and highly politicised, as in the case of migration.

[56] CASE Collective, 'Critical approaches to security in Europe: A networked manifesto' (2006) Security Dialogue 443.

ARTICLES

JUDICIAL EUROPEANISATION THROUGH DECONSTITUTIONALISATION: THE CASE OF THE ANALOGOUS APPLICATION OF THE CITIZENSHIP DIRECTIVE

EFTYCHIA CONSTANTINOU*

TABLE OF CONTENTS: I. Introduction. – II. The Court's ability to influence policies. – III. Research design – IV. The analogous application of the Directive – IV.1. Periods of residence completed under Directive 68/360 – IV.2. Free movers returning to their Member State of origin – IV.3. Free movers naturalised in the host Member State – V. National responses to the analogous application of the Directive – V.1. Periods of residence completed under Directive 68/360 – V.2. Free movers returning to their Member State of origin – V.3. Free movers naturalised in the host Member State – V.4. Same-sex spouses – VI. Judicial Europeanisation through deconstitutionalisation – VII. Concluding remarks.

ABSTRACT: The Court of Justice of the European Union (the Court) is often hailed as a pioneer in integration through law. Existing scholarship on the Court's judicial power overwhelmingly focuses on constitutionalisation and the horizontal policy dimension. As a result, the judicial techniques behind the Court's policy-making and the ensuing implications for domestic policies remain largely understudied. The recent deconstitutionalisation of EU law begs the question as to whether the Court can steer national policies through its case-law without constitutionalising policy outcomes. The *Article* responds to this gap, by empirically investigating the legal techniques underpinning the Court's policy-making in a deconstitutionalised manner and the ensuing implications for Member States' policies. The analysis examines the legal reasoning in all cases where the Court applies the provisions of Directive 2004/38 by analogy, as an example of the deconstitutionalisation process, and traces the responses of all Member States to the Court's jurisprudence. The findings illustrate that the creation of rights through the analogous application of Directive 2004/38 enables the Court to diplomatically balance competing interests and is successful in generating judicial Europeanisation in the domain of migration.

KEYWORDS: Court of Justice of the European Union – European citizenship – judicial Europeanisation – deconstitutionalisation – integration through law – migration policy.

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I. Introduction

The Court of Justice of the European Union (the Court) is widely hailed as a pioneer in integration through law as its rulings are capable of fostering Europeanisation.[1] The scholarly debate on judicial power is primarily centred on the Court's ability to independently further European integration, with a strong focus on constitutionalisation and the horizontal policy dimension.[2] The judicial techniques underpinning the Court's policy-making and the ensuing implications for domestic policies remain largely understudied.

Scholarship on the Court's horizontal policy impact implicitly touches upon the judicial techniques used by attributing the Court's capacity to steer policy developments to the extensive constitutionalisation of European Union (EU) law.[3] Under the "dynamic view",[4] the EU legislator is expected to codify the Court's interpretation of the Treaties as the "joint-decision trap"[5] deems a constitutional override highly unlikely.[6]

Similarly, judicial Europeanisation literature, studying changes in Member States stemming from Court-driven integration, does not examine whether the observed policy changes resulted from the Court's interpretation of Treaty provisions or secondary law.[7] Wasserfallen alludes to a link between constitutionalisation and judicial Europeanisation by arguing that the Court's jurisprudence cannot influence domestic policies unless it is first codified into EU legislation.[8]

[1] M Cappelletti, M Seccombe and JHH Weiler, *Integration Through Law: Europe and the American Federal Experience. A General Introduction* (De Gruyter 1986); A-M Burley and W Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) International Organization 41; A Stone Sweet, *The Judicial Construction of Europe* (1st edn Oxford University Press 2004).

[2] SK Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press 2018); DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' (2016) JComMarSt 846; A Stone Sweet and T Brunell, 'The European Court of Justice, State Non-compliance, and the Politics of Override' (2012) AmPolSciRev 204.

[3] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit. 846 ff; A Stone Sweet, *The Judicial Construction of Europe* cit.; SK Schmidt, 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of "Over-Constitutionalisation"' in D Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017) 17.

[4] DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* cit.

[5] FW Scharpf, 'The Joint-Decision Trap: Lessons From German Federalism and European Integration' (1988) Public Administration 239.

[6] SK Schmidt, 'Governing by Judicial Fiat? Over-Constitutionalisation and its Constraints on EU Legislation' in M Dawson and M Jachtenfuchs (eds), *Autonomy without Collapse in a Better European Union* (Oxford University Press 2022) 105; RD Kelemen, 'The Political Foundations of Judicial Independence in the European Union' (2012) Journal of European Public Policy 43.

[7] SK Schmidt, 'Judicial Europeanisation: The Case of Zambrano in Ireland' (2014) West European Politics 769; M Blauberger, 'National Responses to European Court Jurisprudence' (2014) West European Politics 457.

[8] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' (2010) Journal of European Public Policy 1128.

The need to focus on the mechanisms of judicial law-making is exacerbated by the Court's deconstitutionalisation of EU law in recent judgments.[9] Deconstitutionalisation is broadly understood as a process "shifting attention from the right enshrined in primary law to the rights provided for in secondary law".[10] This process marks a stark departure from the Court's preferred law-making mechanism where a broad interpretation of the Treaties is relied upon to advance integration.[11] Given the change identified in the Court's interpretive methods, it is timely to examine whether the Court can still influence national policies through its jurisprudence and generate judicial Europeanisation without strictly constitutionalising policy outcomes.

This *Article* aims to respond to the gap identified in the scholarship by empirically investigating the legal techniques underpinning the Court's policy-making in a deconstitutionalised manner and the ensuing implications for Member States' migration policies. By studying together deconstitutionalisation and judicial Europeanisation the *Article* seeks to examine whether the two processes are mutually exclusive or alternatively, whether changes in domestic policies are observable in the absence of constitutionalisation. It does so by analysing all cases in which the Court applies the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter "the Directive") by analogy to situations falling outside its strict scope, tracing changes in national migration policies concerning Union citizens and their third country national (TCN) family members.[12] The *Article*, therefore, first asks the question of how the Court creates rights and drives policy through the process of deconstitutionalisation and second if the Court's deconstitutionalised policy-making can successfully generate judicial Europeanisation in domestic migration policies.

The case of the analogous application of the Directive to situations falling outside its scope provides a good test-ground for examining the Court's ability to generate policy change in the national domain while simultaneously engaging in a process of deconstitutionalisation. The Court's analogous application of the Directive is a prime example of the deconstitutionalisation process as the Court frequently applies the provisions of the Di-

[9] C Moser and B Rittberger, 'The CJEU and EU (de-)Constitutionalization: Unpacking Jurisprudential Responses' (2022) ICON 1038; E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' in N Cambien, D Kochenov and E Muir (eds), *European Citizenship under Stress* (Brill Nijhoff 2020) 170.

[10] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit. 177.

[11] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.

[12] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

rective by analogy through the interpretation of Treaty provisions and in doing so redirects the analysis to secondary law.[13] Furthermore, in instances where Treaty provisions are subject to the analogous application of the Directive, the constitutional anchorage of such rights does not shield them from a subsequent legislative override. This is because the legislator could in principle change the conditions enclosed in secondary law which guard the enjoyment of the primary right.[14] The case of the analogous application of the Directive further offers a wider access point than the analysis of a single judgment or a group of judgments concerning the same topic.

The *Article* is structured as follows. Section II presents the theoretical framework and provides an overview of the Court's ability to influence policies. The *Article* design is briefly outlined in Section III. Section IV analyses the legal reasoning in all cases where the provisions of the Directive are applied by analogy. Section V provides a follow-up to the Court's jurisprudence and highlights if and how judgments where the Court applies the Directive by analogy were implemented at national level. Section VI elaborates on the finding of judicial Europeanisation through deconstitutionalisation, characterised by the Court's expansion of citizenship rights through the analogous application of the Directive and the subsequent successful implementation of these judgments by Member States. The final section concludes.

II. The Court's ability to influence policies

Due to the overarching effect of judgments on the behaviour of other actors, the Court can, and often does, provide solutions to socio-political issues and generates policy change. The Court's judgments can influence the policy domain in a two-fold manner; through their implementation they can lead to changes in domestic laws and administrative practices, while on a supranational level they can prompt changes in EU legislation.[15]

Martinsen aptly captures the scholarly debate surrounding the Court's ability to generate policy change on either a supranational or domestic level through Rosenberg's dichotomy[16] as between the "dynamic" and "constrained" views of the judiciary.[17] Following the dynamic view, the Court can trigger policy change at a supranational level by constitutionalising policy outcomes and judicialising politics. The constitutionalisation of EU law

[13] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.

[14] *Ibid*.

[15] DS Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' (2015) Comparative Political Studies 1622.

[16] GN Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (3rd edn The University of Chicago Press 2023).

[17] DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* cit.

places the Court at the forefront of the EU policy-making process.[18] In interpreting Treaty provisions as mandating a specific policy direction, the Court insulates itself, and its jurisprudence, from the court-curbing mechanism of legislative override.[19] Judgments interpreting Treaty provisions cannot be corrected by ordinary legislation and can only be subject to a constitutional override, which is deemed unlikely in the fragmented EU political set-up.[20] The Court therefore, in interpreting the Treaties generates two related effects; higher protection is afforded to the rights concerned, and the processing of disagreement on the scope and substance of such rights through ordinary political channels is discouraged.[21] As a result, the power of the Court *vis-à-vis* the EU legislator is enhanced.

The dynamic view further highlights judicial Europeanisation by tracing changes in Member States stemming from Court-driven integration. Scholarly accounts provide empirical support for the dynamic view by pointing to the presence of judicial law-making in areas of high political salience,[22] and to the replacement of the nation state by the Court as the main "welfare rights-generator".[23] Schmidt's analysis of the prompt implementation of the changes required by the *Ruiz Zambrano*[24] ruling in Ireland further suggests that judicial Europeanisation can be observed even in instances with limited political mobilisation and low costs of legal uncertainty.[25] Under the dynamic view, the Court is also perceived as able to constrain the domestic legislator's room for manoeuvre even in cases of non-compliance as this activates the legal system.[26] This is due to the unique enforcement system resulting from the direct effect and supremacy doctrines which enable the Court to rely on private litigants and national courts to enforce its rulings.[27]

The constrained view, on the other hand, questions the Court's ability to independently generate policy change on both national and supranational levels. On a supranational level,

[18] SK Schmidt, 'No Match Made in Heaven. Parliamentary Sovereignty, EU Over-Constitutionalization and Brexit' (2020) Journal of European Public Policy 779.

[19] RD Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) Law&ContempProbs 117; SK Schmidt, *European Court of Justice and the Policy Process: The Shadow of Case Law* cit.

[20] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit. 849 ff; A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) Living Reviews in EU Governance www.europeangovernance-livingreviews.org.

[21] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.

[22] DS Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' (2011) Journal of European Public Policy 944.

[23] M Wind, 'Post-National Citizenship in Europe: The EU as a Welfare-Rights Generator' (2009) ColumJEurL 239.

[24] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

[25] SK Schmidt, 'Judicial Europeanisation: The Case of Zambrano in Ireland' cit. 781.

[26] A Stone Sweet and T Brunell, 'The European Court of Justice, State Non-compliance, and the Politics of Override' cit.

[27] JHH Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) Comparative Political Studies 510.

this strand of the scholarship regards the Court's discretion as exercised only within the political boundaries as signalled by Member States' preferences.[28] Furthermore, even though a legislative override is unlikely, the EU legislator can constrain the effect of judicial decisions when they interpret secondary law through modification and non-adoption strategies.[29]

The ability of the Court's judgments to generate a vertical policy impact is also perceived as conditioned by a wide range of factors. Wasserfallen argues that due to national implementation problems, activist judicial rulings cannot influence domestic policies unless they are first incorporated into EU legislation.[30] For Conant, in the absence of legal mobilisation, the legal ambiguity underpinning the Court's law-making allows domestic policy-makers to implement rulings to the particular facts without embarking on policy reforms necessary to materialise their wider implications.[31] This view is challenged by the anticipatory obedience thesis which argues that legal ambiguity provides leverage for litigants to pressure domestic policy-makers into pro-actively going beyond what the Court's jurisprudence requires out of fear for further litigation and Court-driven policy change.[32] Blauberger provides the middle ground in arguing that national responses to the Court's rulings depend on the distribution of the costs of legal uncertainty between supporters and challengers of existing domestic rules.[33]

The review of the literature on the Court's policy impact highlighted the implicit link between judicial power and the interpretation of primary or secondary law. The interpretation of Treaty provisions is associated with the Court's expansion of EU law and judicial activism. The strong focus on constitutionalisation suggests that the Court is only able to influence policy outcomes, both horizontally and vertically, by interpreting the Treaties as mandating a specific policy outcome. Conversely, extensive reliance on secondary law manifests greater deference to the legislator and the interests of Member States.[34]

[28] O Larsson and D Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) International Organization 377.18/10/2024 08:55:00

[29] DS Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' cit.; DS Martinsen, *An Ever More Powerful Court?: The Political Constraints of Legal Integration in the European Union* cit.

[30] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.

[31] LJ Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2018).

[32] SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' (2008) Journal of Comparative Policy Analysis: Research and Practice 299.

[33] M Blauberger, 'National Responses to European Court Jurisprudence' cit.

[34] L Azoulai, 'The European Court of Justice and the Duty to Respect Sensitive National Interests' in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013) 167.

Emerging scholarship alludes to the deconstitutionalisation of EU law in recent years by flagging the Court's shift towards secondary law following a period of extensively interpreting Treaty-based rights.[35] The deconstitutionalisation of European citizenship is perceived by scholars as the Court's response to increasing contestation to the constitutionalisation of free movement and the continued judicial expansion of citizenship rights even after the Directive.[36] As existing scholarship is heavily focused on constitutionalisation and the Court's horizontal policy impact, the Court's vertical policy impact in the absence of constitutionalisation remains at best fuzzy.

Against this backdrop, it is of interest to examine first whether the Court can create rights and drive policy through the process of deconstitutionalisation, and second whether the Court's policy-making in a deconstitutionalised manner can effectively spur judicial Europeanisation.

III. Research design

In approaching the question, an empirical enquiry is conducted, examining the legal techniques underpinning the Court's policy-making in judgments where the Directive is applied by analogy and the ensuing implications for migration policies in all Member States.

All citizenship judgments in which the Court applies the provisions of the Directive by analogy are analysed. The narrow focus on the analogous application of the Directive allows for a more nuanced analysis of the judicial techniques underpinning the deconstitutionalisation process. As already noted, the analogous application of the Directive is exemplary of this process. Furthermore, the Directive itself constitutes a legislative intervention in response to the Court's judicial expansion of citizenship rights through constitutional interpretations.[37] Therefore, cases where the Directive is applied by analogy are representative of the Court's post-constitutionalisation era where greater emphasis is placed on the Directive and the limits to citizenship rights.

The data is extracted from the Curia website[38] using the keywords "applied by analogy" or "analogous application" and the subject-matter filter "Citizenship of the Union" provided in the search function. The selected phrases distinguish cases where the Court

[35] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.; N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) CMLRev 889.

[36] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.; SK Schmidt, 'Extending Citizenship Rights and Losing It All: Brexit and the Perils of "Over-Constitutionalisation"' cit.; SK Schmidt, 'No Match Made in Heaven. Parliamentary Sovereignty, EU Over-Constitutionalization and Brexit' cit.

[37] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit.; F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.

[38] Court of Justice of the European Union, *Info Curia: Case Law* curia.europa.eu.

is applying provisions by analogy from cases where Treaty provisions are read in conjunction with legislation without the latter conditioning the scope of the primary rights granted.[39] Furthermore, the subject-matter selection ensures that cases where the Court applies the provisions of other instruments by analogy are excluded from the analysis.[40]

The results are manually reviewed to ensure that all cases in fact concern the analogous application of the Directive. The manual review identified a false positive in *K.A.*[41] where the term appears in the question referred but the Court does not apply any provisions by analogy.

The Court applies the provisions of the Directive by analogy to situations falling outside its scope in eight citizenship judgments delivered from 2011 until 2023. The Court's reasoning is analysed, highlighting the interplay between primary and secondary law.

The second part examines the national policy impact of judgments in which the Court applies the provisions of the Directive by analogy in all Member States. It does so by relying on a mixture of primary and secondary sources. The analysis first examines reports produced by national experts documenting compliance with the Court's case-law in all Member States. The analysis of secondary sources is supplemented by an examination of national instruments transposing the Directive, including amended versions, where this information is publicly available and accessible. The scope of the analysis, which considers all Member States subject to the availability of information, is considerably broader than existing judicial Europeanisation studies which trace the responses of selected Member States.[42]

IV. The analogous application of the Directive

Legal rules tend to be vague which renders them indeterminate in their application, especially in cases found in the "penumbra" of the general meaning of the term.[43] This is intensified in the context of the EU as the open-textured nature of Treaty provisions leads to inevitable gaps.[44] The Court, pursuant to art. 267 TFEU, is entrusted with the task of according substance to normative principles and policy goals enclosed in vaguely formulated Treaty provisions through interpretation.[45]

[39] See *e.g.* case C-490/20 *Stolichna obshtina, rayon "Pancharevo"* ECLI:EU:C:2021:1008.

[40] See *e.g.* case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.

[41] Case C-82/16 *K.A. and Others (Family reunification in Belgium)* ECLI:EU:C:2018:308.

[42] SK Schmidt, 'Judicial Europeanisation: The Case of *Zambrano* in Ireland' cit.; M Blauberger, 'National Responses to European Court Jurisprudence' cit.

[43] HLA Hart, L Green, J Raz and PA Bulloh (eds), *The Concept of Law* (Oxford University Press 2012).

[44] FW Scharpf, 'Community and Autonomy: Multi-level Policy-making in the European Union' (1994) Journal of European Public Policy 219; A Arnull, *The European Union and Its Court of Justice* (2nd edn Oxford University Press 2006); MP Maduro, 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism' (IE Law School Working Paper WPLS08-02-2008).

[45] G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' cit.

EU law allows for rule-based reasoning by analogy when there is a lacuna in primary or secondary law which leaves room for judicial development.[46] The Court can apply a provision by analogy in so far as it can be shown that the rules applicable to the case at hand are very similar to those sought to be applied by analogy, and contain an omission which is incompatible with a general principle of EU law.[47] The Court has applied both primary and secondary law provisions by analogy across a wide range of fields.[48]

The provisions of the Directive have been applied by analogy to various situations falling outside its scope. The Court through the interpretation afforded to Treaty provisions in effect subsumed under the beneficiaries of the Directive free movers returning to their Member State of origin, free movers naturalised in the host Member State and their respective family members. Notably, the situations of returning free movers and naturalised free movers fall outside the scope of art. 3 of the Directive which limits the applicability of the provisions enclosed to "Union citizens who move to or reside in a Member State other than that of which they are a national".[49] The Court also extended the rights granted in art. 16 of the Directive in certain circumstances to holders of a residence permit issued under Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (hereinafter Directive 68/360).[50] The following sub-sections examine the legal reasoning in all cases where the provisions of the Directive were applied by analogy to periods of residence completed under Directive 68/360, free movers returning to their Member State of origin and free movers naturalised in the host Member State.

IV.1. Periods of residence completed under Directive 68/360

The practice of applying the provisions of the Directive by analogy first transpired in *Dias*.[51] The Court applied the rule enclosed in art. 16(4) of the Directive by analogy to periods in the host Member State completed on the basis of a residence permit validly issued under Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years legal residence completed prior to that date.[52]

[46] K Langenbucher, 'Argument by Analogy in European Law' (1998) CLJ 481.

[47] Case C-165/84 *Krohn v BALM* ECLI:EU:C:1985:507 para. 14.

[48] ND Tellis, 'Expansion of the Applicability of EU Company Law Directives via Analogy? A Study Based on the Example of Greek Sea Trading Companies' (2008) European Company and Financial Law Review 353; E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.

[49] Art. 3 Directive 2004/38/EC cit.

[50] Directive 68/360/EEC of the Council of 15 October 1968 on the abolition of restrictions on the movement and residence within the Community for workers of Member States and their families.

[51] Case C-325/09 *Dias* ECLI:EU:C:2011:498.

[52] *Dias* cit. para. 65.

In *Dias* the analogous application of the Directive was justified on the basis of filling a lacuna found in the Directive. The legal gap stems from the fact that the right of permanent residence provided for by the Directive could only be acquired from 30 April 2006. Therefore, periods of continuous legal residence of five years completed before that date could not be relied upon to acquire such right.[53]

Through the analogous application of the Directive to the facts, the Court fills the legal gap without resorting to the interpretation of the Treaties, as suggested by the referring court.[54] The Court's preference for interpreting secondary citizenship rights, as opposed to primary citizenship rights, could be perceived as a sign of deference to the political compromise embodied in the Directive. The Directive was relatively new at the time and many questions were pending as to how its provisions, especially the novel concept of permanent residence enshrined in art. 16, are to be interpreted.[55] The Court therefore, filled the lacuna by building on existing political guidance as opposed to creating a parallel stream of rights grounded in the Treaties.

The analogous application of the Directive further allows the Court to strike a balance between the grant of rights and sensitive national interests. Even though the Court in essence expands the scope of art. 16 of the Directive, it still protects public finances through the interpretation of the term "absence from the host Member State". In *Dias* the term is interpreted as including instances where an individual is absent from the labour market although physically present in the host Member State.[56] This understanding is limited to periods of residence completed under Directive 68/360 where the Directive only applies by analogy. According to the Court, "the integration link between the person concerned and that Member State is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence".[57] The qualification of the scope of art. 16(4) of the Directive in such cases where the provision only applies by analogy partially offsets the effect of the analogous application of the Directive on public finances. This is because the status of permanent residence granted by art. 16(1) of the Directive allows EU citizens to circumvent the conditions enclosed in arts 6 and 7 of the Directive intended to protect public finances.

[53] *Ibid*. para. 57.

[54] *Ibid*. para. 33.

[55] E Guild, S Peers and J Tomkin, *The EU Citizenship Directive: A Commentary* (2nd edn Oxford University Press 2019) 213 ff.

[56] *Dias* cit. paras 63-64.

[57] *Ibid*. para. 63.

IV.2. Free movers returning to their Member State of origin

The Court repeatedly applied the content of the Directive by analogy to Union citizens returning to their Member State of origin upon having resided in another Member State through the interpretation of art. 21 TFEU. This pattern first emerged in the *O. B.*[58] judgment delivered in 2014. The case concerned the residence rights of TCN family members of Dutch nationals in the Netherlands following the return of the latter to their Member State of origin after short periods of residence in another Member State. The Court interpreted art. 21(1) TFEU as meaning that Union citizens who created or strengthened a family life with a TCN during their residence in a Member State other than that of which they are a national, in conformity with the conditions of the Directive, can upon their return to their Member State of origin enjoy the rights enshrined in the Directive.[59]

The application of the Directive via the interpretation of art. 21 TFEU to free movers returning to their Member State of origin is justified on the basis of filling a legal lacuna. In *O. and B.* the Court asserts that a literal, systematic and teleological interpretation of the Directive precludes the establishment of a derived right of residence for a TCN family member of a Union citizen in the Member State of which that citizen is a national.[60] At the same time, the Court highlights the undesirable consequences of denying TCN family members of Union citizens in circumstances such as those of the applicants a derived right of residence. The undesirability of denying such rights is emphasised by the parallels drawn with the situations of workers returning to their Member State of origin and Union citizens residing in a Member State other than of which they are a national. First, the Court's analysis reiterates that the *Surinder Singh* and *Eind*[61] judgments established such derived rights in the context of workers.[62] The Court states that the same logic of removing the same type of obstacle on leaving the Member State of origin underpinning the return of workers exists in situations such as those in the main proceedings. [63] Second, the Court notes that the Directive grants such rights to a TCN who is a family member of a Union citizen where that citizen has exercised his or her right of freedom of movement by becoming established in a Member State other than the Member State of which he or she is a national.[64] Therefore, the Court suggests that the persistence of this legislative lacuna creates an obstacle to leaving the Member State of origin for Union citizens and would undermine the effectiveness of art. 21(1) TFEU.[65]

Given the Court's emphasis on the pivotal role of such derived rights in safeguarding the effectiveness of art. 21(1) TFEU, it follows that such rights should be first granted to

[58] Case C-456/12 *O. and B.* ECLI:EU:C:2014:135.
[59] *Ibid*. para. 61.
[60] *Ibid*.paras 37-43.
[61] *Surinder Singh* cit.; case C-291/05 *Eind* ECLI:EU:C:2007:771.
[62] *O. and B.* cit. para. 46.
[63] *Ibid*. paras 47, 51.
[64] *Ibid*. para. 50.
[65] *Ibid*. paras 51-55.

all returning citizens who exercised their free movement rights, and second be afforded the maximum level of protection against legislative override. As the situation falls outside the scope of the Directive, the Court was in principle under no obligation to apply the provisions of the Directive by analogy, and thus condition the enjoyment of such rights on the requirements outlined in arts 7 and 16 of the Directive.

Against this backdrop, the interpretation of art. 21(1) TFEU as mandating the analogous application of the conditions set out in arts 7 and 16 of the Directive seems to be a panacea as it deters the undesirable consequences of maintaining the lacuna while respecting sensitive national interests. In applying the conditions of the Directive by analogy, the Court leaves it up to Member States to determine whether the sponsors genuinely resided in the host Member State and whether a derived right of residence was enjoyed by the TCN family member pursuant to and in conformity with art. 7(2) or art. 16(2) of the Directive.[66] The Court limits the scope of this principle by making such derived rights of residence conditional upon satisfying the provisions of the Directive. As a result of this formula, according to Muir, the provisions of the Directive in a sense provide a gateway to art. 21 TFEU.[67] The Court further makes a distinction between residence under arts 6 and 7 of the Directive, concluding that residence in the host Member State under art. 6 of the Directive would not suffice for unlocking the rights granted under art. 21 TFEU.[68] In doing so, the Court strikes a pragmatic balance between free movement and the financial and sovereign interests of Member States.

In *Chavez-Vilchez and Others* (hereinafter *Chavez-Vilchez*)[69] the Court briefly addressed the analogous application of the Directive to situations of returning citizens. The Court stressed that before examining the situation under art. 20 TFEU it is first appropriate to consider whether a derived right of residence could be established based on art. 21 TFEU and the Directive.[70] In doing so, the Court implicitly clarified how this newly developed legal formula fits in the broader tapestry of citizenship provisions. In *Chavez-Vilchez* the Court elaborates on its *O. and B.* ruling by stressing that it is for the referring court to assess whether the conditions of the Directive are met for the purposes of conferring a derived rights of residence based on art. 21 TFEU and the Directive.[71] The Court also emphasised the function of arts 5-7 of the Directive as gatekeepers of the rights enshrined in art. 21 TFEU in such situations.[72]

[66] *O. and B.* cit. para. 57.

[67] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.

[68] *O. and B.* cit. paras 52, 59.

[69] Case C-133/15 *Chavez-Vilchez and Others* ECLI:EU:C:2017:354.

[70] *Ibid*. paras 56-57.

[71] *Ibid*. para. 56.

[72] *Ibid*. paras 55-56.

Coman and Others (hereinafter *Coman*)[73] offers another illustration of the Court's careful balancing between individual rights and sensitive national interests through the analogous application of the Directive. The Court held that a TCN same-sex spouse of a Union citizen has a derived right of residence in circumstances such as those in the main proceedings under art. 21(1) TFEU on conditions which cannot be stricter than those laid down in art. 7 of the Directive. The Court recalled its earlier case-law on returning free movers, concluding that Mr. Hamilton can enjoy a derived rights of residence in Romania under art. 21 TFEU since Mr. Coman during the period of his genuine residence in Belgium pursuant to art. 7 of the Directive created or strengthened a family life with him.[74]

The Court's reference frame in *Coman* entails a mixture of primary and secondary law. In considering the first question, the Court asserts that the rights enshrined in art. 21 TFEU include "the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State".[75] It then interprets the term "spouse" as gender-neutral through a close reading of art. 2(2)(a) of the Directive. The Court's analysis reassures Member States that they are not required to provide for same-sex marriages under their national laws. The Court stressed that Member States' obligations are limited to the recognition of such marriages concluded in other Member States for the purposes of granting a derived right of residence to a TCN under the Directive.[76] The Court underlines the difference in the application of arts 2(2)(b) and 2(2)(a) of the Directive in clarifying that the latter, applicable to same-sex spouses, is not conditional on national laws. Member States cannot rely on national law to justify their failure to recognise a marriage concluded between same-sex couples in another Member State in accordance with the law of that state for the purposes of granting a derived right of residence to a TCN.[77]

Muir points to the duality found in the Court's analysis, as on the one hand, the interpretation of the term "spouse" is reasoned exclusively on the basis of secondary legislation, while the rest of the judgment is characterised by a "constitutional level of protection of the right".[78] The change in the level of analysis illustrates the Court's awareness of the political sensitivity of the topic and the need to carefully balance individual rights and Member States' interests. The Court perceives the divergent national approaches towards the recognition of same-sex marriages as conditioning free movement rights on national laws.[79] As this is at odds with the rationale underpinning freedom of movement,

[73] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385.

[74] *Ibid*. paras 23-26.

[75] *Ibid*. para. 32.

[76] *Ibid*. para. 45.

[77] *Ibid*. para. 36.

[78] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit. 195.

[79] *Coman and Others* cit. para. 39.

the Court attempted to remedy this issue by interpreting the term "spouse" for the purposes of the Directive in a gender-neutral way.[80] Notably, the analogous application of the Directive to the case at hand allows the Court to abstain from interpreting the term "spouse" as gender-neutral in the context of art. 21 TFEU. The Court by limiting its interpretation of the term "spouse" to art. 2(2)(a) of the Directive leaves open the possibility for Member States to override this understanding through secondary legislation. After all, the term "spouse" was the result of a political compromise and was purposely drafted in an ambiguous manner to avoid further divisions amongst Member States.[81] The Commission during the drafting of the Directive was of the view that the wording should not oblige Member States to amend their family laws, an area falling outside EU legislative competences.[82] Even though the situation has changed since the introduction of the Directive, as most Member States now recognise same-sex marriages, constitutional bans on same-sex marriage still exist in some Member States. The Court, therefore, by limiting its interpretation to art. 2(2)(a) of the Directive seems to share these concerns and demonstrates respect for Member States' competences.

Altiner and Ravn[83] stands out for being the only judgment where the frame of the analysis determined by the national court is preserved. The referring court sought an interpretation of art. 21 TFEU read in conjunction and by analogy with the Directive, thus demonstrating its familiarity with the Court's earlier case-law and the nexus between the two sources of rights.[84] The Court laconically reaffirmed that the conditions for granting a derived right of residence on the basis of art. 21(1) TFEU to a TCN family member of a Union citizen upon the return of that citizen to the Member State of which he or she is a national should not, in principle, be stricter than those provided for by the Directive.[85]

Lastly, in *Banger*[86] art. 3(2)(b) of the Directive is applied by analogy to situations of returning free movers and their unregistered partners.[87] The Court's reasoning in *Banger* closely follows the earlier case-law and grants residence rights to a TCN unregistered partner of a returning free mover in the latter's Member State of nationality under art. 21 TFEU subject to the provisions of the Directive.

[80] *Coman and Others* cit. paras 37-38.

[81] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* (DJØF 2014) 65, 84.

[82] U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* cit.

[83] Case C-230/17 *Deha Altiner and Ravn* ECLI:EU:C:2018:497.

[84] *Ibid*. para. 18.

[85] *Ibid*. para. 27.

[86] Case C-89/17 *Banger* ECLI:EU:C:2018:570.

[87] *Ibid*. para. 35.

IV.3. Free movers naturalised in the host Member State

The Court in *Lounes*[88] applies the provisions of the Directive by analogy to free movers, naturalised in the host Member State. In *Lounes* the referring Court sought to clarify whether a Union citizen who naturalises in the host Member State following the exercise of the right to free movement under the Directive continues to benefit from its provisions while residing in the United Kingdom (UK), and holding both Spanish and British nationalities.[89] The Court held that even though the Directive does not cover such situations, the TCN spouse of a naturalised dual national, is eligible for a derived right of residence under art. 21(1) TFEU, on conditions which must not be stricter than those provided for by the Directive.[90]

The Court shifts the focus of the analysis on the interpretation of the Directive and art. 21(1) TFEU and the extent to which they can grant a derived right of residence to a TCN spouse of a Union citizen who has acquired the nationality of the host Member State following the exercise of free movement rights under art. 7(1) or art. 16(1) of the Directive.[91] The legal formula of granting rights based on art. 21 TFEU subject to the analogous application of the Directive is used in *Lounes* to freeze in time the rights acquired under the Directive. Capitalising on the paradox of stripping citizens of rights acquired by the exercise of free movement due to naturalisation, the Court expressed a desire to avert an inversely proportional relationship between rights and integration.[92]

The Court fills the legal lacuna by transplanting the formula of establishing rights on the basis of art. 21 TFEU subject to the analogous application of the Directive from the context of returning free movers to naturalised free movers. Nonetheless, the scope of the principle in the context of naturalised free movers seems to be greater than in situations of returning free movers. Citizens returning to their Member State of origin need to prove the creation and strengthening of the relationship with a TCN family member while residing in another Member State. This obstacle appears absent in situations of naturalised citizens. The fact that Ms. Ormazabal only married Mr. Lounes in 2014, long after her naturalisation in 2009, was not detrimental to the establishment of a derived right of residence for Mr. Lounes even though he was never a beneficiary of an analogous right under art. 16 of the Directive.[93]

The *Lounes* judgment was delivered at a pivotal point in the Brexit negotiations where an agreement on citizenship rights was still pending. By grounding such rights in constitutional law, the Court sets the tone for an agreement on the rights enjoyed by naturalised dual nationals and their TCN family members, which would later include British nationals, at the EU-UK negotiations. At the time, the EU legislator was, following *Metock*,[94]

[88] Case C-165/16 *Lounes* ECLI:EU:C:2017:862.
[89] *Ibid*. para. 27.
[90] *Ibid*. para. 62.
[91] *Ibid*. paras 28-30.
[92] *Ibid*. paras 56-60.
[93] *Ibid*. paras 15-16.
[94] Case C-127/08 *Metock and Others* ECLI:EU:C:2008:449.

under the impression that the rights of TCN family members are anchored in secondary law and can thus be subject to legislative corrections.[95] This was evident in the proposal to complement the Directive included in the 2016 Decision of the Heads of State or Government, Meeting within the European Council, Concerning a New Settlement for the United Kingdom within the European Union.[96] In *Lounes* the Court clarifies the constitutional anchorage of the rights concerned, suggesting that the scope of free movement rights for EU citizens and the derived rights enjoyed by their TCN family members, including those with no prior lawful residence, can only be altered through a Treaty reform.[97]

Yet, the judicial activism of grounding such rights in a constitutional interpretation appears to be contained by the analogous application of the Directive. The obstacle of overcoming the conditions laid down in the Directive provides a loophole for the EU legislator to limit the derived rights of residence enjoyed by TCN family members of naturalised free movers by elevating the conditions enclosed in secondary law.

Most recently, in *Chief Appeals Officer*,[98] the Court confirmed the analogous application of the Directive to situations of workers who upon exercising their freedom of movement acquired the nationality of the host Member State through the interpretation of art. 45 TFEU. The Court in *Chief Appeals Officer* held that "[e]ven though Directive 2004/38 does not cover a situation such as that referred to in paragraph 45 of the present judgment, it must be applied, by analogy, to that situation".[99] To guarantee the effectiveness of arts 21 and 45 TFEU, the Court granted a derived right of residence to family members of Union citizens who exercised their freedom of movement by working in another Member State and subsequently acquired the nationality of the host Member State.[100] On this basis, the Court concluded that Member States are precluded from refusing "to grant a social assistance benefit to a direct relative in the ascending line who, at the time the application for that benefit is made, is dependent on a worker who is a Union citizen, or even to withdraw from him or her the right of residence for more than three months".[101] Therefore, the Court's analogous application of the provisions of the Directive in *Chief Appeals Officer* appears to have migration and financial implications for Member States.

V. National responses to the analogous application of the Directive

This section provides a follow-up to the Court's jurisprudence, tracing policy developments in all Member States flowing from the analogous application of the Directive in the

[95] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit. 188.

[96] *Ibid*. 187.

[97] *Ibid*. 190.

[98] Case C-488/21 *Chief Appeals Officer and Others* ECLI:EU:C:2023:1013.

[99] *Ibid*. para. 48.

[100] *Ibid*. paras 46-47.

[101] *Ibid*. para. 72.

cases analysed above. Considering the divergent views in the scholarship as to the ability of the Court to impact national policies, the analysis seeks to elucidate whether the expansion of EU law through the process of deconstitutionalisation can lead to Europeanisation in national migration policies. The following sections survey national compliance with the *Dias*, *O. and B*. and *Lounes* judgments where the Court first applied the Directive by analogy to periods of residence completed under Directive 68/360, free movers returning to their Member State of origin and free movers naturalised in the host Member State respectively. The national responses to *Coman*, where the Court first interpreted the term "spouse" found in the Directive as gender-neutral, are also reviewed.

V.1. Periods of residence completed under Directive 68/360

The responses of the then 27 Member States to *Dias* fall in three categories. As a preliminary note, reports were not available for Denmark, France, Luxembourg and Spain. Furthermore, the issue of whether residence completed under Directive 68/360 counts towards the acquisition of a right of permanent residence was not relevant in Bulgaria and Romania due to their accession date.[102]

Most Member States were already in a position where compliance with *Dias* could be secured without changing existing national laws and policies. Under domestic law or established practices continuous periods of residence occurring before the transposition date of the Directive were already counted towards the acquisition of a permanent right of residence in Austria, Belgium, Estonia, Finland, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia and Sweden.[103] For example, in Estonian the Citizen of the European Union Act of 2006 counts periods of residence before its entry into force towards the acquisition of a permanent right of residence.[104] In Ireland, even though domestic law does not explicitly mention pre-transposition residence, public officials in the Irish Nationality and Integration Service indicated that pre-transposition residence was counted for such purposes even before *Dias*.[105]

The UK is the only Member State where national practices had to be modified to secure compliance with *Dias*. In the aftermath of the judgment, the Department for Work and Pensions in the UK circulated a guide advising administrators to treat *Dias* as a relevant determination while noting that decisions made before the date of delivery which would have been decided differently cannot be revised.[106]

[102] R Fernhout, 'Follow-Up of Case Law of the Court of Justice 2011-2012' (Nijmegen Migration Law Working Papers Series 2012) 108 ff.

[103] *Ibid*. 33 ff.

[104] *Ibid*. 122.

[105] *Ibid*. 114 ff.

[106] UK Department for Work and Pensions, Staff Guide, September 2011, Memo DMG 23/11 DWP para. 11.

The reports for the remaining six Member States, Cyprus, the Czech Republic, Germany, Greece, Latvia and Slovakia indicate that national legislation was ambiguous as to whether periods of residence completed before the transposition date of the Directive are taken into consideration.[107] Furthermore, there is no evidence to suggest that national administrators and courts in these Member States were confronted with a *Dias* scenario before the judgment.[108]

V.2. Free movers returning to their Member State of origin

The Court's ruling in *O. and B.* was successfully implemented by all Member States. In 21 Member States the rights granted by the Court in *O. and B.* were already safeguarded by national laws or administrative practices. National experts indicated that no changes were required in Austria, Croatia, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.[109] In Cyprus the national law transposing the Directive was amended in 2011 to include within its scope Cypriot citizens returning from another Member State after having exercised their free movement rights.[110] In Italy TCN family members of Italian nationals were already entitled to a derived right of residence as the Italian transposition of the Directive extends the family reunification rights provided therein to Italian nationals.[111] Yet, the Italian report documents minor changes in relation to the processing of applications by Italian nationals in response to the *O. and B.* judgment.[112] Similarly, in Sweden, despite the fact that Swedish law extends the rights granted by EU law to all Swedish nationals,[113] a 2014 legislative amendment fully harmonised the rights of Swedish returning nationals and the beneficiaries of the Directive.[114]

The remaining seven Member States correctly implemented *O. and B.* by promptly changing their national laws and administrative practices. National reports documented changes in line with the judgment in Belgium, Denmark, France, Lithuania and the Netherlands.[115] Furthermore, a 2017 amendment to the Bulgarian immigration laws grants residence rights to TCN family members of Bulgarian nationals returning to Bulgaria after

[107] R Fernhout, 'Follow-Up of Case Law of the Court of Justice' cit. 108 ff.

[108] *Ibid*.

[109] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' (2019) European Journal of Migration and Law 358.

[110] Law No. 181(I)/2011 adds paragraph (6) to article 4 of Law No. 7(I)/2007 www.cylaw.org.

[111] R Fernhout, 'Follow-Up of Case Law of the Court of Justice' cit. 72.

[112] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 367.

[113] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' cit. 74.

[114] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 367.

[115] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit.

exercising their free movement rights in another Member State. Even though the Bulgarian legislator opted for implementing the judgment by changing the law applicable to TCN instead of amending the national instrument transposing the Directive, the relevant provision specifies that the simplified procedure applicable to family members of Union citizens also applies to TCN family members of returning Bulgarians.[116] Lastly, in the UK the regulations implementing the Directive extended its scope to returning free movers in certain circumstances.[117] Despite being criticised for imposing stricter conditions on the grant of the rights concerned,[118] the UK rules mirror the conditions found in the Court's case-law as summarised by the Commission.[119]

The analysis illustrated that in most cases the personal scope of the Directive was already extended by national implementation measures to family members of returning nationals.[120] For example, in Finland the national rules transposing the Directive covered family members of returning free movers before the *O. and B.* judgment. In 2007 the national legislation transposing the Directive was amended to include in Section 153(4) AA "family members of a Finnish citizen if the Finnish citizen has exercised his or her right of free movement under the Directive by settling in another Member State, and the family member accompanies him or her to Finland or joins him or her later".[121] In other cases, such as Italy and Sweden, a liberal national transposition of the Directive extended its scope to even family members of static nationals. The *O. and B*. judgment thus had no observable impact on domestic migration policies in these Member States as such rights were already guaranteed by national law.

The impact of *O. and B.* is greater on the migration policies of Member States where the scope of the Directive was not already extended to such groups under national law. For example, in Denmark the Court's analogous application of the Directive to citizens returning to their Member State of nationality after only residing in another Member State led to significant changes in domestic migration policies. While *O. and B.* was pending before the Court, the Danish Western Appeal Court was confronted with a similar factual scenario.[122] The Danish court held that EU law was not applicable to a Danish citizen returning to Denmark accompanied by a TCN family member after having resided

[116] Foreigners in the Republic of Bulgaria Act, Article 24m www.mig.government.bg.

[117] UK Secretary of State, The Immigration (European Economic Area) Regulations 2016 of 2-3 November 2016 No. 1052, para. 9.

[118] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 368.

[119] Notice C/2023/1392 of the Commission of 22 December 2023, Guidance on the right of free movement of EU citizens and their families, para. 18.

[120] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' cit. 73.

[121] S Sankari and S Miettinen, 'Union Citizenship: Development, Impact and Challenges: Finland' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* cit. 513, 515.

[122] Danish Western Appeal Court judgment of 27 March 2012 B-1173-11 reported in U2012. 2187V.

in Germany without performing an economic activity in the host Member State, and on the basis of national immigration rules the national court denied the grant of a derived right of residence.[123] As already mentioned, Denmark changed its immigration laws in the aftermath of *O. and B.* and further established a mechanism for processing applications for family reunification with a Danish citizen under EU regulation.[124] The conditions imposed in fact mirror the content of the *O. and B.* judgment.

V.3. Free movers naturalised in the host Member State

The *Lounes* judgment meant that free movers and their TCN family members could continue enjoying the rights granted by the Directive even after the naturalisation of the former in the host Member State. Therefore, TCN family members of naturalised free movers no longer had to resort to domestic legislation to acquire a right of residence.[125]

The impact of the judgment is expected to be more noticeable in Member States where the family reunification rules applicable to their own nationals diverged significantly from the Directive. As reports by national experts are not available on this issue, the analysis focuses on two Member States, the Netherlands and the UK, which apply stricter rules to their own nationals than those applicable under the Directive.[126]

The guidance offered by the competent Dutch authority clarifies that the Directive also applies to Dutch nationals who lived in the Netherlands as an EU citizen in compliance with EU law before becoming Dutch nationals.[127] In the UK the Immigration (European Economic Area) Regulations of 2016 were amended in 2018 in line with *Lounes*. Following the amendments, Regulation 2 defines European Economic Area (EEA) nationals as including also "a national of an EEA State who is also a British citizen and who prior to acquiring British citizenship exercised a right to reside as such a national, in accordance with Regulation 14 or 15".[128] In contrast, the 2016 version defined EEA nationals as "a national of an EEA State who is not also a British citizen".[129] The amendment also adds Section A to Regulation 9 which applies to EEA nationals who acquired British citizenship

[123] C Jacqueson, 'Union citizenship: Limitations, Opportunities and Paradoxes – The Case of Denmark' in U Neergaard, C Jacqueson and N Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen* cit. 453, 469.

[124] The Danish Immigration Service, *Family reunification with a Danish citizen under EU regulations* nyidanmark.dk.

[125] E Spaventa, N Rennuy and P Minderhoud, *The Legal Status and Rights of the Family Members of EU Mobile Workers* (Publications Office of the European Union 2022).

[126] E Guild, 'EU Citizens, Foreign Family Members and European Union Law' cit. 372.

[127] Immigration and Naturalisation Service, *Dutch Nationals and EU Law* ind.nl.

[128] UK Secretary of State, The Immigration (European Economic Area) (Amendment) to the 2016 Regulations of 2-3 July 2018 No. 801, Regulation 2, para.1(b).

[129] UK Secretary of State, The Immigration (European Economic Area) Regulations (2016) No. 1052, para. 2.

and their family members.[130] As a result, naturalised free movers and their family members can benefit from the right of permanent residence.

The example of the UK best illustrates the constraining effect of *Lounes* on domestic migration policies. The legislative amendment grants TCN family members of naturalised free movers a derived right of residence subject to the conditions found in the Directive. The national immigration rules, previously applicable to such categories and still applicable to TCN family members of static British nationals, are stricter and more costly than those found in the Directive.[131] Furthermore, the Court's analogous application of the Directive in *Lounes* had a lasting impact on Brexit negotiations. As Davies rightly observes, the changes to the draft Withdrawal Agreement from December 2017 to February 2018 safeguard the rights of naturalised free movers post-Brexit in line with *Lounes*.[132] The subsequent EU Settlement Scheme indeed affords protection to TCN family members of Union citizens who were within the scope of the Directive and subsequently naturalised as British citizens.[133] This is commonly referred to as a Lounes Application.[134]

V.4. Same-sex spouses

To implement *Coman* Member States were required to recognise same-sex marriages for the purposes of granting a derived right of residence to TCN spouses of Union citizens in the context of the Directive and when it applies by analogy. As Nic Shuibhne and Shaw rightly point out, before *Coman*, the rights enjoyed by same-sex spouses of Union citizens greatly varied across Member States and this in turn negatively impacted the exercise of free movement rights.[135] Member States responded to the *Coman* ruling in three ways.

The first group consists of 23 Member States where no changes were required to comply with the judgment. Same-sex marriage was recognised before or shortly after the *Coman* judgment in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the UK.[136] As a result, the term "spouse" was already viewed as gender-neutral in the implementation of the Directive. Furthermore, no changes were required in Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy and Slovenia as registered partnerships between same-

[130] UK Secretary of State, The Immigration (European Economic Area) (Amendment) to the 2016 Regulations (2018) No. 801, para. 9.

[131] L Morales, 'Why is the judgement in *Lounes* important for the human rights of European nationals?' (29 May 2018) Morales Advisory Services www.morales.uk.

[132] G Davies, 'Lounes, Naturalisation and Brexit' (5 March 2018) European Law Blog europeanlawblog.eu.

[133] UK Home Office, *EU Settlement Scheme: EU, Other EEA and Swiss Citizens and their Family Members* assets.publishing.service.gov.uk.

[134] UK Government, *Home Office EU Settelemt Scheme Statistics: User Guide* www.gov.uk.

[135] J Shaw and N Nic Shuibhne, 'General Report: Union Citizenship: Development, Impact and Challenges' cit. 72.

[136] A Tryfonidou and R Wintemute, '*Obstacles to the Free Movement of Rainbow Families in the EU*' (Publications Office of the European Union 2021) 39.

sex couples were recognised under their national laws. Therefore, same-sex spouses of Union citizens were already entitled to a derived right of residence in these countries, although it is unclear whether such residence permits were issued with reference to a "spouse" or "registered partner".[137] As noted by Tryfonidou, the Court in *Coman* did not clarify whether Member States are under an obligation to attach the label "spouse" as opposed to "registered partner" when issuing a residence permit to same-sex spouses of Union citizens.[138] Consequently, the practices of these Member States are aligned with *Coman* as TCN same-sex spouses of Union citizens are entitled to a derived right of residence under the Directive and when it applies by analogy. Lastly, no changes were documented in Poland despite the country's stance on same-sex marriage. The Polish authorities stated that same-sex marriage was already accepted as proof for a durably attested relationship for the purposes of granting a derived right of residence under EU law.[139]

The shadow of *Coman* is more prominent in Member States where neither marriage nor registered partnerships between same-sex couples are recognised. The Court, in ruling that Member States must grant a derived right of residence to same-sex spouses of returning nationals regardless of whether such unions are legally recognised in that Member State, essentially mandates a policy change in the migration laws of these Member States. Changes in national laws or administrative practices were recorded in Bulgaria, Latvia, Lithuania, and Slovakia. For instance, in Bulgaria the Supreme Administrative Court confirmed on 24 July 2019 that same-sex couples married in another Member State are eligible for residence rights in Bulgaria.[140] No legislative changes were required to comply with *Coman* since the national law transposing the Directive broadly defines family members for the purposes of the status and rights conferred by art. 2(2) of the Directive as including "persons in factual cohabitation with a Union citizen".[141] In principle, same-sex couples could already benefit from this provision in so far as they were in a factual cohabitation. Nonetheless, considering Bulgaria's stance on same-sex marriages it is unlikely that same-sex spouses were granted a derived right of residence in practice before *Coman*.

Lastly, Romania, the Member State concerned in the proceedings, failed to implement *Coman*. The domestic instrument transposing the Directive was not amended to

[137] *Ibid*. cit. 45.

[138] *Ibid*. 44.

[139] D de Groot, 'Free Movement Rights of Rainbow Families' (June 2023) European Parliamentary Research Service www.europarl.europa.eu 16.

[140] A Tryfonidou and R Wintemute, '*Obstacles to the Free Movement of Rainbow Families in the EU*' cit. 43.

[141] Bulgarian Ministry of Interior, Law for Entering, Residing and Leaving the Republic of Bulgaria of European Union Citizens and Members of their Families of October 2006 Prom. SG. 80/3, Additional Provisions, Section 1(1)(a).

include same-sex spouses under the definition of family members.[142] The relevant Romanian authority, Inspectoratul General pentru Imigrări, continues to deny TCN same-sex spouses of Union citizens and returning Romanians a derived right of residence.[143]

EU institutions have taken various steps to force Romania to comply with *Coman*. The European Parliament's resolution of 14 September 2021 requested the Commission to assess Member States' compliance with *Coman* and initiate enforcement actions under art. 258 TFEU against those that failed to comply.[144] The resolution explicitly calls for the initiation of infringement procedures against Romania over its undeniable and ongoing failure to treat same-sex spouses as spouses for the purposes of granting free movement rights.[145] The actions of EU institutions suggest that it is relatively easy to identify the general implications of judgments where the Court applies the provisions of the Directive by analogy which in turn facilitates the monitoring of national compliance.

VI. Judicial Europeanisation through deconstitutionalisation

The two-fold analysis reveals the analogous application of the Directive to be a powerful judicial tool. Through this interpretive technique the Court managed to diplomatically balance conflicting interests and further integration, as these rulings were largely implemented by Member States. Against a background of growing accusations of over-constitutionalisation, judicial Europeanisation can thus be achieved through a process of deconstitutionalisation.

The analysis of the legal reasoning in all cases where the Directive was applied by analogy underlined how this formula facilitates the navigation of political complexities and conflicting interests. The flexibility afforded by this interpretive technique is best illustrated in *Dias* as the Court was able to tweak the conditions attached to art. 16 of the Directive in cases where it only applies by analogy through a tailored interpretation of the term "absence from the Member State". The interplay between primary and secondary law in cases where the provisions of the Directive are applied by analogy to returning and naturalised free movers further allows the Court to diplomatically balance free movement and sensitive national interests. As already discussed, the dual level of analysis in *Coman* enabled the Court to safeguard the effectiveness of free movement while respecting Member States' views on same-sex marriage. The responses of Member States which oppose same-sex marriages to *Coman* demonstrated that the Court's careful balancing of competing interests is successful in compelling compliance as these Member States implemented the judgment without changing their overall stance on same-sex marriage.

[142] Romanian Government Emergency Ordinance on the Legal Status of aliens in Romania of 12 December 2022 no. 194/2002, art. 46.

[143] A Tryfonidou and R Wintemute, '*Obstacles to the Free Movement of Rainbow Families in the EU*' cit. 42.

[144] Resolution 2021/2679(RSP) of the European Parliament of 14 September 2021 on LGBTIQ rights in the EU.

[145] Resolution 2021/2679(RSP) cit., para. 10.

Crucially, the analogous application of the Directive enables the Court to expand the scope of citizenship rights and drive policy developments without fuelling accusations of judicial activism and over-constitutionalisation. The Court, through the interpretation of art. 21(1) TFEU expands the scope of the Directive beyond what was agreed in the drafting process by Member States. As a result, certain groups excluded from the beneficiaries of the Directive can enjoy the rights enclosed therein. In such cases, the Court arguably interferes with the scope of rights enclosed in legislation through the interpretation given to the Treaties. These rights, stemming from a constitutional interpretation, are further shielded from corrective legislation, and can only be changed through a Treaty revision.

At the same time, the Court's reliance on secondary law when it comes to the conditions limiting the enjoyment of such rights could be perceived as a sign of judicial minimalism. The Court's analogous application of the Directive in such cases follows the letter of art. 21(2) TFEU which subjects the enjoyment of the rights enshrined in art. 21(1) TFEU to the conditions and limitations found in legislation. In theory the EU legislator can modify these rulings by altering the secondary legislation which conditions the primary rights. The emphasis on EU legislation therefore tones down the implications of constitutionalising these rights. As Muir aptly points out, the co-existence of primary and secondary law in such cases responds to over-constitutionalisation critiques and encourages Member States to process disagreements on the scope of such rights through political dialogue.[146] The Court's analogous application of the Directive to situations of returning and naturalised free movers could thus be situated between judicial activism and restraint.

The follow-up to the Court's jurisprudence demonstrated that the legal formula of expanding the scope of EU law through deconstitutionalisation effectively fosters judicial Europeanisation. In the judgments examined, the Court expanded the scope of EU law and issued decisions with indirect implications on policy areas of high political salience such as external migration, Brexit and same-sex marriages. High levels of national compliance were observed in response to the Court's analogous application of the Directive. Member States promptly changed their policies in line with the Court's jurisprudence where existing laws and administrative practices were not already compliant. Romania's response to *Coman* presents the only case of non-compliance.

The overall high levels of compliance, especially in the field of migration which is characterised by national political control and administrative discretion,[147] are likely due to three factors. First, the analysis illustrated how some Member States could secure compliance with the judgments without any need for change. In most instances national laws transposing the Directive extended its scope to periods of residence completed under

[146] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.194.

[147] DS Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' cit. 945.

Directive 68/360, nationals returning to their Member State of origin after residing in another Member State and same-sex spouses before the Court did. In such cases the national legislators extended the scope of the Directive beyond what was required under EU law. The extension of the rights granted by the Directive to economically inactive returnees and sometimes even static nationals under national law is likely due to reverse discrimination concerns or anticipatory obedience strategies. Some Member States, such as Italy, in an effort to combat reverse discrimination of nationals extended the right to family reunification provided by EU law to their own static nationals. Instances where Member States extended the scope of the Directive to economically inactive nationals returning from another Member State before the *O. and B.* judgment are likely due to anticipatory obedience strategies. Following the anticipatory obedience thesis,[148] the legal uncertainty resulting from *Surinder Singh*, which grants such rights to economically active returnees, likely incentivised national policy-makers to pro-actively reform their policies out of fear of further litigation.

Second, the high compliance rates observed could stem from the sufficiently clear implementation guidelines offered to Member States by the analogous application of the Directive. Existing scholarship identifies a chasm between the implementation of case-law and secondary law.[149] The analogous application of the Directive bridges this chasm as the Court by extending the scope of art. 3 of the Directive signals to Member States that these judgments are to be implemented in the same way as EU legislation. In fact, as the analysis illustrated, most Member States responded to the Court's analogous application of the Directive by amending existing national laws transposing the Directive to include the categories stipulated. The rights granted by the Court's case-law are further afforded a lasting protection by being incorporated into the national legal framework. This is best captured by the UK's response to *Lounes* where the national migration rules were first amended and were later safeguarded post-Brexit.

The sufficiently clear guidelines found in the Court's analogous application of the Directive further target national implementation problems discussed in the scholarship. Compliance, at both formal and administrative level, with judgments where the Directive applies by analogy is relatively easy as Member States already have in place the legal framework and administrative mechanisms for granting the rights in question. Conversely, compliance with judgments where the Court creates new rights through a constitutional interpretation often requires setting up new mechanisms.

[148] M Blauberger, 'National Responses to European Court Jurisprudence' cit.; SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' cit.

[149] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.; DS Martinsen, 'Judicial Policy-Making and Europeanization: The Proportionality of National Control and Administrative Discretion' cit.; SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' cit.

Furthermore, the analogous application of the Directive secures compliance with the general implications of judgments beyond the specific facts. It is often unclear how judicial rulings translate into policy, especially in cases where the Court interprets Treaty principles which are less detailed compared to secondary law.[150] As a result, Member States not addressed by the judgment tend to contain compliance by preserving national policies and only implementing the judgment to its specific facts.[151] The national responses to the Court's analogous application of the Directive offer evidence against contained compliance in this context as Member States, particularly those not targeted by the decisions, changed their policies and complied with the general implications of judgments.

Moreover, the analogous application of the Directive overcomes implementation issues at the administrative front. Existing literature suggests that national administrators need specific instructions to implement ambiguous judicial decisions which are often provided by domestic legislation.[152] National administrators across Member States proved to be responsive to judgments where the Court applies the Directive by analogy. As illustrated by the UK's response to *Dias*, national administrators directly implemented the Court's rulings where the provisions of the Directive were applied by analogy in the absence of domestic legislative amendments.

Third, Romania's response to *Coman* illustrates that cases of non-compliance can be easily detected when the Court applies the Directive by analogy. In the only case of non-compliance considerable efforts were taken by EU institutions to ensure Romania's compliance with *Coman*. Therefore, as non-compliance is easily detectable in such cases, Member States have an incentive to promptly implement the Court's rulings where the provisions of the Directive are applied by analogy.

VII. Concluding remarks

The scholarship unveiled the Court's shift towards the interpretation of secondary citizenship rights in recent judgments, after years of consistently shaping the scope and substance of European citizenship through the interpretation of constitutional provisions.[153] In the wake of such developments, this *Article* illustrated that judicial Europeanisation can and does occur through this process of deconstitutionalisation. The findings revealed that the Court can expand the scope of EU law and is able to successfully impact domestic

[150] SK Schmidt, 'Beyond Compliance: The Europeanization of Member States through Negative Integration and Legal Uncertainty' cit.

[151] LJ Conant, *Justice Contained: Law and Politics in the European Union* cit.

[152] F Wasserfallen, 'The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union' cit.; DS Martinsen, M Blauberger, A Heindlmaier and J Sampson Thierry 'Implementing European Case Law at the Bureaucratic Frontline: How Domestic Signalling Influences the Outcomes of EU Law' (2019) Public Administration 814.

[153] E Muir, 'EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship between Primary and Secondary Rights in Times of Brexit' cit.

policies without constitutionalising policy outcomes by applying the provisions of the Directive by analogy to situations falling outside its scope. The analysis, therefore, adds some empirical nuance to theoretical debates about the Court's ability to impact national policies. Crucially, it paves the way for decoupling the study of the Court's influence on policy from the phenomenon of constitutionalisation.

The analysis by providing a comprehensive overview of the Court's policy-making through deconstitutionalisation, revealed the analogous application of the Directive to be a powerful tool for balancing competing interests and fostering judicial Europeanisation. The first part uncovered the interpretive techniques underpinning the Court's analogous application of the Directive, highlighting how this avenue enables the Court to safeguard the effectiveness of free movement provisions while respecting sensitive Member States' interests. The second part traced national responses across Member States to the Court's use of this legal formula, attempting to determine the extent to which judicial Europeanisation occurs in the aftermath of judgments where the Court applies the provisions of the Directive by analogy. The findings demonstrated how the analogous application of the Directive led to the Europeanisation of the sensitive domain of national migration policies, even in times when the judicial expansion of citizenship rights is highly contested. The analysis further highlighted how the analogous application of the Directive effectively targets national implementation problems which according to existing scholarship hinder judicial Europeanisation.

Lastly, this *Article* offered an empirically grounded analysis of judicial Europeanisation through deconstitutionalisation by focusing on the Court's analogous application of the Directive. Even though the empirical insights concern citizenship rights, the general conclusions as to the effectiveness of this technique in fostering judicial Europeanisation, could be relied upon to understand the implications of the Court's analogous application of other secondary law instruments on national policies.

ARTICLE

THE NOTION OF "JUDGMENT" IN THE EU REGULATIONS ON CROSS-BORDER COLLECTION OF MONETARY CLAIMS: A CHANGE IN UNDERSTANDING?

MARTINA TICIC*

TABLE OF CONTENTS: I. Introduction. – II. The notion of "judgment" in the EU regulations on cross-border collection of monetary claims prior to *H Limited* and *London Steam-Ship Owners*. – II.1. "Any judgment". – II.2. "A court or tribunal". – II.3. "A Member State". – III. The notion of "judgment" in the EU regulations on cross-border collection of monetary claims after the *H Limited* and *London Steam-Ship Owners*. – III.1. *H Limited*: Is "double exequatur" now allowed? – III.2. *London Steam-Ship Owners*: New rules of interplay between judgments and arbitral awards. – IV. Conclusion.

ABSTRACT: In the area of cross-border recognition and enforcement, judgments present the most important type of decisions that enjoy free movement within the European Union. The notion of a "judgment" may seem fairly obvious at first. However, given the broad definitions of EU's private international law instruments, the concept quickly proves to be much more complex. This became particularly clear after the recent rulings of the Court of Justice of the EU: the rulings in *H Limited* (C-568/20 ECLI:EU:C:2022:264) and *London Steam-Ship Owners* (C-700/20 ECLI:EU:C:2022:488). In light of the new case-law, this *Article* aims to answer the question as to what exactly constitutes a "judgment" in EU private international law, as well as determine whether the notion has been redefined after these rulings. The questions are answered with reference to the EU regulations dealing with monetary claims, while diverging aspects constituting a "judgment" under national laws of different Member States are highlighted as well.

KEYWORDS: notion of "judgment" – free movement of judgments – private international law – EU law – civil procedure – Brussels I Recast.

I. INTRODUCTION

Cross-border judicial cooperation in civil matters within the European Union (EU) is one of the fastest-expanding areas of EU law in the last decade or so. Initially one of the less-

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regulated ones, now it receives much attention from both the EU and its Member States. Aiming to ensure that natural and legal persons are not prevented or discouraged from exercising the four freedoms of movement due to incompatibilities between legal systems, it is founded on the principle of mutual recognition and enforcement among Member States to make sure that judgments as well can freely move across the EU.[1] Judgments are without a doubt the most important type of documents which represent an enforcement title in the Member States.[2] Although at first it may seem that the concept of a "judgment" is fairly obvious, even after years of applying the rules on the free movement of judgments, the question is still very much relevant today: what actually constitutes a "judgment" in the EU private international law?

The concept is defined very broadly in the EU's legislative instruments on civil and commercial matters. There is a reason for that, it being the need for inclusion of a broad spectrum of various judicial decisions emanating from different Member States. While it may be expected that such a broad concept should make the job easier for the national court,[3] the reality is that many courts have struggled to find the appropriate approach. This is also apparent from rich case law of the Court of Justice of the EU (CJEU). Recently, the question of defining a "judgment" has been addressed by the CJEU in the cases of *H Limited* (C-568/20)[4] and *London Steam-Ship Owners* (C-700/20).[5] The former ruling seems to go into an intricate territory of "double exequatur", *i.e.*, recognition of a Member State's judgment which constitutes a decision validating a foreign judgment's *res iudicata*. As it has long been thought that double exequatur is strictly forbidden,[6] this ruling opens up new questions on the matter and creates space for different interpretations of the notion of "judgment" in the EU. The latter CJEU ruling deals with the thorny interplay between the Brussels I Recast Regulation and arbitration, in the context of the recognition in the United Kingdom of a judgment given by a Spanish court. It requires examination as to the extent to which the scope of the notion of "judgment" is influenced by the notion of "earlier judgment". Additionally, the conclusions deriving from both rulings seem to clash

[1] Treaty on the Functioning of the European Union [2016] (hereinafter, TFEU), arts 67(4), 81.

[2] W Kennett, *Civil Enforcement in a Comparative Perspective. A Public Management Challenge* (Intersentia 2021) 27.

[3] W Kennett, *The Enforcement of Judgments in Europe* (Oxford University Press 2000) 216.

[4] Case C-568/20 *J v H Limited* ECLI:EU:C:2022:264.

[5] Case C-700/20 *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* ECLI:EU:C:2022:488. The notion of "judgment" has also been addressed in case C-646/20 *Senatsverwaltung für Inneres und Sport, Standesamtsaufsicht v TB* ECLI:EU:C:2022:879. This case, however, will not be analysed in this *Article* as the research does not focus on the regulations on family matters that do not primarily concern monetary claims, as explained further on in the Introduction.

[6] K Kerameus, *Enforcement in the International Context* in *Collected Courses of the Hague Academy of International Law* (Brill 1997) 20; F Garau Sobrino, 'The Automatic Enforceability Statement. Towards a New General Theory of Exequatur' (2004) Anuario Espanol Derecho Internacional Privado 101, 104.

at a certain point, particularly in terms of the possibility of including judgments upon judgments under the EU notion of "judgment".

Against the background of these developments, this *Article* aims to analyse what has been established as falling under the notion of "judgment" and whether, in light of the new case law, the general notion of "judgment" has been redefined. These questions are answered here specifically with reference to the regulations dealing with monetary claims, which due to their common features merit being examined separately from other judgments. In fact, with monetary claims, plaintiffs seek satisfaction expressed in monetary terms and such judgments are executed differently than non-monetary ones, as they require the specific performance of monetary payment.[7] The regulations which apply to such claims are:[8] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast)[9] and its predecessors 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention)[10] and its updated versions, and Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation);[11] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a Eu-

[7] K Kerameus, *Enforcement in the International Context* cit. 41, 42.

[8] Although dealing with monetary claims, Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (European Order for Payment Regulation) and Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (European Small Claims Procedure Regulation) are not dealt with in this analysis since they do not contain the definition of a "judgment". Those regulations establish a self-standing, mainly written procedure which is to be done through the use of forms, therefore it was not necessary to define a "judgment" for their purposes. Additionally, certain other EU regulations could also be viewed as dealing with monetary claims. These include *e.g.* Insolvency Regulation [Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)] or Succession Regulation [Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession]. However, these regulations are not included in the research as their scope of application concerns specific areas, *i.e.*, they contain special features, which distinguishes them from the rest of the regulations included in this research. In other words, only the regulations which are primarily dealing with monetary claims in civil and commercial matters, and do not regulate special matters such as insolvency or succession, are included.

[9] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (recast), (hereinafter, Brussels I Recast).

[10] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, (hereinafter, Brussels Convention).

[11] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (hereinafter, Brussels I Regulation).

ropean Enforcement Order for uncontested claims (European Enforcement Order Regulation);[12] Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (European Account Preservation Order Regulation);[13] and Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation).[14] Although technically an instrument dealing with family matters, unlike the rest of the previously mentioned regulations in civil and commercial matters, the latter is listed here because its scope (matters relating to maintenance obligations) relates directly to monetary claims, and has previously been included under the scope of Brussels I Regulation.[15] The remaining regulations on family matters, which do not primarily concern monetary claims, will therefore not be included.[16]

Following the introduction, section II offers a comprehensive overview of the leading CJEU rulings that shaped the meaning of "judgment". In doing so, the *Article* relies not only on the pertinent CJEU case law but also takes on a comparative approach, since the aspects constituting a "judgment" can be vastly different under different national laws. Due to the scope of this *Article*, the comparative analysis may only be done by way of example limited to laws of Germany, Italy, Slovenia and Croatia.[17] Section III focuses specifically on the recent CJEU rulings in *H Limited* and *London Steam-Ship Owners*, and aims to examine whether, as a consequence of the rulings, new issues arise for the future interpretation of the term and consequently, the mechanisms of recognition and enforcement. Finally,

[12] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, (hereinafter, European Enforcement Order Regulation).

[13] Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, (hereinafter, European Account Preservation Order Regulation).

[14] Regulation (EC) 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, (hereinafter, Maintenance Regulation).

[15] Additionally, maintenance is also included under the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention).

[16] Nevertheless, such regulations can in some cases also concern monetary claims, such as in *e.g.*, case C-4/14 *Christophe Bohez v Ingrid Wiertz* ECLI:EU:C:2015:563.

[17] These Member States are selected on the basis of their differing features, having in mind also the objective limitations as to paper volume and language of the legal sources. Importantly, these States differ as to whether they provide for special implementation laws on the relevant EU regulations or not. Furthermore, unlike for example Croatia, Germany adopted the strategy of synchronizing EU instruments with pre-existing domestic ones. Additionally, the judicial systems of Germany and Italy are intensely researched on this topic, whereas Croatian and Slovenian are not, leaving their special features comparatively unnoticed. On top of that, possible interconnections between these selected Member States are expected, since there is a large movement of people, goods, services and capital between these Member States (*e.g.*, Croatia's biggest trade partners in the EU are precisely the other three Member States from this group).

in section IV, conclusions are drawn concerning the currently operational definition of "judgment", and its consistency is evaluated.

II. The notion of "judgment" in the EU regulations on cross-border collection of monetary claims prior to *H Limited* and *London Steam-Ship Owners*

Before examining whether the two recent CJEU rulings have changed the notion of "judgment", it is necessary to first establish the general understanding of the notion that was held prior to those rulings. The first definition of a "judgment" in the EU regulations on the cross-border collection of monetary claims came with the Brussels Convention in 1968, which provides that, for its purposes, a "judgment" presents "any judgment given by a court or tribunal of a Contracting State [now, Member State], whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court".[18] The same definition was retained in the Brussels I Regulation as well,[19] and included in the European Enforcement Order Regulation in 2004[20] and the European Account Preservation Order Regulation in 2014.[21] Owing to the nature of the matters under its scope,[22] the Maintenance Regulation uses the notion of "decision" rather than "judgment" but the definition provided shows that it is essentially the same concept as the "judgment".[23] Therefore, both notions are analysed jointly.

The final step in the phraseological development of the rule is the additional paragraph inserted in the Brussels I Recast, to clarify that for the purposes of section III on recognition and enforcement, the notion of a "judgment" "includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on

[18] Art. 25 Brussels Convention cit.

[19] Art. 32 Brussels I Regulation cit.

[20] Art. 4 European Enforcement Order Regulation cit.

[21] Art. 4(8) European Account Preservation Order Regulation cit. There is only a minor difference – the absence of the term "tribunal" which has no significance in this context.

[22] As the cultural dimension is particularly prominent in the maintenance law, with substantive differences in terms of legal tradition, religion, language, culture and different areas with which maintenance is associated with, *e.g.*, family law or social security law, the term "decision" was more suited. See E Jayme, 'Cultural Dimensions of Maintenance Law from a Private International Law Perspective' in P Beaumont and others (eds), *The Recovery of Maintenance in the EU and Worldwide* (Hart Publishing 2014) 3, 14.

[23] Art. 2 Maintenance Regulation cit.: a "decision" means "a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term "decision" shall also mean a decision in matters relating to maintenance obligations given in a third State.

the defendant prior to enforcement".[24] This comes as a result of the CJEU case law, namely, the landmark ruling in *Denilauler*,[25] which will be further discussed below.

Based on the definition, several decisive elements of a "judgment" can be differentiated and are discussed in turn.

II.1. "ANY JUDGMENT"

The definitions all commence by stating that a "judgment" means "any judgment". This circular part of the definition is not owed to bad drafting or alike, but is actually intended to underline the breadth of the concept by using the word 'any' and the related clarification that follows: "whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court". The list is exemplary as evident from the wording of the provision itself. Thus, it may include various other judicial decisions regardless of their designation.[26]

The reason why the EU legislator opted for a broad definition of "judgment" is that there is a whole array of different types of decisions in different Member States.[27] To illustrate, some of the examples from national laws may be highlighted here. Focusing particularly on the national legal systems of Croatia, Slovenia, Germany and Italy, one may notice many similarities – the general understanding of the notion is the same, as a "judgment" usually pertains to a decision rendered by a court after certain proceeding, *i.e.*, a trial, has taken place before that court. Additionally, judgments are acts of state sovereignty, and its original effects are usually limited to the territory of the state of the court in question.[28] A "judgment" is usually issued when deciding on the merits of the

[24] Art. 2 Brussels I Recast cit.

[25] Case C-125/79 *Bernard Denilauler v SNC Couchet Frères* ECLI:EU:C:1980:130 para. 18. See also I Pretelli, 'Provisional and Protective Measures in the European Civil Procedure of the Brussels I System' in V Lazić and S Stuij (eds), *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme* (T.M.C. Asser Press 2017) 114, 115.

[26] The broadness of the definition of "judgment" is also affirmed by the courts of the Member States, who have to determine whether a certain instrument is to be qualified as "judgment". See, *e.g.*, J von Hein and H Dittmers, 'Germany' in P Beaumont and others (eds), *Cross-Border Litigation in Europe* (Hart Publishing 2017) 150; S Bariattiand others, 'Italy' in P Beaumont and others (eds), *Cross-Border Litigation in Europe* cit. 177.

[27] J Caramelo Gomes and T Keresteš, 'Enforcement Titles in the EU: Common Core After All?' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* (Springer 2023) 77; S Leible, 'Artikel 2' in T Rauscher (ed.), *Europäisches Zivilprozess-und Kollisionsrecht EuZPR / EuIPR. Kommentar* (Verlag Dr. Otto Schmidt KG 2021) 181.

[28] H Linke and W Hau, *Internationales Zivilverfahrensrecht* (Verlag Dr. Otto Schmidt KG 2021) 244.

case,[29] while other types of decisions are reserved for other cases.[30] The types of judgments which can be found under the national laws can slightly differ. While all systems recognise, *e.g.*, partial judgments, interim judgments, waiver judgments or judgments by confession, some peculiarities can also be found. In that sense, Croatian courts can render a judgment without trial (*presuda bez održavanja rasprave*),[31] while Slovenian courts also issue similar type of judgments "based on the state of the file" (*sodba na podlagi stanja spisa*).[32] In Germany, a distinction between the types of judgments is made according to the content; the effect on the instance; and the criterion of conditionality, with many different types of judgments falling under each category.[33] Additionally, while all of these Member States also recognise default judgments, Croatia actually differentiates between two types of such judgments – *presuda zbog ogluhe*[34] and *presuda zbog izostanka*.[35] Additional difference in regards to default judgments can also be found in Germany – as opposed to the judgments from Croatia,[36] Slovenia[37] and Italy,[38] it seems that a German default judgment will be solely based on claimant's factual allegations, regardless of whether it is reasonably supported by evidence.[39] Differences can also be found in terms of the structure of a judgment. In some Member States, such as in Germany, Croatia and Slovenia, the reasoning of a judgment comes last in place; on the other hand, in Italy, the reasoning comes before the operative part.[40] Moreover, in some Member States, including Germany and Italy, reasoning can be further divided into different

[29] An exception may be found in Germany, where the court can render a so-called "procedural judgment" (*Prozessurteil*). More in Leibniz Universität Hannover, Institute for Procedural Law and Attorney Regulations, C Wolf, N Kurth and K Mieszaniec, *National Report Germany* (Project EU-En4s – JUST-AG-2018/JUST-JCOO-AG-2018 2020) 16; S Grubbs (ed.), *International Civil Procedure* (Kluwer Law International 2003) 252.

[30] Primarily decrees, orders and rulings.

[31] Croatian Civil Procedure Act (Zakon o parničnom postupku), Narodne novine 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19 (2019) (hereinafter CCPA), art. 332(a).

[32] Slovenian Civil Procedure Act (Zakon o pravdnem postopku) Uradni list Republike Slovenije, n. 73. (2007) (hereinafter SCPA), art. 282.

[33] Leibniz Universität Hannover, Institute for Procedural Law and Attorney Regulations, C Wolf, N Kurth and K Mieszaniec, *National Report Germany* cit. 16.

[34] CCPA cit. art. 331(b).

[35] *Ibid*. art. 332.

[36] *Ibid*. art. 331(b).

[37] SCPA art. 282.

[38] Codice di Procedura Civile, aggiornato con le modifiche apportate dal D.L. 2 marzo 2024, n. 19 convertito, con modificazioni, dalla L. 29 aprile 2024, n. 56 (hereinafter CPC), arts 290-294.

[39] S Huber, 'The German Approach to the Globalisation and Harmonisation of Civil Procedure: Balancing National Particularities and International Open-Mindedness' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 299; German Code of Civil Procedure (Zivilprocessordnung), BGBI. I S. 3202; 2006 I S. 431; 2007 I S. 1781; 2023 I Nr. 51 (2005), (hereinafter, ZPO) art. 331.

[40] K Drnovšek, 'Comparative View on the Divergence of Structure and Substance of Judgments' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* cit. 118.

parts.[41] Additionally, in some Member States, such as in Croatia, the structure itself is regulated in Court Ordinance,[42] while in others, such as in Slovenia, more detailed standards in regards of structure have been formed through case law.[43] Regardless of national peculiarities, all of these types of decisions would fall under the EU notion of "judgment" as well. Thus, what is considered as judgment under national law, will oftentimes be also considered as an EU "judgment". On the other hand, other types of decisions that can be found in the national systems, such as orders, decrees and rulings, will usually not fall under the EU notion. However, certain deviations are possible, *e.g.*, Croatian decree on the protection of possession[44] and a German order that costs have to be fixed[45] would both qualify as "judgment" in the sense of the EU notion.

It is visible that, phrased in the current way, the definition ensures that all decisions, regardless of their formal characterisation under the national procedural law, can produce legal effects and be recognised and enforced throughout the EU, thus facilitating the free movement of judgments.[46] However, the national examples do not clearly show what would be the common denominator of a "judgment", as there are always certain exceptions and peculiarities. Thus, an answer as to what is the constituting element of the EU notion of "judgment", regardless of categorisation in the Member States, must be found. While the CJEU was never asked such question directly, an answer crystalized over time in its case law.

The constituting element was first presented in the previously mentioned *Denilauler* ruling, where the CJEU stated that decisions which fall under the scope of "judgment" must be "judicial decisions which, before the recognition and enforcement of them are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversary proceedings".[47] Thus, the adversarial principle, *i.e.*, the principle of *audi et alteram partem*, is highlighted as the constituting element of a "judgment". Adversarial nature of the proceedings can be described as "compliance with the rights of the defence and assurance given to the defendant in the proceedings".[48] Based on such understanding, it

[41] *Ibid*. 117, 118.

[42] Sudski poslovnik, Narodne novine 37/2014-663 (2014) cit. art. 62.

[43] K Drnovšek, 'Comparative View on the Divergence of Structure and Substance of Judgments' cit. 115, 116.

[44] E Kunštek and others, *National Report for Croatia* (Project EU-En4s – JUST-AG-2018/JUST-JCOO-AG_2018 2020) 7.

[45] Leibniz Universität Hannover, Institute for Procedural Law and Attorney Regulations, C Wolf, N Kurth and K Mieszaniec, *National Report Germany* cit. 18.

[46] M Requejo Isidro (ed.), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012* (Edward Elgar Publishing Limited 2022) 38; V Rijavec, 'Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* cit. 9, 10.

[47] *Bernard Denilauler v SNC Couchet Frères* cit. para. 13.

[48] L Vogel, *Jurisdiction and Enforcement of Judgments* (2nd edn Bruylant 2020) 113.

was held that provisional and protective measures ordered without prior notice to the defendant do not come within the system of recognition and enforcement.[49]

The importance of the adversarial principle was soon highlighted again. In *Maersk*,[50] the CJEU was met with a question of whether an order to establish a liability limitation fund falls under the EU notion of "judgment". Referring back to the same definition previously given in *Denilauler*,[51] the CJEU once again underlined the importance of the adversarial principle for any national decision to fall under "judgment" in the sense that it noted that the order in question "could have been the subject of submissions by both parties" and that "such an order does not have any effect in law prior to being notified to claimants".[52] Thus, an order such as the one referred to in the case at hand can also be considered as "judgment".

Not long after the ruling in *Maersk*, the notion of "judgment" was addressed again in *Gambazzi*.[53] Here, the inclusion of default judgments in the notion of "judgment" was questioned as, according to the claimant, they are "adopted in infringement of the adversarial principle and the right to a fair trial".[54] The CJEU, noting that the (then applicable) Brussels Convention refers to all judgments given by a court or tribunal of a Member State without distinction, once again repeated the previously given definition,[55] and concluded that a default judgment was given "in civil proceedings which, as a rule, adhere to the adversarial principle".[56] The inclusion of default judgments also becomes somewhat obvious when taking into account the articles regulating the refusal of recognition,[57] which allow for refusal of recognition of judgments which were given in default of appearance, in cases where the defendant was not duly served with the document that instituted the proceedings or an equivalent in sufficient time which would enable him/her to arrange defence. This would suggest that, in cases where the defendant was in fact duly served with the relevant document in time sufficient for the arrangement of the defence, refusal of recognition would not be possible solely because the judgment was given in default of appearance.[58]

This ruling further validated the adversarial principle as a constituting element of a "judgment", and removed the focus off of any national peculiarities when assessing whether particular decision constitutes a "judgment". To illustrate, particularly in terms of default judgments, a short comparison between the notions and effects of default

[49] *Bernard Denilauler v SNC Couchet Frères* cit. para. 18.

[50] Case C-39/02 *Maersk Olie & Gas A/S v Firma M. de Haan en W. de Boer* ECLI:EU:C:2004:615.

[51] *Ibid*. para. 50.

[52] *Ibid*. paras 50, 51.

[53] Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* ECLI:EU:C:2009:219.

[54] *Ibid*. para. 21.

[55] *Ibid*. para. 23.

[56] *Ibid*. paras 22, 25.

[57] Brussels Convention cit. art. 27; Brussels I Regulation cit. art. 34; Brussels I Recast cit. art. 45.

[58] *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* cit. para. 24.

judgments between some national systems can be shown. If we take the example of the German legal system, default of appearance of a party is equated to an admission, *ficta confessio*.[59] The German Civil Procedure Act prescribes that, in the case of plaintiff's petition for a default judgment (*Versäumnisurteil*) against the defendant who did not appear at the hearing, the facts submitted by the plaintiff are considered as admitted.[60] On the other hand, in the Italian legal system, in cases when the defendant fails to appear at the first hearing, the court will declare him/her to be in default.[61] This fact of nonparticipation by a party in a procedure is called *contumacia*.[62] It does not introduce any shift of the burden of proof, neither does any presumption or admission follow from the defendant's absence.[63] Traditionally, the defendant's default was even qualified as *ficta contestatio*.[64] In Croatia, as already mentioned above, two types of default judgments are differentiated in the law.[65] Despite the fact that these differences may seem significant, what matters for the inclusion of these decisions under the notion of "judgment" is precisely the adherence to the adversarial principle.

Finally, in *Gothaer Allgemeine*, [66] the question arose of whether the so-called "procedural judgment" also qualifies as "judgment". In German legal doctrine, a "*Prozessurteil*" is a judgment dismissing the action as inadmissible based on the fact that it failed to satisfy the requirements necessary to deliver a judgment on the merits.[67] Although designated as "procedural judgment" in German law, it is merely a judgment in which jurisdiction is

[59] CG Paulus, *Zivilprozessrecht. Erkenntnisverfahren, Zwangsvollstreckung und Europäisches Zivilprozessrecht* (6th edn Springer 2017) 185; C Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* (Kluwer Law International 2009) 183.

[60] ZPO cit. art. 331(1).

[61] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 2)* (Sweet & Maxwell Limited 2004) 323; M Cappelletti and JM Perillo, *Civil Procedure in Italy* (Springer Science+Business Media 1965) 298.

[62] CPC cit. arts 291-294; C Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* cit. 48, 227; M Cappelletti and JM Perillo, *Civil Procedure in Italy* cit. 297.

[63] C Crifo, *Cross-Border Enforcement of Debts in the European Union, Default Judgments, Summary Judgments and Orders for Payment* cit. 227; M Cappelletti and JM Perillo, *Civil Procedure in Italy* cit. 299.

[64] This means that the defaulting defendant was presumed to contest the plaintiff's claim. This has, however, been changed in 2009, with law n. 60, which established that "the defendant now has a burden to specifically contest facts which he alleges not to be true". See more in MA Lupoi, 'Recent Developments in Italian Civil Procedure Law' (2012) Civil Procedure Review.

[65] E Kunštek and others, *National Report for Croatia* cit. 6.

[66] Case C-456/11 *Gothaer Allgemeine Versicherung AG and others v Samskip GmbH* ECLI:EU:C:2012:719. See also commentary by E D'Alessandro, 'L'influenza esercitata dal diritto nazionale nell'elaborazione di concetti 'europei' ad opera della Corte di giustizia. Il caso Gothaer' in D Dalfino (ed.), *Scritti dedicati a Maurizio Converso* (Roma Tre-Press 2016).

[67] L Merrett, 'Article 2', in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation – Commentary* (Verlag Dr. Otto Schmidt KG 2023) 81; M Klöpfer, 'Unionsautonome Rechtskraft klageabweisender Prozessurteile – Paradigmenwechsel im Europäischen Zivilverfahrensrecht' (2015) Zeitschrift für das Privatrecht der Europäischen Union 210.

denied on the basis of a jurisdiction clause in favour of a court in another country. Such judgment, under German law, is not considered as capable of recognition. Although not explicitly referring to the adversarial requirement, the CJEU once again ruled in favour of including such judgment under the EU notion. The issue here was not actually about the specific requirement for inclusion under "judgment", more so the particular national categorisation which brings into question its quality for such inclusion.[68] What was explicitly confirmed here, is the fact that national categorisation of certain decisions does not matter – the EU conditions set by both definition and the case law do.

This overview of the case law demonstrates that the adversarial principle currently forms a core element for determining whether a decision falls under the notion of "judgment", although not explicitly included in the definitions. The importance of such principle is understandable given that the EU regulations operate on the basis of mutual recognition, which is subject to strict conditions – primarily, the respect of fundamental rights such as the right to a fair trial,[69] which is reinforced precisely through the adversarial principle. Its significance will be further discussed below, as it will also be relevant when analysing the notion of "court or tribunal".

Based on this understanding, it is clear that it does not matter whether decision itself is final and provisional, appealable and non-appealable.[70] The form of the decision is not relevant either – even decisions made by a court in an abbreviated form or not containing an explanation could be included[71] (although this could potentially be regarded as a ground for refusal of enforcement by reason of public policy).[72] It is interesting to note that some Member States took note of the difficulty of recognising and enforcing a judgment in an abbreviated form abroad; for example, the German Code of Civil Procedure explicitly prohibits judgment in an abbreviated form, if it is expected that it will have to be enforced abroad.[73]

[68] *Gothaer Allgemeine Versicherung AG and others v Samskip GmbH* cit. para. 26.

[69] K Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (2015) The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford 4. See also I Kunda, 'Međunarodnoprivatnopravni odnosi' in E Mišćenić (ed.), *Europsko privatno pravo. Posebni dio* (Školska knjiga 2021) 504.

[70] M Requejo Isidro (ed.), *Brussels I Bis* cit. 38; R Fentiman, *International Commercial Litigation* (2nd Oxford University Press 2015) 640; J Caramelo Gomes and T Keresteš, 'Enforcement Titles in the EU' cit. 77; S Leible, 'Artikel 2' cit.183.

[71] S Leible, 'Artikel 2' cit. 182; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' (2010) Collected Papers of Zagreb Law Faculty 54.

[72] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* (Sweet & Maxwell Limited 2004) 871.

[73] ZPO cit. arts 313a (4), 313b (3). See also S Leible, 'Artikel 2' cit. 183.

Many other examples of decisions included in the notion can be given: interlocutory orders, injunctions and decrees of specific performance;[74] orders made in the German *Mahnverfahren* proceedings;[75] an *astreinte*, *i.e.*, an order for penalty payments for non-compliance with the court's order;[76] etc. Recently, the CJEU delivered a new ruling in *Starkinvest*,[77] which dealt with the possibility of an *astreinte* to be included under the notion of "judgment" for the purposes of the European Account Preservation Order Regulation. The ruling established that, for the purposes of that regulation, an *astreinte* could not qualify as "judgment" in terms of its art. 7.[78] Certain deviations between the understanding of the notion in different regulations on cross-border collection of monetary claims are therefore visible. Possible independent interpretation in the regulation relevant for the case at hand must thus always be taken into account.[79]

II.2. "A COURT OR TRIBUNAL"

The next element of the definition is that a "judgment" must emanate from "a court or a tribunal", or, according to the CJEU's interpretation, a decision constituting a "judgment" "must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties".[80] It is understood that this notion of "judicial body" covers "any judicial authority acting independently from other organs of the State and whose decisions are taken following a procedure having the characteristics of judicial proceedings, *i.e.*, based on the respect for the principle of due process".[81] Therefore, a "judgment" may be given by different types of courts or tribunals if they fulfil the necessary requirement of exercising judicial power in relation to the matters that are within

[74] A Briggs, *Civil Jurisdiction and Judgments* (7edn Informa law from Routledge 2021) 719; R Fentiman, *International Commercial Litigation* cit. 640.

[75] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 870.

[76] A Briggs, *Civil Jurisdiction and Judgments* cit. 720. For more information on *astreinte*, see also: K Kerameus, *Enforcement in the International Context* cit. 79, 80; W Kennett, *The Enforcement of Judgments in Europe* cit. 240; A Galič, 'Enforcement by Means of Periodic Penalties (Astreinte) in Slovenia: A Transplant Gone Wild' in A Uzelac and CH van Rhee (eds), *Transformation of Civil Justice. Unity and Diversity* (Springer 2018) 25-39; MP Michell, 'Imperium by the Back Door: The *Astreinte* and the Enforcement of Contractual Obligations in France' (1993) University of Toronto Faculty of Law Review 252; G Glos, '*Astreinte* in Belgian Law' (1985) International Journal of Legal Information 17; etc.

[77] Case C-291/21 *Starkinvest SRL* ECLI:EU:C:2023:299.

[78] *Starkinvest SRL* cit. para. 56. This is related to the requirement of proving the *fumus boni iuris* for the purposes of issuing the European Account Preservation Order. Given that multiple articles in the regulation explicitly refer to "amount specified in the judgment", it seems correct to conclude that a "judgment" in question needs to contain a specific amount of claim, which an *astreinte* does not fulfil. Therefore, the claimant will still need to provide sufficient proof that he/she will likely be successful on the merits of the claim against the debtor.

[79] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 868.

[80] Case C-414/92 *Solo Kleinmotoren GmbH v Emilio Boch* ECLI:EU:C:1994:221 paras 17, 18.

[81] P Wautelet, 'Recognition. Article 32' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Brussels I Regulation* (Verlag Dr. Otto Schmidt KG 2007) 537.

the scope of the relevant regulations on the cross-border collection of monetary claims.[82] Hence, neither decisions of arbitral tribunals,[83] administrative bodies[84] nor any other decisions of private tribunals would qualify as "judgment".[85] The requirements, established primarily through the CJEU case law, thus significantly help with defining the otherwise broad notion of a "court", which can also differ substantially among the Member States.[86]

This element further differentiates judgments from other types of decisions. Particularly important is the differentiation from court settlements, as ruled in *Solo Kleinmotoren*, decided in the context of the Brussels Convention. As court settlements are contractual in their essence, they cannot be included under the notion of judgments, since the latter includes solely judicial decisions given by a court or a tribunal of a Member State, *i.e.*, a judgment must emanate from a judicial body.[87] As a result, the separation between judgments and court settlements is even clearer in the subsequent Brussels I and Brussels I Recast regulations, as both clearly distinguish between these types of decision, placing them under different recognition and enforcement regimes in separate chapters.[88] As provided in Brussels I Recast, court settlements enforceable in the Member State of origin shall be enforced in other Member States without any declaration of enforceability being required; possibility of refusal is only available if enforcement is manifestly contrary to public policy of the Member State addressed.[89]

The national approaches to court settlements vary greatly depending on the type and extent of the court's involvement which results also in lesser or stronger legal effects. Under German law, court settlements are in principle not enforceable. Instead, if there is a dispute

[82] A Briggs, *Civil Jurisdiction and Judgments* cit. 719; S Leible, 'Artikel 2' cit. 190.

[83] A Briggs, *Civil Jurisdiction and Judgments* cit. 719.

[84] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 872; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' cit. 60.

[85] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 871.

[86] See A Uzelac, 'Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations' in XE Kramer and CH van Rhee (eds), *Civil Litigation in a Globalising World* (T.M.C. Asser Press 2012) 179, 180.

[87] *Solo Kleinmotoren GmbH v Emilio Boch* cit. paras 17, 18; L Merrett, 'Article 2' cit. 85; T Domej, 'Recognition and Enforcement of Judgments (Civil Law)' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* (Edward Elgar Publishing 2017) 1473; L Vogel, *Jurisdiction and Enforcement of Judgments* cit. 112; W Kennett, *The Enforcement of Judgments in Europe* cit. 65; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' cit. 55.

[88] See ch. IV Brussels I Regulation cit.; ch. IV Brussels I Recast cit.

[89] Art. 59 Brussels I Recast cit.

between the parties, they must bring an action before a court on the basis of such settlement.[90] On the opposite end are the court settlements originating from Croatia and Slovenia, which actually fall under the notion of "judgment" in the Brussels I Recast. As explained elsewhere, such qualification is due to the special features of these court settlements.[91] In Croatia, a court settlement (*sudska nagodba*) represents parties' agreement made before the court and entered in the minutes of the proceedings.[92] Signed by all parties, the court settlement becomes final and enforceable in the same vein as the judgment (including the *res iudicata* effect). In the process, the court must *ex officio* ensure that there are no ongoing proceedings on the same case matter as the one on which the court settlement has been reached. The same is true for the Slovenian legal system and its concept of court settlements (*sodna poravnava*).[93] Such national court settlements are referred to as the "consent judgments", *e.g.*, in the Heidelberg Report, where the authors also advocated their qualification as judgments rather than court settlements.[94]

The term "court or tribunal" can also include authorities other than courts provided they exercise a judicial function. The Brussels I Recast, in its art. 3, expressly provides two options which include Hungarian public notaries (*közjegyző*) in summary proceedings concerning orders for payment (*fizetési meghagyásos eljárás*),[95] as well as Swedish Enforcement Authority (*Kronofogdemyndigheten*) in their summary proceedings concerning orders for payment (*betalningsföreläggande*) and assistance (*handräckning*).[96] This list of bodies that are included under the notion of "court or tribunal" is exhaustive;[97] however, this did not stop the preliminary questions referred to the CJEU regarding the potential inclusion of some other types of authorities under the notion.

[90] T Domej, 'Recognition and Enforcement of Judgments (Civil Law)' cit. 1473.

[91] I Kunda and M Tičić, 'Authentic Instruments and Court Settlements Under the Twin Regulations' in L Ruggeri and others (eds), *The EU Regulations on Matrimonial Property and Property of Registered Partnerships* (Intersentia 2022) 72-74.

[92] CCPA cit. arts 321, 322.

[93] SCPA cit. arts 306, 307. For more information on court settlements in Slovenia, see, *e.g.*, A Galič, 'Vloga sodnika pri spodbujanju sodnih poravnav' (2002) Zbornik znanstvenih razprav.

[94] Heidelberg report - Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States presented by B Hess, T Pfeiffer and P Schlosser, Study JLS/C4/2005/03, Final version September 2007, Ruprecht-Karls-Universität Heidelberg, 66, 277. See also A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 869; I Kunda and M Tičić, 'Authentic Instruments and Court Settlements Under the Twin Regulations' cit. 72-74.

[95] Art. 3(a) Brussels I Recast cit.

[96] *Ibid*. art. 3(b).

[97] P Mankowski, 'Article 3' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law. Brussels Ibis Regulation – Commentary* (Verlag Dr. Otto Schmidt KG 2023) 93; S Leible, 'Artikel 2' cit. 190.

Whether public notaries from other Member States may be included in the concept of "court" in the sense of Brussels I Regulation and European Enforcement Order Regulation was at issue in *Pula Parking*[98] and *Zulfikarpašić*.[99] Under the then Croatian Enforcement Act, Croatian notaries had the standalone authority to issue writs of execution on the application for enforcement based on a "trustworthy document" (*vjerodostojna isprava*).[100] After the writ is issued by a notary, it is served on the debtor who may lodge an opposition. In that case, the notary must transfer the file to the court which decides on the opposition. In both rulings, the CJEU refused to include the Croatian public notaries under the notion of "court", pointing particularly to the fact that they are not mentioned in the regulation (as opposed to the Hungarian and Swedish notaries);[101] that there are fundamental differences between judicial and notarial functions;[102] and that the principle of *audi et alteram partem* was not complied with.[103] This reasoning, however, may be questioned[104] when taking into account that Hungarian notaries, which operate in the same manner as the Croatian ones,[105] do fall under the notion of 'court' in the Brussels I Regulation. The difference lies in the simple fact that Hungarian notaries are explicitly mentioned in the Brussels I Regulation as included in the notion of "court".[106] As Croatia did not participate in the negotiations on the amendment of Brussels I Regulation (since

[98] Case C-551/15 *Pula Parking d.o.o. v Sven Klaus Tederahn* ECLI:EU:C:2017:193.

[99] Case C-484/15 *Ibrica Zulfikarpašić v Slaven Gajer* ECLI:EU:C:2017:199.

[100] Croatian Enforcement Act (Ovršni zakon) of 2020, art. 31(1). For more on the enforcement on the basis of "trustworthy document", see *e.g.* J Borčić, 'Notaries Public and Distraint Proceedings' (2009) Collected Papers of Zagreb Law Faculty 1251-1320. Additionally, the notion of "trustworthy instrument" can also be found in the Slovenian system: see Zakon o izvršbi in zavarovanju, Uradni list RS, št. 3/07 – uradno prečiščeno besedilo, 93/07, 37/08 – ZST-1, 45/08 – ZArbit, 28/09, 51/10, 26/11, 17/13 – odl. US, 45/14 – odl. US, 53/14, 58/14 – odl. US, 54/15, 76/15 – odl. US, 11/18, 53/19 – odl. US, 66/19 – ZDavP-2M, 23/20 – SPZ-B, 36/21, 81/22 – odl. US in 81/22 – odl. US, art. 23; M Bratković, 'Reorganisation of Enforcement on the Basis of a Trustworthy Document in Slovenia' (2015) Collected Papers of Zagreb Law Faculty 1025-1050.

[101] *Pula Parking d.o.o. v Sven Klaus Tederahn* cit. para. 46; *Ibrica Zulfikarpašić v Slaven Gajer* cit. para. 36.

[102] *Pula Parking d.o.o. v Sven Klaus Tederahn* cit. para. 47; see also case C-53/08 *Commission v Austria* ECLI:EU:C:2011:338 para. 103; case C-32/14 *ERSTE Bank Hungary Zrt. v Attila Sugar* ECLI:EU:C:2015:637 para. 47; case C-392/15 *Commission v Hungary* ECLI:EU:C:2017:73 para. 111.

[103] *Pula Parking d.o.o. v Sven Klaus Tederahn* cit. paras 54, 58; *Ibrica Zulfikarpašić v Slaven Gajer* cit. paras 43, 46, 48.

[104] See also P Poretti, 'The Role of Notaries in EU Law with Reference to Case Law' (2019) Javni bilježnik 9-12.

[105] For more on the notarial order for payment procedure in Hungary, see, *e.g.*, V Harsági, 'The Notarial Order for Payment Procedure as a Hungarian Peculiarity' in R Geimer and R Schütze (eds), *Recht Ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag* (Otto Schmidt/De Gruyter european law publishers 2012) 343-354; M Mantovani, 'Notaries and their Debt-Collection Writs under the Brussels Ia Regulation. A Difficult Characterisation' (2019) Journal of Private International Law 410-412.

[106] M Bratković, 'Why Croatian Notaries are not the Court. On Interpretation of Regulation No. 805/2004 and Regulation Brussels I bis in Judgements Zulfikarpašić and Pula parking' (2017) Collected Papers of Zagreb Law Faculty 307; M Mantovani, 'Notaries and Their Debt-Collection Writs under the Brussels Ia Regulation' cit. 397.

it was not yet a Member State), and has not requested such amendment upon entering the EU,[107] its notaries cannot be regarded as "court" in that sense.

However, with the 2020 Amendments to the Croatian Enforcement Act,[108] it appears that the Croatian notaries in these proceedings would be qualified as "courts" for the purposes of the of Brussels I Regulation and European Enforcement Order Regulation. Namely, the applications for enforcement on the basis of a "trustworthy document" must now be submitted to the municipal court according to the residence of the enforcement debtor, after which they are evenly assigned to public notaries, which are explicitly appointed as commissioners of the court.[109] This differs from the previous solution, where applications were to be submitted directly to the notary of choice – a solution which was previously often critiqued, regardless of the developments on the EU level.[110] Moreover, after receiving the application and assessing whether it is admissible and orderly, the notary notifies the enforcement debtor of the possibility to fulfil the obligation within fifteen days.[111] In that way, the rights of the debtor are protected, in line with the principle of *audi et alteram partem*, which was previously lacking, according to the CJEU. The debtor also has the opportunity to object the enforcement decision, after which the case is referred to court, as was the case before the amendments.[112] While these amendments would allow the Croatian notaries to be included under the notion of "court",[113] it remains to be seen whether the reform of the Brussels I Recast will bring additional changes.[114]

What *Pula Parking* and *Zulfikarpašić* show, in addition to clarifying the concept of "court or tribunal", is the importance of the previously discussed adversarial principle. In fact, it is visible that such principle is a *conditio sine qua non* when defining not only the "any judgment" part of the definition, but also when interpreting the "court or tribunal" part. In that sense, any orders or decisions given by a court or tribunal, but obtained and

[107] H Hoblaj, 'Prorogation of Jurisdiction in Civil and Commercial Matters According to Regulation no. 1215/2012' (2022) Javni bilježnik 78; M Bratković, 'Why Croatian Notaries are not the Court. On Interpretation of Regulation No. 805/2004 and Regulation Brussels I bis in Judgements Zulfikarpašić and Pula parking' cit. 307, 308.

[108] Act on the Amendments to the Enforcement Act (2020).

[109] Croatian Enforcement Act cit. art. 39(a)(4).

[110] A Maganić, 'Dejudicialisation of the Enforcement Procedure in Croatia and Some Neighbouring Countries' (2018) Collected Papers of Zagreb Law Faculty 711.

[111] Croatian Enforcement Act cit. art. 281(1).

[112] *Ibid*. art. 282.

[113] H Hoblaj, 'Prorogation of Jurisdiction in Civil and Commercial Matters According to Regulation no. 1215/2012' cit. 79.

[114] Proposals for reform in other directions are also possible, particularly in light of the recent Working Paper on the reform of the Brussels I Recast, in which the authors suggest that neither Croatian nor Hungarian notaries should qualify as "court", *i.e*., that art. 3(a) of the Brussels I Recast should be removed. See B Hess and others, 'The Reform of the Brussels Ibis Regulation' (MPILux Research Paper 6-2022). See also B Hess, 'La Reforma del Reglamento Bruselas I bis. Posibilidades y Perspectivas' (2022) Cuadernos de Derecho Transnacional 19.

"designed to be obtained *ex parte* or without notice to the defendant" do not qualify as "judgments",[115] *e.g.*, freezing injunctions obtained without notice to the defendant.[116]

II.3. "A MEMBER STATE"

Another element relates directly to the one formerly addressed: a "judgment" emanates from the court or tribunal of "a Member State". This narrows the scope of the notion of "judgment" to those rendered by the court or tribunal in the territory of a Member State, and to an organ of the state which exercises the juridical function of the state.[117] Even by simple grammatical interpretation, such wording suggests that any decision emanating from a Third State cannot constitute a "judgment" for purposes of the regulations. This was questioned early on in the CJEU's ruling in *Owens Bank*.[118] The CJEU stated that the Brussels Convention "does not apply to proceedings, or issues arising in proceedings, in Contracting States concerning the recognition and enforcement of judgments given in civil and commercial matters in non-contracting States".[119] Therefore, the merits of a "judgment" must have been determined in a Member State, not a Third State.[120] Additionally, as the "essential purpose" of a decision by a Member State on an issue arising in the proceedings for the enforcement of a judgment given in a Third State is to determine whether that judgment may be recognised or enforced, such decision cannot be separated from the question of recognition and enforcement, *i.e.*, such decision cannot be deemed as falling under the notion of "judgment" for the purposes of recognition and enforcement under the Brussels regime.[121] In this way, the ruling followed the opinion of Advocate General Lenz in which he stated that the "double exequatur" is also not allowed in situations when the Third State judgment is not declared enforceable as such in the Member State, but is "made on the basis of civil proceedings".[122] Following this ruling, the commentators concluded that decisions of a Member State incorporating the foreign decisions can therefore not qualify as "judgments".[123]

[115] A Briggs, *Civil Jurisdiction and Judgments* cit. 720; R Fentiman, *International Commercial Litigation* cit. 640.

[116] A Briggs, *Civil Jurisdiction and Judgments* cit. 720. See also: A Dickinson, 'English Private International Law Aspects of Provisional and Protective Measures' in M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (British Institute of International and Comparative Law 2005) 292.

[117] L Merrett, 'Article 2' cit. 83; A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 871.

[118] Case C-129/92 *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.* ECLI:EU:C:1994:13.

[119] *Ibid*. para. 37.

[120] L Merrett, 'Article 2' cit. 83.

[121] *Owens Bank Ltd v Fulvio Bracco and Bracco Industria Chimica SpA.* cit. para. 29.

[122] Case C-129/92 *Owens Bank v Fulvio Bracco and Bracco Industria Chimica SpA.* ECLI:EU:C:1993:363, opinion of AG Lenz, para. 23.

[123] L Merrett, 'Article 2' cit. 84.

This ruling may seem obvious taking into account the idea behind the EU's free movement of judgments. In the EU's Area of Freedom, Security and Justice,[124] a judgment emanating from one Member State is recognised and directly enforceable in a different Member State, with limited grounds for refusal available. However, the problem can emerge in a situation in which a judgment emanating from a Third State is recognised in one Member State, and is to be enforced in another Member State. If "double exequatur" were possible, *i.e.*, if the second Member State were obliged to recognise and enforce a decision of the first Member State which basically recognises a Third State's judgment on the merits, this would increase the possibility of forum shopping, where the creditors of the foreign judgment could first try to recognise their judgment in the Member State with the least strict requirements.[125] Other Member States with stricter requirements as to the acceptance of foreign judgments would have no choice but to recognise the decision of the Member States which are more open to foreign judgments and have their rules completely disregarded by the creditors in the respective Third State. As a solution, "double exequatur" is prohibited, or as French would say "*exequatur sur exequatur ne vaut*", both in national laws of some of the Member States,[126] as well as at the EU level.[127] According to some authors, this prohibition includes not only decisions by a court of a Member State recognising a Third State judgment, but also any other judgments of Member States upon judgments of the Third States.[128] This approach, however, has been a matter of reconsideration in the CJEU ruling in *H Limited* discussed below. This ruling comes into clash with the previously mentioned scholarly positions on whether judgment of a Member State made upon judgment of Third States falls under the notion of "judgment" in the EU.

III. The notion of "judgment" in the EU regulation on cross-border collection of monetary claims after the *H Limited* and *London Steam-Ship Owners*

As explained above, the notion of judgments under EU law is to be interpreted broadly, but not without certain limits. As opposed to the differentiations that may exist between types of decisions under national law of a particular Member State, a "judgment" as interpreted in terms of EU regulations allows for a variety of such decisions, many of which

[124] Art. 67 TFEU in conjunction with art. 81 TFEU.

[125] M Holger Kall, 'Doppelexequatur: "ne vaut" oder "no worries"?' (2018) Internationales Handelsrecht. Zeitschrift für das Recht des Internationalen Warenkaufs und Warenvertriebs 141.

[126] For the development on the "double exequatur" in Germany, see M Holger Kall, 'Doppelexequatur: "ne vaut" oder "no worries"?' cit. 108.

[127] S Leible, 'Artikel 2' cit. 188; V Rijavec, 'Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks' cit. 19; E Bylander and M Linton, 'Types of Judgments According to Different Criteria' in V Rijavec and others (eds), *Diversity of Enforcement Titles in the EU* cit. 91.

[128] A Briggs, *Civil Jurisdiction and Judgments* cit. 721; H Sikirić, 'Reasons for Denying Recognition and Enforcement of Court Decisions According to the Council Regulation (EC) No. 44/2001 of December 22, 2000 on Court Jurisdiction and Recognition and Enforcement in Civil and Commercial Matters' cit. 58.

fall under this notion. However, some of the latest CJEU rulings may have additionally blurred the demarcation line between what does and what does not constitute a "judgment" in the EU private international law. In order to examine whether there are changes to the notion of "judgment" that was presented in the previous Chapter, the relevant rulings are discussed in turn.

III.1. *H LIMITED*: IS "DOUBLE EXEQUATUR" NOW ALLOWED?

On 7 April 2022, the CJEU delivered its ruling in *H Limited*, a case dealing specifically with the notion of "judgment" in Brussels I Recast. It particularly addressed the issue of the process of enforcing a judgment of a different Member State, which allowed the enforcement of a judgment of a Third State for the payment of a debt. This brings us to the slippery territory of "double exequatur", or, metaphorically termed, "judgment laundering",[129] previously unimaginable in the EU. Following this ruling, the notion of a "judgment" in the EU regulations has gained wider contours, whereas the notion of "double exequatur" has been narrowed down.

a) Dispute in the national proceedings

The dispute emerged after the English High Court ordered "J", a natural person with residence in Austria, to pay H Limited, a bank, approximately 9 200 000 euro, by the order for payment of 20 March 2019.[130] Although the UK has since left the EU, the case reached the CJEU as UK was still a Member State at the time.[131] The issue is owed to the fact that the order for payment was delivered pursuant to two different judgments by the courts of a Third State – Jordan.

After *H Limited* applied for the enforcement of the order for payment in Austria, the District Court in Austria granted the enforcement of the English judgment. The Austrian court particularly observed the fact that the proceedings in England had complied with the adversarial principle and the order for payment is therefore eligible for enforcement in Austria. The Regional Court confirmed such stance and refused an appeal by "J". The

[129] R Fentiman, *International Commercial Litigation* cit. 641.

[130] England and Wales High Court of 14 2019 [2019] EWHC 860 (Comm) *Arab Jordan Investment Bank Plc & Anor v Sharbain* www.bailii.org.

[131] The UK has officially left the EU in January 2020, while the transition period lasted until 31 December 2020. With the end of that transition period, the Brussels I Recast Regulation became inapplicable in the relation between the UK and the EU. The case at hand, however, occurred while the UK was still a Member State of the EU, therefore the EU regulations still applied. As stated in the Withdrawal Agreement, Brussels I Recast Regulation "shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period" (art. 67(2)(a)). For more information on the legislation regulating "Brexit", see: Council Agreement XT/21054/2019/INIT of 12 November 2019 on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community; Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, on the other part of 30 April 2021.

Austrian Supreme Court, however, did not support such decision based on its view that the exclusion of "double exequatur" applies also to the orders for payment, which are made by court of a Member State based on the action for enforcement of a judgment emanating from a Third State.[132] Given the emerging doubts, the Supreme Court decided to stay the proceedings and refer preliminary questions to the CJEU.

The questions concern the notion of a "judgment", particularly whether arts 2(a) and 39 of the Brussels I Recast need to be interpreted

> "as meaning that a judgment that is to be enforced exists even if, in a Member State, the judgment debtor is obliged, after summary examination in adversarial proceedings, albeit relating only to the binding nature of the force of res iudicata of a judgment given against him in a Third State, to pay to the party who was successful in the Third State proceedings the debt that was judicially recognised in the Third State, when the subject matter of the proceedings in the Member State was limited to examination of the existence of a claim derived from the judicially recognised debt against the judgment debtor".[133]

In case of a negative answer to the first question, the Supreme Court of Austria questions whether enforcement must be refused if the judgment under review is not a "judgment" within the meaning of the relevant provisions of Brussels I Recast, or if the application of the Member State of origin does not fall within its scope, irrespective of the existence of one of the refusal grounds.[134] In case of an affirmative answer to the second question, the question remains whether in the proceedings for refusal of enforcement, the court of the Member State addressed must assume that a judgment falling within the scope of Brussels I Recast exists, based solely on the information provided in the certificate issued pursuant to art. 53.[135]

In short, the CJEU stated that "an order for payment made by a court of a Member State on the basis of final judgments delivered in a Third State constitutes a judgment and is enforceable in other Member States if it was made at the end of adversarial proceedings in the Member State of origin and was declared to be enforceable in that Member State".[136] The CJEU also highlighted the possibility to apply for a refusal based on one of the refusal grounds referred to in art. 45 of Brussels I Recast.

b) Prohibition of "double exequatur" circumvented?

Although it was the settled CJEU case law that an "exequatur of an exequatur" is not permitted,[137] diverse methods of enforcement of foreign judgments in some Member States may still raise doubts in borderline cases like *H Limited*. The CJEU's first task in this case

[132] *J v H Limited* cit. para. 2.
[133] *Ibid*. para. 20.
[134] *Ibid*.
[135] *Ibid*.
[136] *Ibid*. para. 47.
[137] See *J v H Limited* cit. para. 38 and references contained therein.

was to provide interpretation as to whether the English summary order, *i.e.*, the object of recognition in Austria, falls under the notion of "judgment". The English summary order was given following a particular procedure which relates to a specific method of enforcement based in common law. While the concept of exequatur is used in the civil legal systems for the recognition and enforcement of foreign judgments, the approach differs in the legal systems of common law.[138] For a better understanding of the case at hand, a short overview of the English system of recognition and enforcement of foreign judgments is in order.

As opposed to the method of exequatur, the English law differentiates between recognition and enforcement of foreign judgments by virtue of rules of common law, or by virtue of one of the available statutory schemes, *e.g.*, Civil Jurisdiction and Judgments Act 1982, Administration of Justice Act 1920 or the Reciprocal Enforcement of Judgments Act 1933.[139] If a foreign judgment is not enforceable or recognisable under these statutory schemes, it may still be possible under the rules of common law by an "action on the judgment".[140] The idea behind this notion is that a foreign decision provides for a substantive obligation on the judgment debtor, which in itself can form a cause of action in debt which differs from the original cause of action.[141] This option will be available if the judgment is *in personam*, given for a sum of money, is final and conclusive, as well as under the condition that court which gave it had jurisdiction under the rules corresponding to the English private international law ones.[142]

This method was used in the case which prompted the *H Limited* ruling. The claimant applied for a summary judgment on the debt without trial. In such proceedings, the claimant must only prove that the defendant has "no real prospect of success"[143] and that there is "no other compelling reason for a trial".[144] In such cases, there exist a number of defences to the enforcement proceedings, including that a foreign judgment was obtained by fraud or that the proceedings in which the judgment was obtained were in breach of natural justice.[145] It was these two defences that the defendant raised in the

[138] Besides the "exequatur" method, common to the civil legal systems, two more methods for recognition and enforcement of foreign judgments can be distinguished: "registration" method and "transformation" method. While the former requires a registration of a foreign judgment under certain conditions, the latter requires the foreign judgment to be incorporated into a new, domestic one. See more in J Valdhans and T Kyselovská, 'Selected Issues of Recognition and Enforcement of Foreign Judgments from the Perspective of EU Member' in V Rijavec (ed.), *24th Conference Corporate Entities at the Market and European Dimensions (Conference Proceedings)* (University of Maribor Press 2016) 157-173.

[139] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 226.

[140] *Ibid*. 226; S Grubbs (ed.), *International Civil Procedure* cit.197.

[141] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 864, 865.

[142] *Ibid*. cit. 226.

[143] R Fentiman, *International Commercial Litigation* cit. 620.

[144] England and Wales High Court of 14 2019 [2019] EWHC 860 (Comm) *Arab Jordan Investment Bank Plc & Anor v Sharbain* cit. para. 10.

[145] P Barnett, *Res Iudicata, Estoppel and Foreign Judgments* (Oxford University Press 2001) 36, 37.

proceedings before the English High Court, particularly by alleging a fraudulent obtainment of the Jordanian judgments and lack of power of attorney by H Limited, which also related to the point that there was a breach of natural justice in the Jordanian courts which allegedly prejudiced "J".[146] The High Court, however, ruled that there is no real prospect of a successful defence to the claim to enforce the Jordanian judgments.

The crux of the issue at hand is in the peculiarity of the method of an action on a judgment. Although being a method of enforcing a foreign judgment, and despite the fact that throughout the proceedings in question, all of the questions were considered having regard to the Jordanian judgments in question and Jordanian law in general, the final decision was issued as a decision on its own, not a decision on recognition or enforcement of the Jordanian judgments, as is the case with the exequatur method. However, before the ruling in *H Limited*, scholars did not perceive the distinction in the methods as sufficient to treat the decisions brought by an action on the judgment in England as "judgment" under the Brussels regime.[147]

The CJEU, however, ruled otherwise. Its conclusion was reached after consideration of a number of relevant points of the case, starting from two interrelated arguments: first, that the concept of "judgment" is broad in light of the principle of mutual trust,[148] and second, that this concept is not linked to the content of the judgment or else it would jeopardize their free circulation.[149]

The CJEU relied on the mutual trust, stating that it would be undermined if a decision such as one from the English High Court would be denied as a "judgment".[150] This, in the CJEU's opinion, is in line with the broad definition of a "judgment", whereas a restrictive interpretation of the term would create a category of acts which the courts would not be required to enforce.[151] While the existence of mutual trust is one of EU's most important goals,[152] and while it has become a "leitmotiv" of judicial cooperation in the EU,[153] the

[146] England and Wales High Court of 14 2019 [2019] EWHC 860 (Comm) *Arab Jordan Investment Bank Plc & Anor v Sharbain* cit. paras 21-25, 102.

[147] A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 865.

[148] *J v H Limited* cit. para. 29.

[149] *Ibid*. para. 28.

[150] *Ibid*. paras 29, 30.

[151] *Ibid*. para. 31.

[152] See, *e.g*., Communication COM(2014) 144 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2014, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union; European Council Conclusions of 26-27 June 2014.

[153] M Safjan and D Düsterhaus, 'De l'encadrement de l'ordre public procédural des États membres à l'ordre procédural autonome de l'Union' in B Hess and K Lenaerts (eds), *The 50th Anniversary of the European Law of Civil Procedure* (Baden-Baden Nomos Hart Publishing 2020) 60; M Weller, *"Mutual Trust": A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?* in *Collected Courses of the Hague Academy of International Law* (Brill 2022) 138.

level of such trust is certainly not as high as it may be perceived.[154] It is questionable whether decisions such as one in the case at hand strengthen the idea of mutual trust in the EU, or they actually have the opposite effect by raising suspicions among Member States about appropriateness of their procedures.

Separating the notion of "judgment" from the respective contents entails that swift and simple recognition and enforcement may take place between Member States. This is the basis for the CJEU to conclude that the concept of "judgment" "also includes an order for payment made by a court of a Member State on the basis of final judgments delivered in a Third State".[155] The decisive factor for "judgment", as highlighted in the previous section, is the existence of an adversarial nature of the proceedings that led to the decision in question.[156] However, it is precisely in these English proceedings where the adversarial quality of the proceedings may itself be disputed. In such cases, no full trial takes place.[157] The defendant, when taking part in an action on a judgment proceeding, cannot present his/her case fully, but in view of only few defence grounds. As stated by the English High Court, final and conclusive foreign judgment for a definite sum is unimpeachable for error of law or fact, with only few exceptions, such as fraud, public policy, natural justice and penalties.[158] It is questionable whether this is enough for a proper defence,[159] and consequently, whether these are truly adversarial proceedings. Actually, such restricted defences seem logical given that the proceedings essentially aim at enforcement of a foreign judgment. In fact, the English proceedings were limited to examination of the existence of a claim derived from the debt judicially recognised in Jordan.[160] Not only is the English summary order fairly similar to a judgment enforcing Jordanian judgments, but such action on these judgments is actually a method of enforcing other judgments by "transforming" them into a new, domestic one. From the point of view of the purpose and contents of the English proceedings, it appears highly questionable whether the English judgment was actually an "original determination", rather than a validation of a foreign

[154] See, *e.g.*, Communication COM/2022/234 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions of 19 May 2022, 2022 EU Justice Scoreboard; Communication COM/2021/389 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions of 8 July 2021, 2021 EU Justice Scoreboard. See also M Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) Journal of Private International Law.

[155] *J v H Limited* cit. para. 25.

[156] *Ibid*. para. 26. See also *Bernard Denilauler v SNC Couchet Frères* cit. para. 13; *Marco Gambazzi v DaimlerChrysler Canada Inc., CIBC Mellon Trust Company* cit. para. 23.

[157] R Fentiman, *International Commercial Litigation* cit. 620.

[158] England and Wales Hight Court of 13 February 2014 [2014] EWHC 271 (Comm), *JSC VTB Bank v Skurikhin & Ors*, paras 18-20.

[159] P Lorenz Eichmüller, 'H Limited – The Austrian Sequel' (25 July 2022) EAPIL Blog eapil.org.

[160] *J v H Limited* cit. para. 20.

decision.[161] However, from the formal perspective, which the CJEU takes, it is possible to argue that no "double exequatur" *per se* happened in this scenario since an action on a judgment is indeed considered a separate procedure.

c) Public policy exception as a safety net

Aware of the concerns about the fact that its approach to defining the "judgment" incentivises forum shopping[162] and brings in the risks related to inadequate adversarial guarantees, the CJEU in *H Limited* confirms availability of the remedies, including public policy exception, against such English "judgment".[163] Why state the obvious?

Truth is that without the public policy exception, the judgment which is basically a replica of a Third State judgment would be allowed to enter the EU legal order. This case demonstrates the importance that the public policy exception, notwithstanding continuing calls for its abolishment.[164]

However, this solution is insufficient to prevent issues such as that of "double exequatur". After the *H Limited* ruling, the Austrian Supreme Court decided not to rely on the public policy to refuse enforcement.[165] As the Court found that "J" had the opportunity to oppose the claims in the English proceedings, the enforcement of English "judgment" was not refused in Austria.[166] Some may view this in positive light, particularly due to the fact that the public policy exception was used cautiously.[167] However, this may also be seen as a missed opportunity, as it is questionable whether the Jordanian judgments would even be enforced in Austria if not for the easy access provided by the English law. According to the Austrian law, for a foreign judgment to be enforced in Austria, one of the two core requirements[168] is that the reciprocity is guaranteed in the state of origin (in this case in Jordan), followed by a number of other conditions,[169] as well as additional grounds

[161] See A Briggs, *The Conflict of Laws* (Oxford University Press 2002) 118.

[162] It should be noted that since UK is no longer a Member State, this risk has been reduced. See more on the phenomenon of "forum shopping" in F Ferrari, 'Forum (and law) shopping' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* (Edward Elgar Publishing 2017) 789; F Ferrari, *Forum Shopping Despite Unification of Law* in *Collected Courses of the Hague Academy of International Law* (Brill 2019).

[163] *J v H Limited* cit. para. 46.

[164] W Kennett, *The Enforcement of Judgments in Europe* cit. 221; T Keresteš, 'Public Policy in Brussels Regulation I: Yesterday, Today and Tomorrow' (2016) Lexonomica 82; G Mäsch and M Peiffer, 'New Enforcement Regime under the Brussels I bis Regulation: Does the Paradigm Shift Help Judgment Creditors?' in J von Hein and T Kruger (eds), *Informed Choices in Cross-Border Enforcement. The European State of the Art and Future Perspectives* (Intersentia 2021) 39, 40; J Kramberger Škerl, 'Evropeizacija javnega reda v mednarodnem zasebnem pravu' (2008) Pravni Letopis 351.

[165] The Austrian Supreme Court of Justice, 19 May 2022, 3 Ob 71/22w.

[166] *Ibid*. 19, 20.

[167] P Lorenz Eichmüller, 'H Limited' cit.

[168] Austrian Enforcement Code (Exekutionsordnung), RGBl No 79/1896, BGBl No I 100/2016 (2016), art. 406.

[169] *Ibid*. art. 407.

for refusal.[170] The reciprocity between the states must be expressly provided by a formal certificate, *i.e*., in a bilateral or multilateral treaty,[171] which does not currently exist between Austria and Jordan.[172] It follows that Jordanian judgments could not as such be enforced in Austria, which points to the fact that the issue in *H Limited* was a deliberate instance of forum shopping, and a successful one at that. The English procedure was, indeed, "used as a Trojan horse to enter Austria".[173] Given the generally universal negative stance towards the phenomenon of forum shopping,[174] the CJEU's decision in *H Limited* seems even more surprising.

As visible from the above, stressed between the broad notion of "judgment" and narrow notion of "double exequatur", the loosing parties to the proceedings in the Third States may experience disadvantage, especially in the form of uncertainty when eventually the judgment is brought before EU national courts for the purpose of recognition or enforcement. With UK no longer in the EU, the mentioned uncertainty is reduced. However, the possibility of similar issues still remains as the common law system of enforcement of judgments is also used in Ireland.[175] In a similar vein, some authors point to the possibility that this ruling may actually prompt some Member States to incorporate merger judgments into national laws in view of attracting foreign creditors.[176] Additionally, with the UK outside of the EU, the number of cases from the Third States might be on the rise. As the epilogue of the case *H Limited* in Austria clearly demonstrates, the advantage, however, of this constellation of circumstances is in the potential for wider acceptance of the same Third State's judgment across the EU and additionally unifying the EU legal order beyond individual Member States.

d) Impact of H Limited *on the notion of "judgment"*

It follows from the former CJEU's rulings, that in addition to the elements in the law provision itself, the notion of "judgment" entails that it is rendered by an independent authority following the adversarial proceedings between the parties. The judgment in *H Limited* confirmed the broad notion of "judgment", while also stressing the importance of the adversarial principle. While independent of the content, the notion of "judgment" is ra-

[170] *Ibid*. art. 408.

[171] H Heiss, 'Austria' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* (Edward Elgar Publishing 2017) 1893.

[172] N Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in Egypt and the Mashriq Countries' (2018) Journal of Dispute Resolution 130.

[173] V Richard, 'The CJEU on Double Exequatur' (8 April 2022) EAPIL Blog eapil.org.

[174] See F Ferrari, 'Forum Shopping in the International Commercial Arbitration Context: Setting the Stage' in F Ferrari (ed.), *Forum Shopping in the International Commercial Arbitration Context* (Otto Schmidt/De Gruyter European Law publisher 2013).

[175] See, *e.g*., W Binchy, 'Ireland' in J Basedow and others (eds), *Encyclopedia of Private International Law, (Vol 2)* cit. 2183-2192.

[176] B Hess and others, 'The Reform of the Brussels Ibis Regulation' cit. 18; V Rijavec, 'Enforcement Titles Under Brussels I bis Regulation from National to EU Frameworks' cit. 19.

ther formalistic in line with the overall purpose of the EU private international law regulations being free circulation of judgments. Thus, a decision based on a Third State's judgment, such as English summary order, is included in the notion of "judgment".

Although the CJEU's tone in *H Limited* does not suggest that there is any change in the notion of "judgment" or the prohibition of "double exequatur", the sentiment that the latter is thereby breached remains strong. This is particularly so as earlier scholarly opinions stated that any judgments upon judgments emanating from Third States would not qualify as "judgment" in the sense of the relevant EU regulations. Thus, it could be said that the general understanding of the notion of "judgment" is changed, *i.e.*, broadened by the new ruling. At the same time, the notion of "double exequatur" becomes narrower.

Whatever the case may be, the current understanding of the notion of "judgment" is too broad. This is particularly so given that the circumvention of the Austrian national rules on recognition and enforcement of foreign judgments by way of English procedural facet admittedly fits very badly with the prohibition of "double exequatur" settled in the EU private international law. The purpose of the prohibition, *i.e.*, avoiding the forum shopping tactics, is disregarded by this ruling precisely because of the broadness of the current notion of "judgment". This new understanding of the notion also deprives the Member States of their right to assess foreign adjudications based on their own national rules on foreign judgments.

This ruling comes at an interesting time coinciding with the European Commission's assessment of the Brussels I Recast.[177] An opportunity is provided for a closer look at this matter to determine whether similar situations are possible under the laws of any of the Member States, now that UK has left the scene. Depending on the result of this analysis, there might or might not be a practical need to react on the EU level by codifying the rules.

III.2. *London Steam-Ship Owners*: New Rules of Interplay between Judgments and Arbitral Awards

a) Facts of the case

Not long after the decision in *H Limited*, the CJEU presented another ruling dealing with the meaning of "judgments" and their interplay with arbitral awards. The ruling in *London Steam-Ship Owners* ensued after long proceedings following the sinking of the *Prestige* oil tanker in 2002. After a criminal investigation was launched in Spain, several legal entities brought their civil claims against owners and the master of the tanker, as well as against the liability insurer, *i.e.*, the London P&I Club. Pursuant to art. 117 of the Spanish Criminal Code, the claimants had the right to a direct action against the P&I Club.[178] The Club,

[177] Art. 79 Brussels I Recast cit.

[178] Ley Orgánica 10/1995 of 23 November 1995 of Penal Code «BOE» n. 281, of 24 November 1995, art. 117.

however, did not enter an appearance in those proceedings. Instead, it commenced arbitration proceedings in London, in which it sought two declarations.[179] First, that the Kingdom of Spain needed to pursue its claims in the arbitration proceedings pursuant to the arbitration clause which was included in the insurance contract between the owners of *Prestige* and the P&I Club. Second, that it could not be held liable to the Kingdom of Spain in those matters, as the insurance contract stipulated that the insured party must first pay the injured one the compensation, which is in line with the "pay to be paid" clause common to all the insurance contracts concluded with P&I Clubs.[180] The Kingdom of Spain did not participate in the arbitration proceedings.

The arbitral tribunal delivered an award before the Spanish court. It held that the claims for damages by the Kingdom of Spain needed to be referred to arbitration in London, as well as that the P&I Club was not liable in the absence of prior payment of the damages by the owners of *Prestige*. Afterwards, the High Court of Justice in England granted the P&I Club leave to enforce the award and handed down a judgment in terms of the award, despite the opposition from the Kingdom of Spain.

The Spanish court, on the other hand, delivered a judgment in criminal proceedings and acquitted the master of the *Prestige* in regards to the charges of offence against the environment and convicted him of the offence of serious disobedience towards authorities. After appeals brought by multiple parties, the court convicted the master of the offence of negligence against the environment, held both master and the owners, as well as the P&I Club liable in respect of civil claims, amount of which was to be determined by the Provincial Court of Corunna. That court later held the master, owner and the P&I Club liable to over 200 parties.

After the Spanish judgment was submitted to the High Court of Justice in England for recognition, which was granted, the P&I Club lodged an appeal, claiming that this judgment was irreconcilable with the order and judgment by the High Court, within the meaning of art. 34(3) of Brussels I Regulation. This is where the referring court raised the question of whether a judgment given under Section 66 of the Arbitration Act 1996,[181] such as the one in the present case, falls under the notion of "judgment" within the meaning of art. 34(3) of the Brussels I Regulation. The court also wondered whether a judgment entered in terms of award can fall under the notion of "judgment" of the Member State in which recognition is sought. Finally, the court asked whether, in case that the art. 34(3)

[179] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 26.

[180] More on the "pay to be paid" clause in *e.g.*, N Ronneberg Jr., 'An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide' (1990) University of San Francisco Maritime Law Journal; J Kimball, 'The Central Role of P&I Insurance in Maritime Law' (2013) TulLRev.

[181] United Kingdom's Arbitration Act 1996, 'An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes' ch. 23, section 66.

does not apply, it is permissible to rely on the public policy exception in Brussels I Regulation as a ground for refusal of recognition and enforcement, or do arts 34(3) and (4) provide exhaustive grounds in terms of *res iudicata* and irreconcilability.[182]

Going against the opinion of the Advocate General Collins,[183] the CJEU ruled that

> "a judgment entered by a court of a Member State in terms of an arbitral award does not constitute a "judgment", within the meaning of that provision, where a judicial decision resulting in an outcome equivalent to the outcome of that award could not have been adopted by a court of that Member State without infringing the provisions and the fundamental objectives of that regulation, in particular as regards the relative effect of an arbitration clause included in the insurance contract in question and the rules on lis pendens contained in Article 27 of that regulation, and that, in that situation, the judgment in question cannot prevent, in that Member State, the recognition of a judgment given by a court in another Member State".[184]

In terms of the last question, the CJEU considered that a judgment cannot be refused recognition and enforcement as being contrary to the public policy "on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in terms of an arbitral award".[185]

b) "Judgment" in London Steam-Ship Owners as compared to "Judgment" in H Limited

London Steam-Ship Owners, without a doubt, creates changes to the concept of "earlier judgment". However, before moving on to these new requirements and the question of whether this change also potentially influences the general understanding of "judgment", it is important to view the notion of "judgment" as understood here, and compare it with the conclusions given by the CJEU in its prior judgment of *H Limited*, as the two rulings seem to be incoherent.

As explicitly stated, arbitration falls outside the scope of the Brussels I Recast.[186] The same was the case with its predecessors, Brussels I Regulation and Brussels Convention. This exception covers all matters related to arbitration and excludes it in its entirety, including the ancillary proceedings brought before national courts.[187] As established in *Gazprom*,[188] proceedings for recognition and enforcement of arbitral awards are covered

[182] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 40.

[183] Case C-700/20 *The London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* ECLI:EU:C:2022:358, opinion of AG Collins.

[184] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 81.

[185] *Ibid*.

[186] Art. 1(2)(d) Brussels I Recast cit.; recital 12 of the Preamble of the Brussels I Recast Regulation.

[187] Case C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* ECLI:EU:C:1991:319 para. 18. See also T Hartley, 'Arbitration and the Brussels I Regulation – Before and After Brexit' (2021) Journal of Private International Law 70.

[188] Case C-536/13 *"Gazprom" OAO v Lietuvos Respublika* ECLI:EU:C:2015:316 para. 41.

by the national and international law, such as the New York Convention on the recognition and enforcement of foreign arbitral awards,[189] applicable in the Member State in which recognition and enforcement are sought. It is because of the (almost) universal acceptance of the New York Convention that the arbitration exception was included in the Brussels Convention in the first place.[190]

Since all matters relating to arbitration fall within this exception, it has been held that judgments entered in terms of arbitration awards do not enjoy the benefits of mutual trust and cannot circulate freely within the EU judicial area in a way that "judgments" do. Scholarly opinions[191] and Member States' domestic case law[192] agree that the judgments entered in terms of arbitral awards do not fall within the notion of "judgment". Given that the similar opinion related to the judgments upon judgments of the Third States proved to be false by the CJEU's ruling in *H Limited*, may this by analogy extend also in regards to judgments entered in terms of arbitration awards?

Both judgments entered in terms of arbitral awards and judgments upon judgments of Third States are ancillary in nature – they are dependent on a prior adjudication, *i.e.*, an originating act.[193] Both aim to assess the validity of the originating act, whether it be a foreign judgment or an arbitral award, as well as determine its effects in the Member State in question.[194] In *H Limited*, "judgment" was made upon the judgment of a Third State in a matter within the scope of the Brussels I Recast, while in *London Steam-Ship Owners*, the original decision was an arbitral award. Hence, in comparison with the former ruling, the decision in the latter can be viewed as a reduction of the scope in the broad understanding that was reaffirmed there, this reduction being the result of the limitation in the scope *ratione materiae* of the Brussels I Recast, and not the notion of "judgment" *per se*.[195]

[189] The New York Arbitration Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, New York.

[190] L Radicati di Brozolo, 'The Relation between Courts and Arbitration: Support or Hostility' (2012) Opinio Juris in Comparatione 1, 2; Report C 59/72 by Professor Dr Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, para. 61.

[191] A Briggs, *Civil Jurisdiction and Judgments* cit. 721; Report C 59/72 cit. para. 65; A Layton and H Mercer (gen eds), *European Civil Practice (Vol 1)* cit. 362.

[192] See, *e.g.*, a 2009 decision by the German Federal Court of Justice, in which this Court decided that a judgment by a court of a Member State, which incorporated a foreign arbitral award, according to the merger doctrine cannot be enforced under the Brussels I regime. German Federal Court of Justice (Bundesgerichtshof), 2 July 2009, IX ZR 152/06.

[193] M Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the "Judgment Route" the Wrong Road?' (2013) Journal of International Dispute Settlement 607.

[194] *Ibid*.

[195] B Hess, 'Arbitration and the Brussels I bis Regulation: London Steam-Ship Owners' Mutual Insurance Association (2023) CMLRev 538.

However, stating that judgments entered in terms of arbitral awards cannot fall under the notion of "judgment" because arbitration is excluded from the scope of Brussels I Recast is not enough to warrant the different treatment of judgments which similarly confirm a Third State's judgment, as seen in *H Limited*. There, the CJEU focuses on the second level judgment in England to establish it is a "judgment" under Brussels I (Recast), and not on the originating acts – the two judgments from Jordan, *i.e.*, a Third State. On the other hand, in *London Steam-Ship Owners*, the mere possibility of recognising or enforcing the judgment entered in terms of arbitral awards through Brussels I (Recast) is not even considered, while the same judgment could fall under the notion of "earlier judgment" only under strict requirements. Here, the originating act, that being the arbitral award, is clearly of utmost importance for the possibility of its inclusion under "judgment". Why was the same standard not held for judgments whose originating act is a Third State judgment? After all, recognition and enforcement of a Third State judgment under Brussels I Recast is not possible – national rules of the Member State of enforcement apply here. It has been previously noted that arbitral awards do not change their nature nor function by being approved by a court of a Member State, *i.e.*, the arbitral awards still remain outside of the scope of the Brussels I (Recast).[196] This argument can be equally expanded to Third State judgments – while such judgment can be recognised and enforced in a certain Member State (even if it may be through the English procedure of "action on a judgment"), it does not change their nature and origin, which stems from a State whose judgments do not benefit from the free movement of judgments allowed through the relevant regulation such as the Brussels I (Recast). Other Member States must still retain their right to assess whether the originating act, *i.e.*, a Third State judgment, can be recognised and/or enforced according to their own rules on recognition and enforcement of foreign decisions. Thus, arbitration being out of scope of Brussels I (Recast) is not a proper argument, as enforcing Third State judgments is also outside of its scope.

When dealing with the situations such as the ones at hand, there should either be consistent focus on the second level judgment in a Member State (without looking back at the originating act), or the first level judgment, *i.e.*, the originating act. In the former case, merger judgments and any judgments upon judgments would be allowed recognition and enforcement under the relevant EU regulations, if the second level judgment, which is rendered in the Member State, falls under the scope of application. In the latter case, if the originating act cannot fall under the notion of "judgment", neither should the second level act. The biggest issue that arises when comparing the rulings in *H Limited* and *London Steam-Ship Owners* is precisely the fact that CJEU does not take a consistent, coherent stance in regards to judgments upon judgments. While one ruling focuses on the first level judgment, therefore prohibiting its recognition or enforcement under the EU regulation, the other focuses on the second level judgment, allowing it to freely move among the other Member States in the future.

[196] K Kerameus, *Enforcement in the International Context* cit. 20.

These rulings highlight the lack of consistency in the interpretation of "judgment", especially in view of decisions stemming from common law systems. If a judgment based on an arbitral award does not constitute a "judgment", neither should a judgment based on a Third State's judgment. This is primarily because the second level judgment does not decide on the merits "afresh" – as the dispute in question is decided by the first level judgment, it is that judgment that should be taken into account.[197] The additional reasons against inclusion of judgments based on Third States' judgments under the EU notion of "judgment" have already been described above. On the occasion that the ruling in *H Limited* is to be deemed as the proper understanding, and the first level judgment should not matter for the sake of inclusion under "judgment", the same criteria should be held also for judgments entered in terms of arbitral awards. This position, however, would open a Pandora's box in terms of the interplay of judgments and arbitral awards, as well as in terms of the purpose of arbitral exception in Brussels I Recast. Moreover, it would also bring additional changes to the general notion of "judgment" due to the new requirements in terms of the notion of "earlier judgment", which will be further elaborated below.

The only option left, which is the current state of affairs, is leaving this inconsistent interpretation of "judgment" as it is, and hoping it does not lead to any more issues in the future. This option may be appealing, particularly due to the fact that all of the problems brought to the surface through these two rulings are a product of England, *i.e.*, of its common law system which at points comes at a clash with the civil law system. After Brexit, the relevance of these rulings for the future is undoubtedly diminished. At the same time, common law is still used in Ireland, therefore the possibility of similar issues is not completely erased. Regardless of the practical repercussions, it is regretful that the CJEU has not given these issues a proper conclusion.

c) Extending the principles of EU judicial cooperation in civil matters to arbitral tribunals

Regardless of the previously presented inconsistencies in interpretation between *H Limited* and *London Steam-Ship Owners*, the impossibility of including judgments entered in terms of arbitral awards under "judgment" in terms of Brussels I (Recast) was taken as a fact in the CJEU's ruling in *London Steam-Ship Owners*. However, a distinction was made between the general notion of "judgment" and the notion of "earlier judgment" in the sense of art. 45(1)(c) of the Brussels I Recast (formerly, art. 34(3) Brussels I Regulation), which provides the ground for refusal of recognition and enforcement based on irreconcilability. In contrast to the notion of "judgment" in general, the notion of "earlier judgment" within the ground for refusal must therefore be interpreted in a way that it also covers judgments entered in terms of an arbitral award. Such bar to the recognition and enforcement remains possible as the fact that an "earlier judgment" is outside of the

[197] M Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards' cit. 611.

scope of the EU regulation does not make a conflict of two judgments acceptable, as long as they are both valid in the relevant legal system.[198] Thus, some have interpreted this to cause the notion of "earlier judgment" to expand outside of the material scope of the Brussels I (Recast) regulation itself.[199] This view, however, does not entail that also the notion of "judgment" is expanded indirectly to arbitral awards. It is to note that the focus is not on the arbitral award (or the Third State judgment as in the CJEU's ruling in *H Limited*). This was regarded as one of the positives of the CJEU's ruling in *London Steam-Ship Owners*: it confirmed a different understanding of the notion of "judgment" within different contexts of the Brussels I Recast and its predecessors, thereby additionally consolidating the differing interpretation of the relevant notions.[200]

What is not regarded as positive are conditions that the CJEU sets for arbitral awards to be included within the concept of "earlier judgment". After concluding that a judgment entered in terms of an arbitral award is fully capable of constituting an "earlier judgment",[201] the CJEU goes on to establish that this is dependent on certain factors. It states that "the position is different where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of that regulation, of a judicial decision falling within the scope of that regulation".[202] As an argument for this stance, the CJEU recalls that interpretation of a provision of EU law must be done by considering the context of that provision and all of the objectives that are pursued by the relevant regulation. Therefore, the principles underlying judicial cooperation in civil matters in the EU must be kept in mind.[203] In the case at hand, the CJEU highlights two of those principles that were infringed by the judgment entered in terms of an arbitral award: the relative effect of an arbitration clause included in an insurance contract, and the principle of *lis pendens*.

These requirements were unforeseeable. With regards to the first principle, the CJEU recalls that "a jurisdiction clause agreed between an insurer and an insured party cannot be invoked against a victim of insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or before the courts for the place where the victim is domiciled",[204] as previously established in *Assens Havn*.[205] The *Assens Havn* ruling, however, stems from the need to uphold the objective pursued by the

[198] T Hartley, 'Arbitration and the Brussels I Regulation' cit. 72.

[199] B Hess, 'Arbitration and the Brussels I bis Regulation: London Steam-Ship Owners' Mutual Insurance Association' cit. 538; A Mourre, 'Is Commercial Arbitration Entering in Dangerous Waters in the European Union' (2023) Asian International Arbitration Journal 3.

[200] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 53.

[201] Within the meaning of art. 34(3) of the Brussels I Regulation.

[202] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 54.

[203] *Ibid*. para. 58.

[204] *Ibid*. para. 60.

[205] Case C-368/16 *Assens Havn v Navigators Management (UK) Limited* ECLI:EU:C:2017:546 paras 31, 40.

regulation, namely its ch. II, section 3.[206] Such objectives cannot be expected to be upheld in regards to matters outside of the scope of the regulation itself, *i.e.*, it is questionable how in the matter explicitly excluded from the scope of the regulation, account should be taken of the fundamental rules of that same regulation.

With regards to the principle of *lis pendens*, the CJEU stated that "the minimisation of the risk of concurrent proceedings is one of the objectives and principles underlying judicial cooperation in civil matters in the European Union".[207] Because of this, a judgment entered in terms of arbitral award cannot prevent recognition and enforcement of a judgment from a different Member State. However, *lis pendens* between arbitration and court proceedings is hardly ever regulated, primarily because an arbitration agreement usually confers exclusive jurisdiction and derogates court jurisdiction.[208] It has been suggested that "*lis pendens* in favour of judicial proceedings has no place in arbitration"[209] as "arbitration and court proceedings belong to separate worlds".[210] Along these lines are also provisions on *lis pendens* in Brussels I Recast as they do not apply to arbitration, only to parallel proceedings before the courts.[211] The CJEU's argument is also questionable considering the ruling in *Liberato*, where the CJEU stated that a breach of the *lis pendens* rule cannot in itself justify non-recognition of a judgment on the ground that it is manifestly contrary to public policy in that Member State.[212] Although this was stated in the context of the public policy exception, it still indicates that the *lis pendens* rule does not carry such an "importance" to cause refusal of recognition and enforcement of a judgment. This being the case for judgments, why should it be any different for arbitral awards?[213]

If the rules relevant for recognition and enforcement of "judgments" in the EU should now be extended to arbitral awards, this would point to the fact that judgments enjoy higher importance than arbitral awards, as some of the well-known rules of arbitration are being disregarded in order to allow enforceability of judgments over arbitral awards on the same matter. Though not explicitly, a hierarchy among different types of decisions would be made. Indication of such hierarchy could perhaps have been sensed from the

[206] *Ibid*. para. 41.

[207] *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. para. 70.

[208] Z Nový, 'Lis Pendens Between International Investments Tribunals and National Courts' (2017) Czech Society of International Law 542; E Gaillard, 'Abuse of Process in International Arbitration' (2017) ICSID Rev 28.

[209] G Bermann, *International Arbitration and Private International Law General Course on Private International Law* in *Collected Courses of the Hague Academy of International Law* (Brill 2016) 85.

[210] Z Nový, 'Lis Pendens Between International Investments Tribunals and National Courts' cit. 539.

[211] *Ibid*. 538.

[212] Case C-386/17 *Stefano Liberato v Luminita Luisa Grigorescu* ECLI:EU:C:2019:24.

[213] G Cuniberti, 'London Steam-Ship Owners: Extending Lis Pendens to Arbitral Tribunals?' (23 June 2022) EAPIL Blog eapil.org.

CJEU's previous ruling in *West Tankers*,[214] where the rules of the Brussels I Regulation were set above those of the New York Arbitration Convention.[215] In any case, these requirements for judgments entered in terms of arbitral awards to qualify as "judgments" in the sense of art. 34(3) could not have been foreseen.[216] Going by the previously established elements necessary for a decision to qualify as "judgment",[217] as well as the previously established understanding that even the decisions not falling under the general notion of "judgment" may still qualify as an "earlier judgment" under art. 34(3) of Brussels I and 45(1)(c) of Brussels I Recast, the judgment entered in terms of arbitral award should have been capable of constituting an "earlier judgment" in the sense of art. 34(3) of Brussels I and art. 45(1)(c) of Brussels I Recast.[218] As it stands now, it may seem that the political happenings at the time,[219] as well as financial repercussions[220] that would follow if siding with the AG's Opinion, had an influence on the CJEU's ruling. Regretfully, this has been done at the cost of legal certainty.

Although the notion of "earlier judgment" has undoubtedly been changed, *i.e.*, significantly restricted, it remains left to inspect whether this has any effect on the general notion of "judgment". Going by the assumption that (regardless of the contrasting conclusion in *H Limited*) judgments whose originating act was an arbitral award do not fall under the notion of "judgment", this change in the notion of "earlier judgment" does not affect the general notion of "judgment". This is due to the former's broader scope – what falls under "earlier judgment" does not necessarily fall under "judgment".

IV. Conclusion

It is quite difficult to grasp that in the EU judicial area in which judgments from all of the 27 Member States should circulate without frontiers, the notion of "judgment" is still not sufficiently clear. Although the broadness of definitions given in the EU regulations on

[214] Case C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* ECLI:EU:C:2009:69.

[215] R Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments* in *Collected Courses of the Hague Academy of International Law* (Brill 2013) 238.

[216] Also pointed in A Briggs, 'Humpty-Dumpty, Arbitration, and the Brussels Regulation: A View from Oxford' (23 June 2022) EAPIL Blog eapil.org.

[217] As established in section II of this *Article*.

[218] As supported in *The London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain*, opinion of AG Collins, cit.

[219] Particularly referring to the United Kingdom leaving the EU.

[220] On the basis of the Spanish judgment, the master, owners and the London P&I Club were "liable to over 200 separate parties, including the Spanish State, in sums in excess of EUR 1.6 billion, subject, in case of the Club, to the global limit of liability of USD 1 billion". However, on the basis of the London award, "in the absence of prior payment of the insured liability by the owners, the Club was not liable to the Spanish State in respect of the claims". See *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain* cit. paras 18, 22.

cross-border collection of monetary claims is understandable, additional criteria are often necessary to conclude whether a certain decision falls under this notion. This is the result of the vast variety of judicial decisions in different Member States not known in others, which prompted their courts in multiple instances over the years to seek the CJEU's clarification. Although the line of cases improved general understanding of the notion of "judgment" in the EU since 1968, there is more to be done to enhance legal certainty. This has only been confirmed by the recent CJEU's rulings in *H Limited* and *London Steam-Ship Owners*. While these cases directly address the notion of "judgment", they also touch upon some of the particularly intricate matters of "double exequatur" and the interplay of judgments and arbitral awards.

Common to both CJEU rulings is that they affect the previous understanding of the notions of "judgment" or "earlier judgment", the former in the general context of recognition and enforcement, and the latter in the special context of refusal of recognition and enforcement on the grounds of irreconcilability. The ruling in *H Limited* explains that the notion of "judgment" covers also an English payment order issued in the special summary contested examination of a judgment given in a Third State. This ruling effectively distorts the general idea of the "double exequatur" as understood previously, allowing for its circumvention if the Member State's national law provides for a respective type of proceedings. As the UK has since left the EU, the threat of a wave of such cases is lessened, but some cases might still come along, particularly from Ireland. As a matter of principle, the notion of "judgment" is overly broad, at the expense of the prohibition of "double exequatur". The CJEU held that the risks associated with the adversarial nature of the proceedings may be counter-balanced by means of the public policy clause. Despite the fact that no qualitative conclusion can be drawn from the fact that in the case at hand the Austrian court found no reasons to invoke public policy, this mechanism is extremely rarely used and may prove insufficient.

In *London Steam-Ship Owners*, the difference between "judgment" in the process of recognition and enforcement according to the provisions of the EU regulations, and the "earlier judgments" being the grounds of refusal of recognition and enforcement of a "judgment", has been established. While the CJEU ruling clearly establishes that judgments entered in terms of arbitral awards do not fall under the former notion, they can fall under the latter one under certain conditions. This conditionality substantially changes the previous understanding and establishes additional requirements that were unforeseeable. Thus, the ruling revised understanding of the interplay between judgments and arbitral awards in the EU. This was done, however, based on highly questionable reasoning.

Following the two CJEU rulings in 2022, the notion of "judgment" has undergone changes in different directions. On the one hand, *H Limited* confirms the sheer broadness of the notion by including the English payment orders given after a limited examination of a Third State judgment, and subsequently diminishing the relevance of the principle of the prohibition of double exequatur. Here, the CJEU focused on the ancillary judgment, *i.e.*, a

second level judgment, without giving much thought to the originating act, *i.e.*, a first level judgment which was rendered in a Third State and as such was not susceptible to recognition and enforcement under the Brussels regime. In that sense, the notion seems to have become over-encompassing. On the other hand, *London Steam-Ship Owners* confirms the exclusion of judgments entered upon arbitral awards from the general notion of "judgment", while at the same time introducing significant restrictions to decisions that can fall under the notion of "earlier judgment" in the sense of articles on refusal of recognition and/or enforcement. In that sense, the general notion of "judgment" has not undergone additional changes, while the notion of "earlier judgment" has gotten additionally restricted. At the same time, the logic of *H Limited* is severely diminished by this ruling as here, the CJEU does not even consider the fact that an ancillary, second level judgment such as judgment entered in terms of arbitral award could be included under the notion of "judgment" for the purpose of recognition and enforcement under Brussels I (Recast) – in this case, the originating act, *i.e.*, the arbitral award, is the only thing that matters.

While acknowledging that the root cause of the issues in interpreting the notion of "judgment" in both cases arose due to peculiarities of the English, *i.e.*, common law, legal system, it can still be concluded that the case law continues to be the source of confusion and uncertainty for the parties. Establishing that, further research into the extent of those uncertainties is necessary and could provide basis for conclusion regarding the possible legislative actions at the EU level. As it stands now, the rulings only brought confusing and inconsistent interpretation of the EU notion of "judgment".

ARTICLES

SCHENGEN AND EUROPEAN BORDERS
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WHICH RULE OF LAW FOR THE EXTERNAL BORDERS OF THE EUROPEAN UNION? AGENCIES, INSTITUTIONS, AND THE COMPLEX UPHOLDING OF THE RULE OF LAW AT THE EU'S EXTERNAL BORDERS

LUISA MARIN*

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ABSTRACT: This *Article* expands the rule of law crisis narrative to the EU administrative layer. It starts by introducing the context where the agencies have developed; it continues with an operationalization of the rule of law for agencies; in the next section, it places the evolution of the agencies against the background of the low-intensity constitutionalism of the EU legal order and its meaning. It unpacks this concept into the right to effective judicial protection, which is assessed in its constitutional potential in the case law on the Hungarian rule of law; it further continues with an assessment of the case law concerning the instruments of the external dimension of migration and border management, focusing

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on the deference shown by the CJEU. The thesis argued in this *Article* disputes the idea of the consolidation of a coherent approach toward rule of law issues, especially when migration-related policies are concerned. The *Article* concludes with a claim that an effort of constitutional coherence is necessary to support the embedding of the agencies into a more robust rule of law framework.

KEYWORDS: Frontex – rule of law – judicial review – right to an effective remedy – Commission – Court of Justice.

I. INTRODUCTION: THE LOW-INTENSITY CONSTITUTIONALISM OF THE EU AND ITS MEANING FOR AGENCIES

In the governance of migration, the EU administrative level is increasingly vested with operational powers.[1] This represents a shift from the original design of European integration, with the EU acting as a regulator, and the enforcement left in the hands of national bureaucratic bodies. Instead, agencification has become a key-feature of EU integration; consequently, instances of shared administration multiply.[2]

Additionally, in the last years, there have been many reports, investigations, by both European institutions and civil society, criticising the policies and practices implemented by agencies, with Frontex having acquired a highly problematic role in this respect.[3] The main claims concern, in a nutshell, the breach of the legal framework governing its activities, the poor respect for fundamental rights, in the sense of both participation or acquiescence to gross fundamental rights violations committed by states, and the failed mainstreaming of fundamental rights protection into the actual functioning of the agencies.

This *Article* contributes to this debate underscoring the broader constitutional embedding of agencification, exploring the meaning of the constitutionalisation of the EU legal order for the functioning of agencies. In the words of Poiares Maduro, the EU has undergone a process of low-intensity constitutionalism,[4] and the pivotal judgment *Les*

[1] We refer to the European Border and Coast Guard Agency (hereinafter: Frontex) and the European Union Asylum Agency (hereinafter: EUAA), replacing EASO.

[2] D Fernández-Rojo, *EU migration agencies: the operation and cooperation of FRONTEX, EASO and EUROPOL* (Edward Elgar Publishing 2021). See also M Scholten, 'EU Enforcement Agencies' in M Scholten (ed) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023); M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020).

[3] For a general understanding of the matter see the debate on 'Frontex and the Rule of law' at verfassungblog.de. L Marin, 'Frontex as the epicenter of a rule of law crisis at the external borders of the EU' (2024) ELJ 11; see also the articles of the special issue edited by L Marin, M Gkliati and S Nicolosi (eds), *The External Borders of the European Union: Between a Rule of Law Crisis, and Accountability Gaps* (2024) ELJ.

[4] Poiares Maduro frames the process as characterized by a gradual judicial and political development built upon national constitutional sources and was limited to the control of European and national forms of power, not linked to the creation of a polity. In M Poiares Maduro, 'The importance of being called a constitution: Constitutional authority and the authority of constitutionalism' (2005) ICON 340-342.

Verts,[5] back in 1986, has represented a turning point in the process, legitimising a constitutional narrative of European integration.[6]

This process of low-intensity constitutionalism has concerned, first, national public powers; later, also European public bodies have been limited in their room of manoeuvre because the Court of Justice of the EU (hereinafter: CJEU) had to defend the character and the quality of the newly established European legal order. It is not a case that in the same year as *Les Verts*, the CJEU decided – in *Johnston*– that the right to an effective remedy is an expression of a general principle of law which is also to be taken into consideration in Community law.[7] The very core constitutional identity of the EU is therefore precisely forged on the relationship between public powers - in their double declination of (sub-)national and supranational- and individuals, and it posits that the exercise of public powers is constrained by rules of law; institutions are posited to ensure the respect of those higher rules, among others.

Against the background of previous research framing the emerging rule of law crisis affecting Frontex,[8] this *Article* contributes to the reflection by developing a constitutional law discourse on agencies, in particular unravelling the core tenets of the rule of law, whose pillar is precisely the right to an effective legal remedy.

Rule of law crisis does not only mean the rule of law backsliding by illiberal governments. Challenges to the EU rule of law derive from consolidated institutional and organizational failures in Member States violating norms of EU and domestic constitutional laws;[9] rule of law challenges arise as well if EU agencies do not respect core tenets of the EU rule of law, if the primary legal framework is disregarded because trumped by policy considerations. Secondly, the interest in a rule of law framework is deriving from the fact that fundamental rights litigation is knowing a stasis moment.[10] The merit of the rule of law is that it focuses on the actor exercising public authority, an agency, be it European or domestic, and not on the status or the rights of a migrant.

After this introduction, the *Article* develops the meaning of the rule of law for the EU. The rule of law postulates effective judicial protection, and this tenet must be satisfied also in the context of agencification. In the next section, the *Article* develops the most recent developments on the rule of law, focusing on the rule of law backsliding and on the Hungarian case, as illustrative of a successful example of upholding the rule of law

[5] Case 294/83 *Parti écologiste "Les Verts" contre Parlement européen* ECLI:EU:C:1986:166.

[6] E Stein, 'Lawyers, judges, and the making of a transnational constitution' (1981) AJIL 1; JHH Weiler, 'The Transformation of Europe' (1991) YaleLJ 2403.

[7] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206 para. 18.

[8] L Marin 'Frontex as the epicenter of a rule of law crisis' cit.

[9] E Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' (2021) EuConst 471.

[10] D Thym 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy' (2020) IJRL 569. See also D Thym, 'Judicial Dynamism and Its Limits: The Role of National Courts and their Interaction with the CJEU' (August 2024) ADiM Blog adimblog.com.

and the right to effective judicial protection in the context of migration management. This contribution of the EU institutions (Commission and Court of Justice) in preserving the rule of law, is subsequently compared with the activities of the same institutions in the context of external borders, by focusing on the decisions concerning the EU-Turkey deal, and on the very recent case law against Frontex. The *Article* concludes arguing for the non-homogeneous upholding of the rule of law in the context of the European administrative order. Instead, an effort of constitutional coherence is necessary to support the embedding of the agencies into a more robust rule of law framework.

II. The rule of law and its implication in the EU legal order: effective judicial protection

The rule of law has progressively been established as a basic pillar of the EU legal order. In a first foundational moment, the CJEU has developed the core features of the newly established legal system. Among them, primacy concerns the interactions between EU law and domestic legal systems. Primacy requires trust from domestic courts, which has been granted –within a dialogical process- because the EU legal order has developed respecting some values and principles. These have been built by the CJEU in a sedimentary manner with its case law.[11] In a second moment, the rule of law acquired new significance with the accession of democracies whose commitment to the values of liberal constitutionalism has revealed –after the accession- its superficial nature.[12] This has nevertheless contributed to developing the meaning of the rule of law and expanding the toolkit to defend it.

Since *Les Verts*,[13] the CJEU has constructed the EU as a legal order based on the rule of law, implying that the exercise of power is constrained by law. Its core meaning, guaranteeing that the will of the majority does not oppress minorities, is an expression of the democratic principle. Its concrete application is translated into several other principles and rules, including legality, legal certainty, prevention of abuse of power, equality before the law, and access to justice.

As formulated by the Venice Commission, the rule of law "requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality, and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures".[14]

[11] ME Vergara and G Villalta Puig, 'The Quiet Architect Finds its Voice: The Primacy of the Law of the European Union after Press Release No 58/20 of the Court of Justice of the European Union' (2021) EPL 673; A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[12] G Halmai, 'Illiberal Constitutional Theories' (2021) Jus politicum 135.

[13] *Les Verts* cit para. 23.

[14] Venice Commission of the Council of Europe, Rule of Law Checklist, adopted in Venice at its 106th Plenary Session on 11-12 March 2016, p. 10.

Within the EU, the Commission has framed the EU rule of law as including "(...) legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law".[15] The rule of law is therefore not a single principle but a system of principles and rules and it requires institutions to grant the implementation of those principles.

II.1. Rule of law and effective judicial protection

The provisions of the Charter of Fundamental Rights of the European Union (Charter) which have translated this core value into rules (art. 19 TEU and art. 47 of the Charter) are of crucial importance for the actual implementation of the rule of law into practice, for example by complementing existing administrative internal remedies (e.g., complaints mechanism to Fundamental Rights Officer in Frontex, or Consultative Forum in Frontex or Ombudsman at European level) with external -and necessarily judicial- oversight mechanisms. If the former are expression of the right to good administration (art. 41 Charter), judicial review is an expression of one of the pillars of the rule of law paradigm. Indeed, the combined provisions of art. 19 TEU and art. 47 of the Charter establish that the rule of law framework is essentially operationalised through effective judicial review. The right to effective judicial protection is a cornerstone of the rule of law, and therefore, the realisation of the objectives of the EU in full respect of its commitment to the constitutional values and principles requires that its activities take place in a context where judicial review is ensured on all acts and activities, including those of its institutions, bodies, offices, and agencies of the Union (art. 263 TFEU) which have legally binding effects or which affect the position of third parties. Together with the rules that define the conditions and boundaries for exercising those powers, effective judicial review contributes to ensuring respect for the European primary legal framework.

In this context, it is important to elaborate on the significance of the judgment *Associação Sindical dos Juízes Portugueses*,[16] where the Court has stated that the tangible expression of the values of the rule of law is a task for both the CJEU and the national courts and tribunals. Therefore, it is upon the Member States to ensure that EU law is applied in their territories with a guarantee of effective judicial protection. More precisely, "[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".[17]

This section demonstrates that, next to an initial foundational phase where the low-intensity constitutionalism of the EU legal order was instrumental to its consolidation in

[15] Communication COM (2014) 158 final from the Commission of 11.3.2014 on A new EU Framework to strengthen the Rule of Law, p. 2.

[16] Case 64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

[17] *Ibid.* para. 36.

relation to the legal orders of the Member States, the same principles and pillars have been reinstated when the values have been challenged within domestic legal orders. For these reasons, the respect of effective judicial review mechanisms seems to be co-essential to the respect of the rule of law and should therefore apply to all the activities of the EU, including those exercised by its agencies. The core question to be examined in this context is how to translate the requirements of direct judicial review of the acts of the Union to this field of analysis.[18]

II.2. The rule of law and its meaning for agencies

The agencification of the EU administrative space triggers the issue of rule of law application to EU agencies exercising executive powers. Rule of law requires that such powers do not operate arbitrarily; in contrast, it postulates that agencies' activities are constrained by law and subject to a system of scrutiny and oversight; furthermore, it implies that legal remedies and procedures must be in place to review the legality of the measures adopted.[19]

Within the framing of European constitutionalism, the requirement of legal accountability should apply to the activities carried out by agencies, since these are expressions of the EU executive power and must be held accountable to multiple actors, including EU institutions;[20] furthermore, while coordinating and supporting the tasks of Member States' administrations when implementing EU law and policies, they do interact with individuals.

Irrespective of the type of activity they carry out, be it of direct enforcement or of support,[21] their activities must be subject to accountability mechanisms, including adequate and effective judicial oversight in courts. This is a legal standpoint which is expression of the early interpretation of EU law by the CJEU, as embodied in the case law *Meroni*, *Romano*, and *Short-Selling*.[22] Later judgments, while adjusting the *Meroni* doctrine to the evolution of agencification, did not fully abandon the legacy of *Meroni*.[23]

[18] Indirect judicial review via the preliminary reference procedure cannot be deemed to be effective based on the interpretation adopted by the CJEU of this instrument. For similar observations, see G Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach' (2020) EuConst 466.

[19] C Harlow, *Accountability in the European Union* (Oxford University Press 2002) 144-167.

[20] D Curtin, 'Delegation to EU non-majoritarian agencies and emerging practices of public accountability' in D Geradin and N Petit (eds), *Regulation Through Agencies in The EU. A New Paradigm Of European Governance* (Edward Elgar Publishing 2005) 88.

[21] D Curtin and M Egeberg, 'Tradition and innovation: Europe's accumulated executive order' (2008) West European Politics 640.

[22] Case 9-56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* ECLI:EU:C:1958:7; Case 98/80 *Giuseppe Romano v Institut national d'assurance maladie-invalidité* ECLI:EU:C:1981:104; Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (Short Selling)* ECLI:EU:C:2014:18.

[23] M Simoncini, '"Live and let die?" The Meroni doctrine in 2023' (26/09/2023) EU Law Live eulawlive.com.

For this purpose, we should consider that agencies involved in enforcement and operational activities, typical of migration, do carry out *activities* of executive nature, expression of their mandates. While the Treaties refer to *acts* of bodies, offices and agencies, all administrative activities must be subject to forms of judicial review: this is a *lacuna* of the Treaties that must be filled with their evolutionary interpretation. The second element we should consider is that these activities do take place according to and after *acts* of administrative nature.

The argument put forward here is supported also by the doctrine of accountability, which distinguishes between ex ante and ex post accountability mechanisms. Also in this perspective, the role of effective judicial protection must be strengthened because judicial review can be seen as compensating for limited *ex ante* accountability mechanisms, which can be claimed to be applicable also to EU agencies.[24]

Having explained the interconnection between the rule of law and judicial protection in the constitutional framework of the EU, the next section will expound on the rule of law crisis that is unfolding within backsliding Member States to test to which extent supranational institutions are upholding the rule of law and its tenets.

III. The rule of law and democratic backsliding of illiberal Member States

The phenomenon of the so-called rule of law backsliding has been unfolding in the EU for quite some time now and has reached worrying levels of severity.[25] Scholars have investigated the issue with a peculiar focus on Poland and Hungary, which have been in the spotlight as the major "rule of law breakers" among the EU Member States. In this framework, one of the most debated questions was (and is) the capacity and preparedness of the EU to tackle, correct, and sanction the violation of the rule of law and of the other values enshrined in art. 2 TEU. EU institutions have tried to make use of both the existing apparatus, as already designed in the Treaties, and newly established instruments.

[24] C Harlow, *Accountability in the European Union* cit. *Mutatis mutandis*, Deirdre Curtin reasoned over input and output legitimacy and ex ante and ex post accountability mechanisms, pointing out the specificity and challenges of judicial accountability in the context of the ECB accountability mechanism. In D Curtin, 'Linking ECB Transparency and European Union Accountability', in ECB Legal Conference 2017: Shaping a new legal order for Europe: a tale of crises and opportunities (2017) ecb.europa.eu 83 ff.

[25] Literature on the rule of law backsliding has been growing exponentially in the last years. Among many others, see D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) EuConst 512; L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 19; M Claes, 'Editorial Note: How Common are the Values of the European Union? (2019) Croatian Yearbook of European Law and Policy VII; K Lenaerts, 'New Horizons for the Rule of Law Within the EU' (2020) German Law Journal 29; L Pech, 'The Rule of Law in the EU' in P Craig, G de Burca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 307; L Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) Hague Journal on the Rule Law 107.

The EU rule of law toolbox, thus, is a mix of old and more recent components. This section aims to highlight how supranational institutions, have been active in upholding the principles of the rule of law.

III.1. The rule of law crisis in the EU: overview and countermeasures

The erosion of the rule of law and other EU founding values has started to become increasingly evident in Hungary and Poland in the last decade. For this reason, the analysis will focus on the period covering the last two Commissions, *i.e.* the one of 2014-2019, led by Juncker, and the one of 2019-2024, led by Von der Leyen.

The Juncker Commission made use of both art. 7 TEU and the infringement procedure to face rule of law-related issues. Ultimately, the same Commission conceived new tools which have been later finalized by the Von der Leyen Commission. The procedure under art. 7 TEU was triggered in 2017 against Poland, for the first time.[26] The European Parliament, which backed up the Commission's action,[27] launched the same procedure against Hungary the following year.[28] While the activation of art. 7 against the Polish State was mainly linked with the issue of the various threats to the independence of the judiciary posed by the reforms passed by the ruling party "Law and Justice" (*Prawo i Sprawiedliwość*), the action against Hungary was associated with a broader variety of criticalities, including functioning of the constitutional and electoral system, corruption and conflict of interests, weakening of fundamental freedoms, protection of minorities, and – for what is of particular interest for the purpose of this *Article* – fundamental rights of migrants, asylum seekers and refugees.[29] These include the use of unlawful and arbitrary detention, automatic removals to Serbia, lack of access to asylum procedures, and effective remedies. The Hungarian case contributes to the argument developed here, *i.e.*, showing that when rule of law backsliding within states intersects with asylum and borders policies, then we have mobilisation of supranational institutions.

[26] See Proposal for a Council decision COM(2017) 835 final from the Commission of 20 December 2017 on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law. This move had been preceded by the attempt by the Juncker Commission to open a dialogue with the Polish Government in January 2016 under the Rule of Law Framework, *i.e.* a process of continuous dialogue with the Member State concerned, whereby the Commission interacts and keeps the European Parliament and Council regularly informed.

[27] European Parliament Resolution 2018/2541(RSP) of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland.

[28] European Parliament Resolution 2017/2131(INL) of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

[29] *Ibid.* paras. 62-72.

The (mis)use of art. 7 TEU has been widely commented on and criticized by scholars.[30] The European Parliament has criticized the Commission and the Council, for refraining from acting in a coherent, timely, and determined manner.[31]

As regards the infringement procedure, several proceedings have been brought against Poland and Hungary in the context of rule of law compliance. In the case of Poland, a crucial issue at stake has been and is the independence of the judiciary: the Commission has challenged the Polish Law on Ordinary Courts,[32] the Polish Law on the Supreme Court,[33] the disciplinary regime of Polish judges,[34] all for their impact on the independence of the judiciary.[35]

Irrespective of these multiple proceedings, the approach of the Commission has been criticized, as being too soft and inefficient vis-à-vis the breach of the rule of law and other European values in Hungary and Poland.[36] The CJEU, for its part, when "fed" with infringement proceedings by the Commission, has shown a determined approach, placing itself in defense of the values enshrined in art. 2 TEU.[37]

In addition to those already existing and provided for in the Treaties, new tools have been developed for the protection of rule of law. These include the Rule of Law Report and the conditionality mechanism, that has been challenged by Poland and Hungary.[38] While a

[30] S Carrera and P Bárd, 'The European Parliament vote on Article 7 TEU against the Hungarian government. Too late, too little, too political?' (14 September 2018) CEPS Commentary ceps.eu.

[31] European Parliament resolution 2022/2647(RSP) of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary. The Parliament seems to suggest that the behavior of the concerned EU institutions and the way art. 7 was managed pose questions in terms of compliance with the principle of the rule of law by the EU itself. Despite various declarations of intent, by the President of the Commission herself, very little has been done in practice to resume the procedure under art. 7 TEU. President Von der Leyen, for example, affirmed that "*The third option is the Article 7 procedure. This is the powerful tool in the Treaty. And we must come back to it*": see Speech by President von der Leyen at the European Parliament Plenary on the rule of law crisis in Poland and the primacy of EU law, SPEECH/21/5361, Strasbourg, 19 October 2021.

[32] Case C-192/18 *Commission v. Poland* ECLI:EU:C:2019:924.

[33] Case C-619/18 *Commission v. Poland* ECLI:EU:C:2019:531.

[34] Case C-585/18 *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*; C-624/18 CP *(Independence of the Disciplinary Chamber of the Supreme Court);* case C-625/18 DO *(Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982.

[35] The Von der Leyen's Commission followed up on this, by launching infringement procedures on the Polish law on the judiciary preventing domestic courts from directly applying certain provisions of EU law protecting judicial independence, and from putting references for preliminary rulings on such questions to the CJEU. Cf. European Commission Press release IP/20/772 of 29 April 2020, 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland'.

[36] See, in this sense, S Priebus, 'The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values?' (2022) JComMarSt 1533.

[37] For an overview of the case-law of the Court relating to the principle of rule of law, see L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case' (2021) SIEPS 3.

[38] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget ('Conditionality Regula-

complete overview cannot be done here, the conditionality mechanism entered into force on 1 January 2021, and covers breaches of the rule of law that affect or seriously risk affecting the sound financial management of the budget or the protection of the financial interests of the Union. In December 2022, for the first time, the Conditionality Regulation was triggered leading to the imposition of measures for the protection of the Union budget against the consequences of breaches of the rule of law in Hungary, concerning public procurement, the effectiveness of prosecutorial action and the fight against corruption in Hungary.[39]

Overall, it is possible to conclude that, in the case of the rule of law backsliding represented by illiberal democracies, EU institutions, and the CJEU in particular, have been ready to uphold the rule of law values and to defend their principles with the toolkit provided for in EU law. Without discussing the merits and the effectiveness of this action, this activism is to be explained with the fact that the very authority of EU law has been and is at stake. The next section will zoom in on the Hungarian case.

III.2. Effective judicial protection at the intersection of the rule of law backsliding in Hungary: the case law on reception conditions and detention of protection-seekers

The case law of the CJEU in relation with the Hungarian legislation and practice on migration and asylum represents an interesting step towards the edification of the meaning of the EU rule of law with a strong constitutional embedding, since the Hungarian rule of law backsliding has entailed, among others, a contested and repressive domestic reception system for migrants.[40] In this context the CJEU has consolidated the rule of law thanks to the implementation and interpretation of the Directives on Returns, Procedures, and Reception.[41] The rule of law backsliding in this country has taken shape also

tion'). Hungary and Poland unsuccessfully tried to challenge the regulation by bringing actions for annulment to the Court of Justice: see Hungary's annulment application in Case C-156/21 *Hungary v European Parliament and Council* ECLI:EU:C:2022:97, and Poland's annulment application in Case C-157/21 *Poland v European Parliament and Council* EU:C:2022:98.

[39] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary. The budgetary impact of this suspension amounted to approximately €6.3 billion in budgetary commitments. For an analysis of the link between rule of law and economic sanctions, see G Halmai, 'The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States' (EUI Working Papers 2018/06).

[40] B Nagy, 'Hungarian Asylum Law and Policy in 2015–2016. Securitization Instead of Loyal Cooperation' (2016) German Law Journal 1053; B Nagy, 'From Reluctance to Total Denial. Asylum Policy in Hungary 2015–2018' in V Stoyanova and E Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 23–31.

[41] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals 98–107; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) 60–95; Directive 2013/33/EU of

with various instances of direct contestation against EU legal instruments, such as the Relocation Decisions: these have been challenged by Hungary and other Visegrad states, before the CJEU, but without success.[42]

This case law is particularly functional to the argument made here since it witnesses the effort of the CJEU to contribute to the affirmation and consolidation of the rule of law in the context of migration management in one state which has weaponised migrants to engage in a conflict of sovereignty with the EU, undermining the authority of EU law and its primacy. This conflict of sovereignty has entailed the discussion of categories such as sovereignty, primacy, and national security, as instruments used by Hungary to challenge the authority of EU law in the domestic legal order.[43]

Yet, in a thread of cases, the CJEU has been adamant in its choice of resorting to the categories of European constitutionalism toward Hungary.

The first cluster of cases is represented by *Torubarov* and *FMS*.[44] The first case originated from a Russian national who applied for international protection in Hungary, allegedly being under criminal prosecution in Russia because opposition leader. The second case concerned transit zones situated at the external border of Hungary. Both cases are relevant since the CJEU explicitly placed boundaries to the activities of national authorities in the implementation of EU law, thanks to the resort to the guarantees of the Procedures Directive, which implements the right to an effective remedy as per art. 47 of the Charter, and by providing direct effect to those provisions, entailing the disapplication of the domestic law in conflict with European law. These boundaries are framed on the respect of legal certainty and of the right to effective remedies and are pervasive, since they affect the domestic legal order, thanks to the primacy and to the effect of the Charter. In all these cases, originated from Hungary, the Court has stated that primacy and the right

the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) 96–116.

[42] L Marin, 'Governing Asylum with (or without) Solidarity? The Difficult Path of Relocation Schemes, Between Enforcement and Contestation' (2019) Freedom, Security & Justice: European Legal Studies 55.

[43] For an overview on this conflict, see L Marin, S Penasa and G Romeo, 'Migration Crises and the Principle of Solidarity in Times of Sovereignism: Challenges for EU Law and Polity' (2020) European Journal of Migration and Law 1.

[44] Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* ECLI:EU:C:2019:626;

Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* ECLI:EU:C:2020:367. For a comment on this case-law, see B Nagy, 'Hungary, in Front of Her Judges' in P Minderhoud, S Mantu and K Zwaan (eds), *Caught in Between Borders: Citizens, Migrants, Humans. Liber Amicorum in Honour of Prof. Dr. Elspeth Guild Tilburg* (Wolf Publishers 2019); L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' in A Bufalini and others, *Annuario ADiM 2020: raccolta di scritti di diritto dell'immigrazione* (Napoli: Editoriale scientifica 2021).

to an effective remedy require national judges to self-declare their competence in assessing the complaints proposed by migrants. This is required by EU law and should take place even if the domestic law has chosen to disregard EU law.[45]

Furthermore, the Court interprets the right to an effective remedy as requiring that if a complaint is decided by an administrative authority, its decision must be subject to judicial review before a judge.[46] It is precisely the reasoning behind this point that is relevant also for our discourse since the Court further investigates whether the Hungarian law complies with EU law. Being the challenge against a decision assessed by the administrative authority, EU law could be respected only if that authority could be considered independent, which is not the case. Alternatively, that decision must be amenable to judicial review before an independent court.[47] In this reasoning, the CJEU elaborates on its earlier case law on the independence of the judiciary, such as *L.M.* and *A.K.*, and concludes that domestic law does not comply with EU law and therefore must be set aside.[48]

Overall, the Court asserts the bases of the functioning of the rule of law, recalling the principle of the separation of powers, and its implications and tenets, arguing that the Hungarian judiciary does not satisfy this requirement, since it runs contrary the essential content of the right protected by the Charter. Considering the effectiveness of EU law, the CJEU empowers domestic judges to assess the domestic decision, setting aside a conflicting domestic provision.[49]

This case law is relevant because it places paramount importance on the right to an effective remedy, and this could find application also once the CJEU is called to assess the effectiveness of the internal administrative complaints mechanisms which are available against the decision of the agencies. These cases can be considered among the *grands arrêts* of the ECJ, because they develop the spirit of the *Van Gend en Loos*, re-asserting legal relationships between individuals and courts, even when domestic authorities had interrupted them. Secondly, the Court has mandated the domestic judge to find in its domestic system the instrument to fill the gap caused by the breach of the EU legal order, as a system based on the rule of law which means a system of complete legal remedies, be it at domestic or European level. Once again, the Court has filled the gaps in the system, acting as a trustee of the community of the Member States, in the full spirit of European constitutionalism.[50]

[45] I Goldner Lang, 'No Solidarity without Loyalty: Why Do Member States Violate EU Migration and Asylum Law and What Can Be Done?' (2020) European Journal of Migration and Law.

[46] *FMS and others* cit. paras. 109-147. Here the Court refers to its case law on the rule of law in Poland, referring extensively to the requirements elaborated in occasion of preliminary references originated from Poland and Portugal.

[47] *Ibid.* para. 77.

[48] *Ibid.* paras 132-134.

[49] I Goldner Lang, 'No Solidarity without Loyalty' cit.

[50] L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' cit.

Another case witnessing the engagement of the European Commission is the infringement proceeding that followed up to this case.[51] In this last case by the CJEU, the Commission has taken the initiative to challenge the Hungarian legislation before the CJEU.

This case is important because it certified the deficiencies of the Hungarian asylum and reception system. More precisely, the CJEU, sitting as Grand Chamber, declared Hungary's failure to comply with EU law by restricting access to asylum procedures, unlawfully detaining protection seekers in transit zones, and illegally removing them to Serbia. Significantly, the Court acknowledged "the virtual impossibility of making an application for international protection in Hungary",[52] thereby certifying the existence of a widespread and systematic unlawful practice of breaches of fundamental rights. While Hungary ignored the Court's ruling, Frontex was associated with episodes of human rights violations on the Hungarian territory. The allegation of complicity with Orbán's government was too much to take, for the Agency's already damaged reputation. It thus decided to suspend all its activities in Hungary: this is the first – and for the time being, the only– time Frontex leaves a Member State. Yet, the withdrawal from Hungary was not officially announced but kept under the radar.[53]

Ultimately, it is here argued that the CJEU is adamant in defending the rule of law in cases of blatant breaches against it, and when primacy is at stake, even when it deals with external borders; in doing so, the Court resorted to its typical toolkit, the one developed in the context of EU law, including the categories of primacy, effectiveness of EU law and setting aside domestic law in conflict with EU law.

In a nutshell, the CJEU deploys its typical toolkit of constitutionalism in cases of direct contestation by a Member State.[54] Here the interesting question is: to which extent is the Court willing to develop the logic of these cases also while deciding on cases concerning other domains, for example, while scrutinizing the activities of the agencies? The analysis will now continue exploring whether other domains of the external borders' policy do convey the same idea of legality, or whether we do witness different approaches.

IV. Two weights and two measures? The "fading legality" at the external borders of the EU and the role of the European Commission

This section aims to focus on the broader contextual and constitutional setting where the policy of external borders is located, by discussing the role of the Commission in enforcing the rule of law at the external borders in a consistent way. The next section will focus

[51] Case C-808/18 *Commission v. Hungary* ECLI:EU:C:2020:1029.

[52] *Ibid.* para.118.

[53] On this topic, see FL Gatta, 'Between Rule of Law and Reputation: Frontex's withdrawal from Hungary' (8 February 2021) VerfassungsBlog verfassungsblog.de.

[54] L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' cit.

on the CJEU. The underlying question is whether the policies concerning the external borders are witnessing the emergence of a fading legality in EU law, by, first, assessing the role of the Commission as the guardian of the Treaties, and secondly, the case law of the CJEU in this context, before zooming in on the way the Court is exercising its scrutiny over the agencies, based on the little case law existing on Frontex, in a second instance. Typically, these institutions are the main enforcers of legality of EU law: the Commission has the instrument of the infringement procedure in its hands and the CJEU has always exercised a leading role in interpreting EU law, filling the gaps in the original design of the Treaties and enabling the development of further integration. It is therefore to be expected that, in all the domains of integration, the institutions do act with the same paradigm of legality as the cornerstone of their activities.

This section argues that the Commission is exercising a double role in this domain, one as a policy guide and designer and the second as the guardian of the Treaties. Yet, in this latter function, the Commission fails to integrate respect for fundamental rights in the development of its policies. As such, it contributes to creating its share of challenges to the legality of this domain of EU law and is incapable of bringing integration forward.

The scholarship increasingly criticized the role of the Commission in the enforcement of the EU law in several situations. Since 2015 Member States have been prompt in reinstating checks at the internal borders, and the Commission has been silent in challenging these practices before the CJEU.[55] With the humanitarian crisis between Belarus and Poland, the Commission has quiesced with abuses by Polish authorities and did not intervene to restore respect for most basic humanitarian principles and rules.[56] Similarly, with the Croatian police practices the reaction of the European Commission has been “mild”, in the words of Goldner Lang and Nagy.[57] According to Tsourdi, the Commission is not adequately integrating asylum-related failings in its monitoring processes concerning the rule of law, and more precisely, the first Commission report on the Commission’s annual rule of law report (sept 2020) “does not seem to grasp the intricate links between asylum-related violations, the situation at the EU’s borders and the rule of law”.[58]

Yet, with defiant states, the Commission is rather proactive with infringement proceedings.[59] I argue that this selectivity of the Commission in pursuing infringements is highly problematic, for several reasons. First, if the guardian of the Treaties is not fulfilling

[55] S Solomon and J Rijpma, ‘A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship’ (2023) German Law Journal.

[56] M Grześkowiak, ‘The "Guardian of the Treaties" is No More? The European Commission and the 2021 Humanitarian Crisis on Poland–Belarus Border’ (2023) Refugee Survey Quarterly 22.

[57] I Goldner Lang and B Nagy, ‘External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement’ (2021) EuConst 442.

[58] E Tsourdi, ‘Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?’ (2021) EuConst.

[59] In respect to Hungary, see the case *Commission v Hungary* cit.

its mandate with the right impartiality, it might result criticized in the exercise of its function, with the consequence of diminishing its credibility.[60] Second, it is of paramount importance that the Commission strives for the emergence of a single rule of law in the European Union. In this respect, a serious and systematic breach of a fundamental right should be declared as such, irrespective of any motivation concerning the state committing the breach toward the Union, be it defiance or not. A different answer might provide an incentive to violate EU law also for other states, and, eventually, it jeopardizes the role of the Commission as policy maker, since it finds itself to operate in a context where the poor enforcement of EU law is systemic. Furthermore, if the legality of the rule of law is not coherently related to an axiological content,[61] it turns into a simulacrum of legality, to a deep detriment of the same. Third, the role of Frontex is also compromised if it does not appear to operate in a strong framework governed by the rule of law. Lacking this, the intergovernmental nature of the Management Board and the hybrid functioning of the Agency will undermine its capacity to act as a "fair" European actor.[62] The inherently political ambit of operation of Frontex will expose even more the political fractures existing among Member States, and in this way Frontex will turn into a sounding board of those fractures, undermining its success.[63] This is especially relevant since the latest reforms have assigned it a supervisory role with vulnerability assessments.

In the next section, the role of the CJEU will be considered.

V. One, none, or a hundred thousand? Searching for a (coherent) approach in the case law of the Court of Justice

This section tests whether the external dimension of migration policies is witnessing the emergence of a rule of law in line with the premises discussed above, by assessing the case law of the CJEU in this context. It starts from the case law on the EU-Turkey deal before zooming in on the way the CJEU is exercising its scrutiny over the agencies, based on the recent cases against Frontex.[64] It is argued that this case law is illustrative of the lack of a single compass in adjudicating these matters.

[60] Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* and *NW v Bezirkshauptmannschaft Leibnitz*ECLI:EU:C:2022:298. See also P Cebulak and M Morvillo, 'The Guardian is Absent: Legality of Border Controls within Schengen before the European Court of Justice' (25 June 2021) VerfassungsBlog verfassungsblog.de.

[61] See *mutatis mutandis* V Moreno Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order', in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019).

[62] M Deleixhe and D Duez 'The new European border and coast guard agency: pooling sovereignty or giving it up?' (2019) Journal of European Integration 41.7.

[63] *Ibid.*

[64] The case law concerning Frontex as employer and as contractor remains out of the scope of this work, because not relevant to our argument.

V.1. The decisions on the EU – Turkey deal: denialism fed by *realpolitik*?

With the EU-Turkey deal, Germany has succeeded in having the support of the EU to achieve a policy target it decided to prioritize, *i.e.*, to curb the arrivals of migrants from the Eastern borders, by agreeing the return to Turkey of all irregular migrants crossing from Turkey into Greek islands.[65] This was supposed to take place in full accordance with EU and international law, excluding any kind of collective expulsion, and in all respect for the asylum rights of protection-seekers. Part of the deal was a special regime for Syrians: for every Syrian being returned, another Syrian would be resettled from Turkey to the EU in light of the UN Vulnerability Criteria. This deal has been criticized for its gross violations of international law obligations,[66] but has been praised by others as necessary.[67] After 2016, the deal was renewed in 2021, and new funding has been provided by the EU to Turkey within this framework.[68] Since it has been applied for several years, perhaps it is rather fair to acknowledge that legal obligations or obligations can arise even from an instrument of informal law.[69]

Contested for many reasons and grounds, the instrument has been challenged by migrants before the General Court (GC) with an annulment action. The order of the GC on the EU-Turkey deal can be framed as a cold shower of *realpolitik*: the GC has denied that the act was an agreement and that it could be attributed to the EU; instead, it was

[65] It is commonly recognised that Merkel has been a crucial sponsor of the deal. See A Albayrak 'German Chancellor Angela Merkel Pushes EU Migrant Deal in Turkey Visit' (23 April 2016) The Wall Street Journal wsj.com; M Karnitschnig and J Barigazzi 'EU and Turkey Reach Refugee Deal' (18 Marc 2016) Politico politico.eu.

[66] C Costello, 'It needs not be like this' (2016) Forced Migration Review 12 ff; S Peers, 'The final EU/Turkey refugee deal: a legal assessment' (18 March 2016) EU Law Analysis eulawanalysis.blogspot.com. On the same topic, G Fernández Arribas, 'The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem' (2016) European Papers europeanpapers.eu 1097; C Favilli, 'Nel mondo dei "non-accordi". Protetti sì, purché altrove' (2020) Questione Giustizia questionegiustizia.it 1; C Favilli, 'La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito?' (2016) Diritti Umani e Diritto Internazionale 405.

[67] D Thym, 'Why the EU-Turkey Deal is Legal and a Step in the Right Direction' (9 March 2016) VerfassungsBlog verfassungsblog.de.

[68] See the analysis by ISPI, 'A Pragmatic Shift: Evolving EU-Turkey Relations' (30 March 2021) ispionline.it; and D Albanese, 'The Renewal of the EU-Turkey Migration Deal', (18 May 2021) ISPI ispionline.it.

[69] On the nature of the deal, see M Gatti and A Ott, 'The EU-Turkey statement: legal nature and compatibility with EU institutional law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019). See also G Fernández Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?' (2017) European Papers europeanpapers.eu 33. See also E Kassoti and A Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (TMC Asser Press 2022) 237.

assessed as an act whose paternity could be attributed to the Member States acting outside the EU's sphere of action.[70] The GC judged it was adopted by the Heads of State and Government of the Member States "using the European Council as a mere occasional venue within which to coordinate their action".[71]

As masterfully described by Professor Cannizzaro, the GC simply took the approach of avoidance or denialism as an expression of *realpolitik*, to avoid embarking on answering a complex set of legal and political questions, concerning a "deal" or agreement that was in breach of procedural rules set by the Treaties for its adoption, and secondly, with a dubious compliance with substantive and fundamental rights standards, just to mention some of the main challenges.[72] More fundamentally, even accepting that the solution chosen by the GC could be seen as respectful of the attribution of competences between EU and Member States, it seems problematic to conclude that, despite the presence of the President of the Council and of the Commission, States can decide whether when they gather within the European Council, they act as members of one of its institutions, or in their international capacity. The reasoning of the GC has been unconvincing as to its conclusion that, in such a context, the act was to be attributed to the Member States. The choice to interpret and situate the deal radically out of the scope of EU law has also secured it from other judicial challenges (at EU level), namely for the respect of interinstitutional balance between the institutions, which is an expression of the constitutionalisation of the EU legal order.[73] This aspect is especially problematic for EU law.

The CJEU confirmed by order the judgment of the GC, by dismissing the appeals as manifestly inadmissible or manifestly unfounded, on a proposal from the Judge-Rapporteur and after hearing the Advocate General on its procedural choice. It argued that the appeals were incoherent and not adequately motivated.[74]

However, this position is to be criticised also considering the practice of the implementation of the deal, which is monitored by the Commission.[75] The yearly monitoring by the Commission is indicative of the implementation of an EU instrument, the funding facility for refugees in Turkey, which is one of the elements of the deal.

[70] Case T-192/16 *N.F. v. European Council* ECLI:EU:T:2017:128.

[71] E Cannizzaro, 'Denialism as the Supreme Expression of Realism – A Quick Comment on *NF v. European Council*' European Papers (European Forum Insight of 15 March 2017) europeanpapers.eu 251. On the same line, see S Carrera, L den Hertog and M Stefan 'It wasn't me! The Luxembourg Court orders on the EU-Turkey refugee deal' (15 April 2017) CEPS Policy Insights ceps.eu.

[72] E Cannizzaro, 'Denialism as the Supreme Expression of Realism' cit. See also P Garcia Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' (2022) European Papers europeanpapers.eu 109.

[73] P Garcia Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' cit.

[74] Joined Cases C-208/17 P to C-210/17 P *NF and Others v European Council* ECLI:EU:C:2018:705.

[75] Communication COM(2022) 243 final from the Commission of 24 May 2022: Sixth Annual Report on the Facility for Refugees in Turkey.

Against this background, the argument put forward by the European judges is hardly convincing in terms of legal argumentation. Yet, this choice seems to be illustrative of a different approach chosen by the European judges toward the legal (and political) challenges raised by the deal, an approach of self-restraint and avoidance toward the activities of the EU institutions and the Member States. As to its meaning, this case law is rather problematic in terms of respect for the constitutional setting of the EU, including its institutional balance and the balance of powers and competences between the EU and Member States. In addition, it does not display a coherent approach to dealing with the issues underlying the management of migration, such as fundamental rights, that receive mixed attention across the case law discussed in this *Article*.

V.2. Exploring the limits of effective judicial protection within the EU: the litigation against Frontex

In the last months, several orders and judgments have been released by the GC and some are pending before the CJEU in lawsuits against Frontex.[76] The current section will provide an overview, attempting to sketch the lines that guide the case law of European judges. These cases witness the mobilization of victims, lawyers, civil society, and academia against a contested and ever-expanding agency. While the first case of 2019 dealt with transparency, the latest stream of cases concerns judicial oversight and remedies available to assess the compliance of different types of Frontex operations with fundamental rights.[77] Considering the room of manoeuvre of the CJEU and its creative interpretation of EU law, this case law is also informative as to its doctrine in the policy of external border management. Indirectly, it tells us to which extent the EU system of judicial remedies is offering protection to individuals against the activities of the European administration, and on the relation between EU law and human rights or between EU and third-country nationals.

a) Transparency and access to documents: the first lawsuit targeting Frontex activities with a failure to act

A first judgment of the GC of 2019 concerned access to documents, a particularly thorny issue since the operations of Frontex are difficult to monitor, when taking place on the high seas or remote areas, and transparency is of paramount importance for accountability.[78]

Activists Izuzquiza and Semsrott sought access to documents for Joint Operation (JO) Triton, in particular access to documents containing information on the name, type, and

[76] Case T-282/21 *SS and ST v European Border and Coast Guard Agency* ECLI:EU:T:2022:235; Case T-600/21 *WS and Others v Frontex* ECLI:EU:T:2023:492, whose appeal is pending as case C-679/23 P *WS and Others v Frontex*; case T-600/22 *ST v Frontex* ECLI:EU:T:2023:776, whose appeal is currently pending as case C-62/24 P; case T-136/22 *Hamoudi v Frontex*, ECLI:EU:T:2023:821, whose appeal is currently pending as case C-136/24 P; case T-205/22, *Naass and Sea Watch v Frontex*, ECLI:EU:T:2024:266.

[77] The case law concerning Frontex as employer or as contractor falls outside the scope of this analysis.

[78] Case T-31/18 *L. Izuzquiza and A. Semsrott v. European Border and Coast Guard Agency (Frontex)* ECLI:EU:T:2019:815.

flag of every vessel deployed in the Central Mediterranean in the past section of a still ongoing operation. The denial of Frontex has been challenged in court but without success. The Court has sided Frontex on all reasons and grounds and referred in a reiterated manner to its *Sison v. Council* case, where the protection of public security has been deemed as a ground for refusing access to documents. Of all the arguments put forward by the applicants, one could have hoped for a more balanced decision, for example recognising the legitimacy of the public to know operational data concerning past months of a still ongoing operation or concerning parts of the access to documents requested that have been communicated on Twitter by the same Frontex.[79] If the Agency discloses information concerning its activities, why the same process cannot be the result of a request from individuals?

This shows that Frontex enjoys great discretion in deciding what to disclose and that the scrutiny of the GC does not go beyond a certain (low) threshold, *i.e.*, checking for a manifest error of assessment; instead, it adjudicates with a good dose of self-restraint, and it recognises a significant discretion to the Agency. This is worth investigating since the deployment of new and emerging technologies as well as artificial intelligence will entail that agencies will exercise forms of discretion concerning the specification of criteria and technical aspects demanded by the legislation.[80] This requires due monitoring by civil society and institutions, and conversely, some forms of transparency to monitor to activities of the agency.[81]

b) The first lawsuit targeting Frontex activities with a failure to act

Another recent case concerns an action for failure to act against Frontex, brought by two applicants about alleged pushback operations conducted in the framework of the JO Poseidon in the Aegean Sea.[82] The argument by the applicants was that, because of the "violations of fundamental rights or international protection obligations", Frontex had to adopt a decision of withdrawal of the financing, or suspension or termination of the activities in the Aegean, according to art. 46(4) of the Frontex Regulation (EU) 2019/1896.

[79] M Gkliati and J Kilpatrick, 'Crying Wolf Too Many Times: The Impact of the Emergency Narrative on Transparency in FRONTEX Joint Operations' (2021) Utrecht Law Review 57. See also E Frasca, 'Caselaw Commentary of the General Court (European Union), Judgement of 27 November 2019, *Izuzquiza and Semsrott v. Frontex*, T-31/18: Sailing through Transparent Waters? A Comparison between Cases Concerning Public Access to Information Related to Search and Rescue Operations in the Mediterranean' (2020) Cahier de l'EDEM dial.uclouvain.be.

[80] A Musco Eklund, 'Rule of Law Challenges of "Algorithmic Discretion" & Automation in EU Border Control: A Case Study of ETIAS Through the Lens of Legality' (2023) European Journal of Migration and Law 249.

[81] L Marin, 'The deployment of drone technology in border surveillance: Between techno-securitization and challenges to privacy and data protection' in M Friedewald, J P Burgess, J Čas, R Bellanova and Walter Peissl (eds), *Surveillance, Privacy and Security* (Routledge 2017) 107.

[82] *SS and ST v European Border and Coast Guard Agency* cit.

Seized with an action for failure to act, the GC has dismissed the action as inadmissible with an Order of 7 April 2022 on the ground that Frontex had replied to the request of the applicants. The GC deemed that, although the reply did not lead to the results sought by the applicants, it cannot be declared as missing: the action for failure to act concerns, as recalled by the Court, "the failure of the institution concerned to take a decision or to define its position".[83] For this reason, the Court has verified that Frontex has replied to the letter of the applicants,[84] explaining its position and the grounds for a decision taken as per art. 46(4) of the Frontex Regulation. On this basis, the Court rejected the application for failure to act as inadmissible. Furthermore, the Court did not engage in the assessment of the position of Frontex, which could be challenged – so said the Court – with an annulment action, but it evaluated the procedural interaction of the parties, arguing that the steps taken by Frontex do not fulfill the criteria to decide that the Agency has failed to act. While this cannot be objected against from the perspective of EU law, it leads us to observe that the failure to act cannot be considered an instrument to assess the compliance of Frontex activities against the background of the applicable legislation.

Curiously, the GC has left on the table possible alternatives, namely pointing to the annulment action, which however has stringent *locus standi* requirements, as recalled by the same court.[85] In particular, the known criterion of the individual concern will be hard to prove for migrants. A few months later, another chamber of the GC indeed rejected as inadmissible an action for failure to act and annulment, thus confirming that also the action for annulment represents a complicated pathway for applicants.[86]

If this application – as presented by the GC – represents a position that tries to elicit a change in the policy of the Agency, it must be observed that the GC did not assess the merits of the reply or the position taken by the Agency, thus confining its role to a very limited formal scrutiny over the presence (or lack) of a reply.

It can be hoped for that the indication suggested by the Court on the annulment action will be taken onboard by litigants in further lawsuits promoted also to test the scope of the control exercised by the Court once seized by new challenges. However, it is consistent case law of the Court that the *locus standi* criteria of the direct and individual concern are interpreted very stringently: it will be very hard, if not impossible, for a migrant affected by a Frontex JO to prove the fulfilment of these requirements.

For this reason and based on this precedent and of earlier case law, it is hard to imagine how the remedies provided for in arts. 265 and 263 TFEU might be used in the future as tools in the availability of migrants as an effective judicial remedy to verify the compliance of the Agency to the respect of its legal framework.

[83] *Ivi*, para. 22.
[84] *Ivi*, paras. 25-31.
[85] *Ivi*, paras. 23, 33.
[86] *ST v. Frontex* cit.

c) Action for damages against Frontex, for fundamental rights violations in return operations and maritime border controls: WS and others *and* Hamoudi

In another case, *WS and others v. Frontex*, currently under appeal, the GC has been seized with an action for damages against Frontex.[87]

The applicants, Syrian nationals, claimed compensation for damages allegedly suffered concerning a return operation conducted by Greece and Frontex. Removed from Milos to Leros, where they have applied for international protection, they were then removed to Turkey with a joint return operation. They claimed that they suffered material and non-material damages, concerning their removal, because, in their allegations, Frontex violated the Charter, the 2016 Frontex Regulation,[88] and the Frontex' own Standard Operating Procedures.

The Court – after having declared the action as admissible – dismissed it on the grounds, choosing to shield Frontex from liability.[89] This is a worrisome outcome, as the action for damages displayed a good potential for challenging the activities of the agencies in the perspective of the review of legality and compliance with the rule of law, including fundamental rights protection.[90]

In contrast, the GC has decided to focus on the formal element that the final responsibility for the return decision is taken by the state, and consequently, any activity carried out by Frontex in the process of a joint return operation, is not going subject to judicial review, thanks to this formal element.[91] As to the role of Frontex, we can read that its task is merely to provide technical and operational support to the Member States, and that it is the latter that have the competence and responsibility to assess the merits of the return decisions

[87] *WS and Others v Frontex* cit.

[88] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

[89] *Ex multis*, J De Coninck, 'Shielding Frontex: On the EU General Court's "WS and others v Frontex"' (9 September 2023) VerfassungsBlog verfassungsblog.de and S Nicolosi, 'The European Border and Coast Guard Agency (FRONTEX) and the Limits to Effective Judicial Protection in European Union Law', (2024) ELJ 149. See also G Davies, 'The General Court finds Frontex not liable for helping with illegal pushbacks: it was just following orders' (11 September 2023) European Law Blog europeanlawblog.eu; T Molnár, 'The EU General Court's Judgment in *WS & Others v Frontex*: What Could International Law on the Responsibility of International Organizations Offer in Grasping Frontex' Responsibility?' (18 October 2023) EJIL: Talk! www.ejiltalk.org; F Partipilo, 'The EU General Court's judgment in the case of *WS and Others v Frontex*: human rights violations at EU external borders going unpunished' (22 September 2023) EU Law Analysis eulawanalysis.blogspot.com; M Fink and J Rijpma, 'Responsibility in Joint Returns after *WS and Others v Frontex*: Letting the Active By-Stander Off the Hook' (22 September 2023) EU Law Analysis eulawanalysis.blogspot.com.

[90] M Fink, C Rauchegger and J De Coninck, 'The Action for Damages as a Fundamental Rights Remedy' in M Fink (ed), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (Cambridge University Press 2024); M Fink, 'EU Liability for Contributions to Member States' Breaches of EU Law' (2019) CMLRev 56; M Fink, 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' (2020) German Law Journal 532.

[91] *WS and Others v Frontex* cit. para. 65.

and to examine applications for international protection.[92] This appears to be crucial in the reasoning because the GC links responsibility for damages to the power to assess the merits of the return decisions or applications for international protection. The lack of this final responsibility interrupts the causal link between action and (alleged) damage, which is one of the necessary elements to establish non-contractual liability.[93] By doing so, the Court effectively protects Frontex from judicial scrutiny. One could even imagine a case where the decision is fully legitimate, but then during the execution of the decision the Agency mistreats the migrant, for example, beating him/her. According to the GC, an action claiming for damages is to be dismissed because the formal act is correct.

Yet, in contrast, Frontex does not have the final responsibility for the decision, but an important role in different phases of the procedures and legal obligations, deriving from several provisions of EU primary and secondary law. First, the role of Frontex is salient during the execution of the removal, providing technical and operational assistance to the Member State.[94] Furthermore, Frontex has monitoring obligations toward the Member State, also concerning their respect for fundamental rights.[95] Its activities go well beyond a formal decision, and as such, should be scrutinised.

This decision is especially regrettable because it displays a path in the reasoning of the GC that does not adequately consider all the obligations emerging from the legal framework and, at the end of the day, the evolving role of agencies as the pivot between European institutions and national administrations. In doing so, the GC fails to grant respect to the European legal framework.

Another aspect worth being underlined and discussed is that, as demonstrated in the reconstruction made by the GC in the decision, the complaint mechanism provided for in the Frontex Regulation is ineffective: the applicants had to lodge multiple complaints across a time of 3 years. Eventually, FRO could only inform the applicant of the decision of the Greek authorities, *i.e.*, the closure of the internal investigation and its classification as "confidential"; for its part, the applicants were also dissatisfied with the FRO report as it did not point out the role of Frontex in the return operation.[96] Furthermore, the internal complaint procedure does not respect the parameters of the right to an effective remedy (as consolidated by the CJEU in the case law recalled in section 3.2): therefore, a decision of the Fundamental Rights Officer would require a review by a court. This is currently not

[92] *Ibid.* para. 64.

[93] *Ibid.* paras. 66-67.

[94] Arts 27-28 Regulation (EU) 2016/1624 cit.

[95] S Tas,'Frontex above the law – A missed opportunity for a landmark judgment on Frontex's responsibility with regards fundamental rights violations: WS and Others v Frontex (T-600/21)' (20 September 2023) EU Law Live eulawlive.com; M Fink, Expert Opinion: Case T-600/21 WS and Others v Frontex (3 February 2022), available at dx.doi.org.

[96] *WS and Others v Frontex* cit. paras. 6-16.

provided for in EU law.[97] As already stressed, this mechanism does not meet the core principles of functional and structural independence.[98]

This aspect too deserves further analysis, since it has been seen as a crucial tool in the context of the respect of the principle of good administration. Yet, in the case of Frontex, the complaint mechanism is not fulfilling its potential and is therefore not an instrument functional to the achievement of the right to an effective remedy as per art. 47 of the Charter.

In the most recent case, *Hamoudi*, the GC has been seized with another action for damages, this time concerning a pushback operation conducted by Greek authorities in the context of a Frontex joint Operation.[99] In this case, a Syrian national sought compensation for the damage suffered in relation to the fact that, after his arrival on the island of Samos, he has been intercepted by the Greek police and, on the same day, he and others have been sent back to the sea. The day after, the Turkish Coast Guard took him on board and relocated to the Turkish territory. In this context, the applicant argues that an airplane operated by Frontex, engaged in surveillance and reconnaissance operations, flew over the scene twice. On that occasion, two Frontex operations were ongoing in Greece, one rapid border intervention and JO Poseidon.

This case addresses one crucial question concerning the operation of Frontex, *i.e.*, its involvement with the Greek policy of pushbacks and covers the current discussion on the interpretation of art. 46 of the Frontex Regulation on the director's duty to suspend or terminate activities that involve fundamental right violations. It is worth recalling that this constitutes one of the grey areas of its functioning and that, in the recent past, this policy has been under scrutiny by the European Parliament, and, also by an internal investigation set up by the Frontex Management Board.[100] These inquiries, together with a report by OLAF, have proved mismanagement of the Agency and serious violations of the legal framework by the former Executive Director Leggeri, moving him to resign from its function.[101]

[97] M Stefan and L den Hertog, 'Frontex: Great Powers but No Appeals' in M Chamon, A Volpato and M Eliantonio (eds) *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 151.

[98] *Ibidem.* See also J Alberti, 'The Position of Boards of Appeal: Between Functional Continuity and Independence', in M Chamon, A Volpato and M Eliantonio (eds), *Boards of Appeal of EU Agencies: Towards Judicialization of Administrative Review?* (Oxford University Press 2022) 245; A Pirrello and M Eliantonio, 'A Board of Appeals for Frontex: Panacea for Violations or Another Patch in the Incomplete System of Accountability?' (2024) ELR 51

[99] *Hamoudi v Frontex* cit.

[100] European Parliament, LIBE Committee, 'Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations', July 2021; see also 'Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea', Final Report of the Frontex Management Board Working Group (1 March 2021) frontex.europea.eu (hereinafter FRaLO Final Report). For additional reports on Frontex, see: European Court of Auditors, Special Report No. 8/2021 'Frontex's support to external border management: not sufficiently effective to date'.

[101] FragDenStaat, 'OLAF, Final Report on Frontex' fragdenstaat.de, leaked in October 2022. Frontex, *Management Board conclusions from the extraordinary MB meeting of 28-29 April 2022* frontex.europa.eu.

Even if the facts of the case might not be related with the operations covered by the OLAF report, just to make one example, it would be expected that the European judges would have devoted attention to this case.

Yet, the GC decided even by order, without holding a hearing with the applicants.[102] It recalled that the core elements of the non-contractual liability are the unlawful conduct, the damage, and the causal link between conduct and damage.

The GC decided that the applicants did not manage to prove, to the standard requested, the damage suffered. The order is mainly focused on explaining that, first, the written statement originated only from the applicant; second, the identity of the applicant is not identifiable from the photographs and videos, and third, that the videos of the Bellingcat report are not sufficiently specific on the events of the case.[103] In other words, much of the decision is devoted to explaining that the Court did not believe in the genuine nature and the quality of the application. Instead of facing the challenges in law, the Court decided to dismantle the facts, by raising the burden of proof to what looks like an exceptionally high standard. Based on this, could another application be more successful, or will it face similar challenges?

Other challenges might arise in the determination of the quantification of the damage requested, in the causal link between Frontex conduct and the damage. In other words, the GC is sending signals to applicants showing that the road toward the recognition of damages concerning the activities of Frontex is tortuous and bumpy. Many obstacles must be faced, and every case is giving the GC the chance to display its arsenal of weapons to dismiss the applications of individuals.

In reality, the issue of shared responsibility is not foreign to EU law. First of all, the current drafting of the Frontex Regulation embeds in art. 7 the shared responsibility of Agency and Member States' authorities for the implementation of European Integrated Border Management (EIBM), including return operations, the management of national sections of the external borders, and the cooperation with third countries.[104] Though the boundaries of the responsibilities between authorities are not clear, can we simply escape from any form of responsibility because a formal decision is not taken by Frontex?

Furthermore, in an appeal concerning Europol, the case *Kočner*,[105] Advocate General Rantos has argued that the joint and several liability of Europol and states' authorities can occur in a case implying liability for joint data processing concerning a leak of data to the media. The decision of the Court has confirmed the interpretation that the Europol

[102] *Hamoudi v Frontex* cit. para. 14.

[103] *Ibid.* paras 42-48.

[104] Such a provision was already laid down in art. 5 of the 2016 EBCG Regulation, according to which Member States ensure the management of their external borders in their own interest and in the common interest of all Member States while the agency supports the application of Union measures relating to the management of the external borders.

[105] Case C-755/21 P *Kočner v EUROPOL* ECLI:EU:C:2023:481.

Regulation has created "in accordance with the intention of the EU legislature to favour an individual who has suffered damage, a set of rules under which Europol and the Member State concerned are jointly and severally liable for the damage suffered as a result of such processing".[106]

Furthermore, in the same case, the CJEU held that those provisions "must be interpreted as not requiring the individual concerned who has established that unlawful data processing has occurred [...] to identify which of the entities involved in that cooperation undertook the conduct constituting that unlawful processing".[107]

Though the *Kočner* case refers to the Europol Regulation, the statement in principle should guide a reflection on Frontex, and if the case, move the legislator to better clarify the legal framework governing joint and several liability for Frontex' activities.

More in general, this case shows that joint and shared liability can be a solution that grants that agencies activities do not remain out of control.

d) Results of the case analysis and discussion

The case law concerning Frontex activities in border management and returns displays an attitude of self-restraint of the General Court; to date, there are no decisions of the Court of Justice. In the several cases considered, the GC chose to self-restrain in its task of judicial control on the activities of the Agency. While it must be acknowledged and observed that some of the cases have been dismissed on the basis of a consolidated jurisprudence, other cases could have been seized by the GC as an opportunity to address the substance of the right to judicial remedy in the case of the activities of EU agencies. Instead, this path has not been taken.

This is problematic for several reasons: first, the fact that agencies' tasks do entail operational activities is a peculiarity of agencies operating in the context of Justice and Home Affairs (JHA), and this represents a crucial difference in comparison to more traditional regulatory agencies, that operate through acts of various types and nature, be they formal and informal, or binding and non-binding. However, this peculiarity cannot be a reason to elude and evade the necessary judicial control of their activities.

Secondly, reforms have shaped the evolution of Frontex and other JHA agencies far beyond the mere function of coordination and support, and this is widely acknowledged in the legal framework: as recalled above, art. 7 of the Frontex Regulation provides for shared responsibility of the correct implementation of the EIBM. At the same time, the literature explains this evolution and discusses the emergence of forms of shared administration.[108] Therefore, the choice of the GC to focus on the formal element of the final

[106] *Ibid*. para. 62.

[107] *Ibid*. para. 80.

[108] *Ex multis*, D Fernández-Rojo, *EU migration agencies* cit. and M Scholten, 'EU Enforcement Agencies', in M Scholten (ed) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing 2023) 152; see also M Scholten and A Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar Publishing 2020).

decision does imply that a significant share of agencies' "work" remains out of control and is deprived of any form of judicial scrutiny.

Third, the CJEU should take an active role in this context, also to avoid national judges stepping in on these matters. It is of paramount importance that the CJEU clarifies which is the natural judge for the activities of European agencies, especially in the context of multi-actor operations, if the domestic judge or the European one, and if so, which might be the channels to provide applications with effective remedies.

In assessing the case law in matters concerning the external borders – including the decisions on the EU-Turkey deal – there are reasons to doubt that the CJEU deploys the same parameters of legality to assess more "internal" policies.[109] This is worth reflecting on for several reasons. If, on the one side, the management of external borders is a matter of shared competences between EU and Member States, the increased presence of the EU in the territories of the Member States cannot take place to the disadvantage of the rule of law. Rule of law requires effective judicial scrutiny, and this finds an expression in the right to an effective legal remedy. Therefore, the mandate of EU migration agencies must be underpinned by a solid legal background, anchored in the respect of EU primary law. Lacking this, it will be hard to convince states to do the same, and the threat resulting from this approach is affecting the overall idea of the legality of the area of freedom, security and justice (AFSJ). The external borders of the EU cannot be considered as no men's land: the respect of the legal framework on fundamental rights should be guaranteed; undermining the coherence of the legal order goes to the detriment of the same integration.

VI. Conclusions: the difficult emergence of a rule of law for EU agencies, between self-restraint and fading European constitutionalism

This *Article* discusses the constitutional embedding of *agencification*, namely the extent to which it respects the rule of law, recognising the principle of judicial scrutiny as a corollary of the right to effective remedy enshrined in the Charter.

The Treaties were designed having "another world" in mind, *i.e.*, the EU as a regulatory authority and not as an administrative entity. As recalled by Schütze, the original design of the EEC was one of executive federalism in the German style.[110] However, the Treaties are the expression of the theory of incomplete contracting, as argued by Martin

[109] P Garcia Andrade, 'The External Dimension of the EU Immigration and Asylum Policies Before the Court of Justice' cit. Similarly, see V Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration', in the special issue edited by L Marin, M Gkliati and S Nicolosi (eds), *The External Borders of the European Union: Between a Rule of Law Crisis, and Accountability Gaps* (2024) ELJ.

[110] R Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) CMLRev 1385.

Shapiro.[111] The CJEU has been entrusted with the power and the instruments to fill the gaps left by the system of the Treaties. In this context, the CJEU has played a proactive role in the construction of a process of legal integration based on the internal market.[112] This action has contributed to the embedding of the new legal order into a constitutional framework, characterised by primacy and autonomy.[113]

The process of constitutionalisation, pressed and accepted by domestic courts, had the merit of securing the emergence of an EU rule of law of a constitutional character. The Charter has been integrated into the case law of the CJEU. One of the core tenets of the rule of law is judicial scrutiny which is embedded in the fundamental right to an effective remedy.

This *Article* has elaborated on the idea of the rule of law from the perspective of the activities of agencies. Agencies must undergo judicial scrutiny, among other forms of scrutiny and oversight mechanisms. Transposing this constitutional narrative to agencies – an effort carried out in this *Article* – entails that EU Treaties have set up a complete system of remedies to ensure the protection of the legal positions of individuals.[114] The gaps and shortcomings of this legal order should be then integrated or amended by the same actors that have contributed to this constitutionalisation. These issues are even more urgent because agencies have grown, Frontex in particular, at an exponential level.

The recent rule of law backsliding, and the answers adopted by EU institutions to face it, also witnesses the core relationship between rule of law and the right to effective legal remedies. In this context, where the primacy of EU law is a legal good to be secured, the CJEU has worn the hat of a constitutional court: the Hungarian case provides an example.[115] However, this statement cannot be generalised: quite in contrast, in the external dimension of migration policies, supranational institutions display a different approach.[116] The case law of CJEU is very oriented toward self-restraint and deference to EU institutions and Member States, especially in litigation where individuals raise a challenge. The judgments on the EU-Turkey deal are an expression of a total deference toward political powers, also in a context where the issues have a constitutional relevance, touching upon the delimitation of competences between EU and Member States, the inter-institutional balance, and the protection of fundamental rights.

[111] M Shapiro, 'The European Court of Justice', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 321; A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[112] E Stein, 'Lawyers, judges, and the making of a transnational constitution' cit.

[113] JHH Weiler, 'The Transformation of Europe' cit.; D Halberstam, 'Joseph Weiler, Eric Stein, and the Transformation of Constitutional Law' in M Poiares Maduro and M Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press 2017) 219.

[114] M Fink (ed) *Redressing Fundamental Rights Violations by the EU* cit.

[115] L Marin, 'La Corte di Giustizia riporta le "zone di transito" ungheresi dentro il perimetro del diritto (Europeo) e dei diritti (fondamentali)' cit.

[116] V Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration' cit.

It is here suggested that the CJEU has had and still has the power to fill the gaps and adjust the system of remedies to the emergence of new situations, considering the evolved morphology of the EU administrative layer.

It is therefore important that European courts face their role in underpinning the legitimacy of the activities of the agencies, with effective judicial scrutiny against the acts and against the activities of the agencies. The case law on Frontex, from access to documents and transparency, to the latest action for damages, is displaying the same attitude of self-restraint. However, this treatment is not justified. If self-restraint toward political issues can be understood, the task of a court – like the GC – should nevertheless be to scrutinise that administrative powers are in full compliance of EU rules and principles. The emergence of an EU administrative layer should respect its normative implications. In full harmony with the constitutional constraints of delegation, as developed by the CJEU in its case law *Meroni*, *Romano*, and *Short-Selling*,[117] delegation of powers to agencies requires a system of adequate and effective accountability mechanisms and judicial oversight, aimed at scrutinising the acts and activities of the agencies.[118] This is even more significant for agencies of the AFSJ increasingly concerned with enforcement powers, entailing the exercise of operational activities, in contrast to traditional administrative activities taking shape in administrative decisions.[119] All the scrutiny exercised by civil society on the activities of EU agencies in migration, and the evidence brought to the fore, raise severe questions on the self-restraint position of European judges.

Furthermore, EU law requires integral implementation and enforcement by the Member States: the same applies to agencies, which must integrate into their activities and policies the respect to the numerous fundamental rights provisions that govern their functioning. An approach of "two weights and two measures" to the implementation of the legal framework undermines the respect of EU law and the same credibility of supranational institutions.

To conclude, the emergence of many declinations of the rule of law in the context of migration goes to the detriment of the implementation of EU law and the credibility of its main supranational institutions. Yet, these should recognise the importance of underpinning the expansion of the agencies' mandate into a more robust constitutional narrative, based on a coherent rule of law doctrine.

[117] M Simoncini, '"Live and let die?" The Meroni doctrine in 2023' cit.

[118] See the contribution of Volpato to the debate on the delegation of EU decision-making powers to agencies: A Volpato, *Delegation of Powers in the EU Legal System* (Routledge 2022).

[119] M Scholten, 'On EU agencies with enforcement powers' (5 October 2023) EU Law Live eulawlive.com.

ARTICLES

SCHENGEN AND EUROPEAN BORDERS
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BIOMETRIC BORDERS ENVISAGED BY FRONTEX: FUNDAMENTAL RIGHTS IN THE BACKSEAT

MATIJA KONTAK*

TABLE OF CONTENTS: I. Introduction. – II. Technological and legal aspects of biometrics. – II.1. Technological aspects and the application of biometrics in the EU. – II.2. Biometric legal framework. – III. Frontex's biometric policy and fundamental rights. – III.1. Frontex role and legal obligations concerning biometrics. – III.2. Technology foresight on biometrics for the future travel. – IV. Conclusion.

ABSTRACT: This *Article* provides an assessment of the biometric policy of the European Border and Coast Guard Agency (Frontex) and its consequences for the fundamental rights of migrants. It provides an overview of the technological aspects of biometrics, their application, and the legal framework in the context of the Area of Freedom, Security and Justice. This sets the background for an analysis of how and why Frontex uses biometrics to advance its goals. This *Article* analyses policy papers, legal provisions, and other sources, but particularly the Technology Foresight on Biometrics for the Future of Travel, a report on biometrics published by Frontex. This *Article* concludes that Frontex fails to account for the consequences of its biometric policy on fundamental rights when considering the effects of biometric technologies for the future.

KEYWORDS: Frontex – biometrics – biometric data – personal data – fundamental rights – privacy.

I. INTRODUCTION

This *Article* aims to critically examine the policy of the European Border and Coast Guard Agency (Frontex) on biometric technologies used in the EU and its impact on the protection of fundamental rights. In particular, this *Article* argues that Frontex fails in its legal obligation to respect fundamental rights in relation to its biometric policy.[1]

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[1] EU law uses the terminology of fundamental rights instead of human rights. In this *Article*, the fundamental rights concept is mostly used, even though in international law and in the European Convention on Human Rights (ECHR) the term is human rights.

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This *Article* consists of two main parts. The first explains how biometric technologies work, where they are used and what the applicable legal framework is in the EU. The second part explains the role of Frontex concerning biometric technologies in the EU, especially in the light of the report which Frontex published on the future of biometrics in border management.[2] This *Article* argues that considerations of fundamental rights, particularly privacy and data protection, are lacking in Frontex's approach to the future of biometrics.

II. Technological and legal aspects of biometrics

II.1. Technological aspects and the application of biometrics in the EU

The terms "biometrics", "biometric technologies", and "biometric data" can be hard to distinguish, especially in the realm of law.[3] Biometrics mean automated recognition of individuals based on human characteristics.[4] Biometric technologies are a group of modern technologies that allow identification of persons.[5] For example, 3D facial recognition technology identifies a person by the geometry of their face. Other prominent biometric technologies include iris recognition (which can employ natural light, infrared light, or other means to scan the iris) and fingerprint recognition (with many modes of comparing fingerprints). However, biometric technologies differ in how developed a certain technology is, how accurate it is, how acceptable it is to the public, and how fast and how cheaply a biometric technology operates. Most importantly, biometric technologies have different impacts on privacy and other fundamental rights.

Biometrics can be used unimodally, meaning that only one mode or biometric technology is applied in a particular instance. However, biometrics are increasingly used multimodally, meaning that more than one biometric technology is applied. An example of a multimodal system is the upcoming Entry Exit System (EES), which will require both fingerprints and facial recognition as an identity check.[6] Using more biometric technologies increases the accuracy and security of the system, but further infringes the privacy of the

[2] Frontex, *Technology Foresight on Biometrics for the Future of Travel* (European Border and Coast Guard Agency, 2022) www.frontex.europa.eu.

[3] One paper that tackles the problematic terminology of biometrics is by C Jasserand, 'Avoiding Terminological Confusion between the Notions of "Biometrics" and "Biometric Data"' (2016) International Data Privacy Law 63.

[4] International Organization for Standardization, *ISO/IEC 2382-37:2022(en) Information technology — Vocabulary — Part 37: Biometrics* www.iso.org.

[5] A distinction is often made between identification and verification. Identification is understood as meaning establishing who a person is among many persons (one-to-many comparison), while verification means checking whether the person present is the same as the person in the document (one-to-one comparison).

[6] Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) (EES Regulation), art. 17.

individual.[7] The question arises as to what exactly are the limits of multimodal biometrics: could three or five biometric technologies be applied in parallel if they further increase accuracy and reduce the risk of fraud?

Biometric technologies change the notion of identification; instead of presenting a travel document to another person, people present their own bodies to a machine as a means of identification. Individuals can benefit from biometrics. Biometrics can be used to identify unaccompanied children or missing persons who can be recognised by their physical features and connected with their families. Biometric technologies promise border checks without our stopping, with only an invisible radar tacitly scanning our (happy) faces as we walk through an "e-gate" corridor. An ideal case would be to utilize a biometric technology that does not disturb the migrant, that shortens the time to cross a border, and where biometric data are neither stored nor accessible for other purposes. However, once collected, biometric data may be used for many purposes.

Public authorities of the EU Member States rely on biometric technologies in their role concerning migration, asylum, and border management. For example, border guards use human presence detectors that look for hidden movements or heartbeats inside lorries crossing into the EU.[8] Aerial drones with image recognition and infrared cameras are used by Frontex as well as national authorities to "control" the vast maritime borders of the EU.[9] Most EU Member States today have databases of millions of fingerprints, facial recognition, or DNA profiles (or all of these) which can be searched by modern computer algorithms.[10] These national databases of biometric data are mostly for law enforcement purposes and may have different rules on what type of data is stored, for how long, or who can access it. Human rights issues raised by these national biometric databases represent the "biometric" case law before the European Court of Human Rights (ECtHR).[11]

There are EU information systems which are fundamental to the operation of the Area of Freedom, Security and Justice. The European Asylum Dactyloscopie Database (Eurodac) relies on fingerprint recognition as a means of identifying and allocating responsibility for asylum seekers among Member States.[12] EES will collect fingerprints and facial images of travellers to the EU who do not need a long-term visa, and Member States will be able to

[7] G González Fuster and M Nadolna Peeters, *Person Identification, Human Rights and Ethical Principles: Rethinking Biometrics in the Era of Artificial Intelligence* (European Parliamentary Research Service Scientific Foresight Unit, December 2021) www.europarl.europa.eu.

[8] Science for Humanity, Human Presence, Movement & Heartbeat Detection System (MDS) s4h.be.

[9] Frontex, presentation on large hybrid drones, available at www.frontex.europa.eu.

[10] At least eleven EU Member States have biometric databases with facial recognition. F Ragazzi, E Mendos Kuskonmaz, IZ Plájás, R Van de Ven, B Wagner, *Biometric & Behavioural Mass Surveillance in EU Member States* (Report for the Greens/EFA in the European Parliament, October 2021) extranet.greens-efa-service.eu 38.

[11] *Infra*, section II.2.*(a)*

[12] Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of "Eurodac" (Eurodac regulation), art. 1(1).

choose which of the two will be the main biometric identifier for identity verification.[13] Authorised staff of Frontex will have access to the biometric data collected by EES.[14] Frontex is involved in the future development of EES and its biometric aspects.[15] Another valuable information system is the Schengen Information System, upgraded in 2023 to include biometrics such as palm prints, fingerprints, as well as DNA records in the case of missing persons.[16] There are other EU information systems or information exchange frameworks which concern biometric data. Some of these systems will become interoperable, which will make it easier for public authorities to access personal and biometric data.[17]

II.2. Biometric legal framework

In the EU, especially in relation to migration, asylum, and law enforcement, biometrics are regulated by primary law and by secondary legislation.[18] The first is the human rights framework of the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (CFR). The other important legal framework concerning biometrics is the data protection framework of the EU, in particular the General Data Protection Regulation (GDPR), the Law Enforcement Directive (LED), and their provisions regarding biometric data protection.[19]

a) Biometrics and fundamental rights

The use of biometric technologies raises fundamental rights issues, in particular concerning privacy, non-discrimination, and human dignity. The CFR is applicable to institutions, bodies, offices, and agencies of the EU and to Member States when they are applying EU law.[20] The meaning and scope of rights in the CFR is the same as those same rights laid out in the ECHR.[21] The CFR has distinct rights to privacy (art. 7) and to data protection

[13] Regulation (EU) 2017/2226 cit. 20–82 (EES Regulation).

[14] *Ibid*. art. 63.

[15] Frontex, *Technology Foresight on Biometrics for the Future of Travel* cit. 106.

[16] Commission Implementing Decision (EU) 2023/201of 30 January 2023 setting the date on which operations of the Schengen Information System start pursuant to Regulation (EU) 2018/1861 of the European Parliament and of the Council and Regulation (EU) 2018/1862 of the European Parliament and of the Council.

[17] N Vavoula, *Immigration and Privacy in the Law of the European Union: The Case of Information Systems* (Brill 2022).

[18] E Kindt, 'Biometric Data Processing: Is the Legislator Keeping Up or Just Keeping Up Appearances?' in G González Fuster, R Van Brakel and P De Hert (eds), *Research Handbook on Privacy and Data Protection Law: Values, Norms and Global Politics* (Edward Elgar Publishing 2018) 389.

[19] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 General Data Protection Regulation – GDPR; Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 Law Enforcement Directive – LED.

[20] Charter of Fundamental Rights of the European Union [2012] (CFR), art. 51.

[21] Arts 52(3) and 53 of the Charter.

(art. 8), while the ECHR in its right to privacy also encompasses the right to data protection.[22]

The ECtHR decides the impact of modern technologies (and biometrics in particular) on human rights through the lens of art. 8 ECHR which protects the right to private and family life. Art. 8(2) ECHR provides that interference by a public authority with the right to private life of an individual is justified if it is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[23] *S and Marper v UK* is the emblematic case, both for modern technologies in general and for biometric technologies in particular.[24] It concerns the collection and storage of fingerprints and DNA samples of persons who were acquitted but with the data being retained indefinitely by the police. The judgment in *S and Marper* is important because the Court established a framework for dealing with biometric technologies in the context of human rights, particularly the right to private life. Further, the Court distinguished between the taking of biometric samples, storing these samples, and processing the data as separate interferences with the right to private life.[25]

The concrete facts of each specific case are crucial for determining the fundamental rights implications. These facts include: what biometric technology is used (as DNA profiling infringes the right to privacy more than the taking of fingerprints), for how long the biometric or personal data are stored, who can access the data, which categories of persons must have their biometric data collected, what are the qualities of the law prescribing the use of biometric technology in terms of the possibility of review of a decision to store biometric data and effective oversight.[26] The mere collection of biometric data infringes privacy, regardless of if or for how long such data are stored.[27] To justify interference with a right, there must be a legitimate aim for the interference by public authorities with the fundamental right (in the case of the CFR) or a human right (in the case of the ECHR). Furthermore, the assessment of interference is conducted via a proportionality test, but the essence of a human (or fundamental) right must not be infringed.[28]

[22] ECtHR *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App n. 931/13 [6 November 2017] GC para. 137.

[23] Art. 8(2) ECHR.

[24] ECtHR *S and Marper v UK* App n. 30562/04 and 30566/04 [4 December 2008] GC.

[25] *Ibid*. para. 120.

[26] *Ibid*.

[27] *Ibid*.

[28] Not adhering to basic principles of data protection infringes the core of the fundamental right to data protection: case C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238 para. 40. The essence, or the core, of the fundamental right in the context of data protection was also elaborated in the following judgments: case C-203/15 *Tele2 Sverige* ECLI:EU:C:2016:970 para. 101; joined cases C-511/18 *Quadrature du Net* ECLI:EU:C:2020:791.

Newer "biometric" case law follows the reasoning of *S and Marper v UK*. In *Gaughran v UK*, the ECtHR decided that the indefinite detention of the biometric data of convicted persons is contrary to the right to private life under art. 8 ECHR.[29] In *Glukhin v Russia*, the ECtHR ruled that facial recognition software used by public authorities against a peaceful sole protester conflict with the ideals and values of a democratic society and is therefore contrary to art. 8 ECHR.[30]

In the EU's fundamental rights framework, the CFR in many respects corresponds to the ECHR. This includes the right to private and family life under art. 7 CFR, which is almost identical to art. 8 ECHR. However, unlike the ECHR, the CFR has a separate explicit right to data protection contained in its art. 8. The CFR prescribes that a measure interfering with a fundamental right must genuinely meet the objectives of general interest recognised by the EU or the need to protect the rights of others, but additionally the "essence" of a fundamental right, privacy in this case, must be respected.[31]

The case law of the Court of Justice of the EU (CJEU) indicates that there is a justified interference with the right to privacy in having to provide two fingerprints to be stored on the chip of a biometric passport for the purpose of preventing identity fraud and illegal migration.[32] The *Willems* case adds that public authorities, considering again art. 7 CFR, do not have to guarantee that biometric data processed for passports will not be used for other purposes.[33] These judgments of the CJEU explicitly established that biometric technologies may be allowed in certain instances and that their use is assessed via arts 7 and 8 CFR, along with secondary legislation on data protection.

Besides privacy and data protection, other fundamental rights may come into consideration when applying biometrics. Primarily, human dignity[34] may be affected by the way in which a biometric technology operates or by the data it processes. In the case of fingerprinting, human dignity may be infringed by the coercive nature of the procedure, particularly in cases where certain categories of persons, such as irregular migrants or asylum seekers, are forced to choose between having their fingerprints taken or possible detention along with the loss of access to asylum. There is also an issue on how human dignity is affected if fingerprints are forcefully taken, and what it means to have fingerprints forcefully taken in the case where a person does not fully comprehend the procedure or their rights.[35]

[29] ECtHR *Gaughran v UK* App n. 45245/15 [13 June 2020].

[30] ECtHR *Glukhin v Russia* App n. 11519/20 [4 July 2023].

[31] Art. 52(1) of the Charter.

[32] Case C-291/12 *Schwarz* ECLI:EU:C:2013:670.

[33] Case C-446/12 *Willems* ECLI:EU:C:2015:238.

[34] Art. 1 of the Charter.

[35] EU Fundamental Rights Agency (FRA) notes that sometimes fingerprints are forcefully collected and advises that fingerprinting should not be forced: fra.europa.eu. FRA advises authorities to repeatedly give information on why fingerprints are taken in the context of Eurodac to "reduce the risk to resort to coercive measures" edps.europa.eu.

Human dignity may also be affected by facial recognition technology. As it is put in the EDPB Guidelines 05/2022 on the use of facial recognition technology in law enforcement: "[h]uman dignity requires that individuals are not treated as mere objects. FRT [facial recognition technology] calculates existential and highly personal characteristics, the facial features, into a machine-readable form with the purpose of using it as a human license plate or ID card, thereby objectifying the face".

Facial recognition raises issues of the fundamental right to non-discrimination. Facial recognition may not recognise equally well black as opposed to white faces, and female faces as opposed to male.[36] However, facial recognition algorithms are rapidly improving, and newer algorithms may no longer discriminate in a statistically significant manner.[37] Nevertheless, the right to be treated equally remains an important safeguard which must be accounted for in all stages of the deployment of a biometric technology. The biometric algorithm must perform well in tests, be trained on representative data, and at least perform better than a human border guard inspecting a photo in a travel document with their naked eye and inherent human prejudice.

b) Biometrics and EU data protection legislation

The use of biometric technologies which results in the processing of personal data is also regulated by secondary legislation on data protection, in tandem with primary legislation concerning fundamental rights. Broadly speaking, public authorities use biometric technologies for two purposes, with different data protection legal bases: for law enforcement and for migration, asylum, and border control purposes. The processing of personal data means performing any operation, automated or not, on information that relates to an identified or identifiable natural person. Biometric data are defined in the GDPR as "personal data resulting from specific technical processing [...] which allow or confirm the unique identification of that natural person [...]".[38] This definition is very narrow because it restricts the concept of biometric data only to those data that result from a technical process (*e.g.* machine reading a document) and only for the purpose of unique identification.[39]

[36] J Buolamwini and T Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) Proceedings of Machine Learning Research; P Grother, M Ngan and K Hanaoka, 'Face Recognition Vendor Test Part 3: Demographic Effects' (19 December 2019) NIST publication.

[37] "We consider demographics, and note that for the more accurate algorithms, error rates are so low that accuracy variations across sex and race are insignificant", in P Grother, A Hom, ML Ngan and K Hanaoka, 'Face Recognition Vendor Test (FRVT) Part 7: Identification for Paperless Travel and Immigration' (13 July 2021) NIST publication 8381.

[38] Art. 4(14) GDPR cit. Emphasis added.

[39] On the legal nature of biometric data, see C Jasserand, 'Legal Nature of Biometric Data: From "Generic" Personal Data to Sensitive Data' (2016) European Data Protection Law 297–311; G González Fuster and M Nadolna Peeters, *Person Identification, Human Rights and Ethical Principles: Rethinking Biometrics in the Era of Artificial Intelligence* (European Parliamentary Research Service Scientific Foresight Unit, December 2021) www.europarl.europa.eu.

The use of biometric technologies can be legally viewed as either the processing of personal data, in the case of biometric technologies which have the purpose of categorisation, or as the processing of biometric data, if it concerns processing by technical means for the purpose of unique identification. Biometrics can be used for purposes other than identification: to categorise people by their age, gender or by other attributes determined by biometrics. Biometrics can be used to ascertain whether a car driver is drowsy or whether a person in a public space is carrying something akin to a weapon. In these cases, persons are not necessarily uniquely identified by biometrics. Therefore, such (biometric) data processing may not fall in the ambit of biometric data processing as defined in EU law, but in the broader context of the processing of personal data. What is more, in some cases of biometric categorisation in which people are categorised on the basis of "special categories" of personal data (for example, by their ethnic origin, health status or sexual orientation), again the stricter rules of art. 9 GDPR, which establish conditions for the processing of special categories of personal data, such as biometric, health or ethnic data, apply. Finally, in limited circumstances (*e*.*g*. because of specific encryption methods), the processing of information by biometric technologies may not relate either to an identified or identifiable natural person. Such processing of anonymous information is not the processing of personal data and is therefore not regulated by the GDPR. Thus, we can conclude that biometric technologies in the context of migration, asylum, and law enforcement are used for the processing of biometric data, or, in the case of categorisation, the processing of personal data. However, in the context of the biometric technologies considered in this article, the purpose is precisely the unique identification of a natural person by technical means. Consequently, such processing of data can be labelled biometric data processing.

The principles of processing personal data, prescribed in art. 5 GDPR, pose limitations to the operating of biometric technologies. Biometric technologies are sophisticated and opaque in operation, which presents a challenge for the principle of fairness and transparency of data processing. Biometric technologies tend to result in an abundance of sensitive data on the subject, particularly in the case of DNA profiling, and this raises challenges for the principle of data minimisation. Biometric technologies are not error-proof, and some, such as facial recognition, must be especially considered in the light of the accuracy principle. Biometric data processing means transposing unique physical human characteristics into digital data (which can then easily be shared, stored, and copied). Thus, key issues concerning the use of biometric technologies are framed by the principles of storage limitation, purpose limitation, and the integrity and confidentiality of the data. This last issue of the security of personal and biometric data is related to "privacy by design" covered in art. 25(1) GDPR, which require that state-of-the-art technologies and techniques be used. Among the rights of data subjects stipulated by the GDPR, in the context of biometric technologies, the right not to be subject to a decision solely based

on automated decision-making is particularly important, but with a relevant exception in the case where the automated decision is based on law and "to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests".[40]

Art. 9(2)(g) GDPR is important as it provides the legal basis for the processing of biometric data by public authorities. The processing is allowed provided it is necessary for reasons of substantial public interest and based on a law proportionate to the aim pursued. Additionally, it needs to respect the essence of the right to data protection and provide safeguards for the fundamental rights of the data subject. These conditions overlap significantly with the conditions of art. 7 CFR and art. 8 ECHR, as these also contain a proportionality test. The GDPR, however, does not apply to all processing of biometric data. When personal data are processed for the purposes of law enforcement, the LED is applicable. In comparison to the GDPR, the LED is less stringent in allowing the processing of biometric data.[41]

The processing of personal or biometric data for law enforcement purposes is regulated by the Law Enforcement Directive as a *lex specialis*. Art. 3(13) LED defines biometric data in the same manner as art. 4(14) GDPR. The LED specifically requires that data controllers distinguish between distinct categories of data subjects, such as those convicted of a crime, those under suspicion, victims, and other parties such as witnesses. Processing must be necessary for the purpose of law enforcement and based on law which specifies the objective and purpose of the processing and the personal data to be processed. The GDPR in principle prohibits the processing of biometric data and then lists exceptions to this prohibition, including the processing of biometric data for reasons of substantial public interest. On the other hand, the LED allows the processing of special categories of personal data, including biometric data, where strictly necessary and authorised by law. Public authorities processing biometric data must also adhere to the principles of data processing under art. 4 LED.

Many of these issues related to biometric data processing were addressed by the CJEU in a recent judgment. In case C-205/21 *Ministerstvo na vatreshnite raboti*, the CJEU found that the processing of biometric (and genetic) data by police authorities is allowed for the purpose of law enforcement if based on a sufficiently clear and precise national law prescribing such processing even if this national law mistakenly refers to the GDPR instead of the LED.[42] The CJEU determined that the processing of biometric data under the LED is allowed only if strictly necessary, with required safeguards, while the processing of biometric data under the GDPR is prohibited, but with a list of exceptions. Thus, there must no ambiguity in the interpretation of national law about which one is the correct legal basis. If there is a conflict between national provisions that seem to allow and

[40] Art. 22(2)(b) GDPR cit.

[41] Compare art. 10 LED cit. 10 with art. 9(2) GDPR cit.

[42] Case C-205/21 *Ministerstvo na vatreshnite raboti* ECLI:EU:C:2023:49.

those that seem to preclude data processing, the solution of the conflict is to favour the interpretation that secures the effectiveness of the LED. The CJEU states that distinct categories of data subjects, such as those convicted as opposed to those only suspected of a crime, must be treated differently regarding interference with their fundamental rights. The CJEU concludes that art. 10 LED, which sets the conditions for the processing of special categories of data (including biometric data) read with the LED principles of lawfulness, fairness, legitimate purpose and data minimisation, prohibits national legislation which requires the systematic collection of biometric and genetic data of persons accused of an intentional offence if such national legislation does not provide that competent national authorities can verify that it is strictly necessary and that there are no other means available that cause less serious interference with the rights and freedoms of the data subject.

c) Biometrics, Frontex and the Artificial Intelligence Act

Artificial Intelligence Act (AI Act)[43] will greatly influence the legal framework for biometrics in the EU and it can be counted among the "basic" rules for application of biometrics along with GDPR and LED that Frontex will have to consider. However, the relationship between AI Act and biometrics is highly complex. Biometric-related terms are mentioned over a hundred times in AI Act.[44] This legislation also defines for the first time in EU law important biometric concepts, such as biometric categorisation.[45] A complete overview of biometric side of AI Act cannot be given here, but certain highlights that may affect biometric practices of Frontex can be made.

AI Act creates what can be called a risk pyramid of AI practices, from those that carry no obligations for providers or deployers to those AI practices that are prohibited. High-risk AI systems must satisfy requirements stipulated by the AI Act.[46] High-risk AI systems include the biometric information systems of the EU used in migration, asylum and border control.[47] Certain special exemptions or carve-outs for these systems are provided in the AI Act.[48] Biometrics are explicitly named as a high-risk AI practice (even though it could be argued that not all sorts of biometrics entail AI).[49]

At the pinnacle of the AI Act's risk pyramid are the prohibited AI practices. Many of those prohibited practices are of biometric nature. AI Act prohibits AI systems that create

[43] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

[44] The term "biometric" is mentioned 122 times in various forms in the Artificial Intelligence Act.

[45] See Regulation (EU) 2024/1689 cit. recital 16 and 30, art. 3(40).

[46] Arts 8-28 Regulation (EU) 2024/1689 cit.

[47] Annex III, point 7 Regulation (EU) 2024/1689 cit.

[48] See Regulation (EU) 2024/1689 cit. art. 14(5) second paragraph; art. 78(3); recital 73 last sentence.

[49] Annex III, point 1 Regulation (EU) 2024/1689 cit.

facial recognition databases through the untargeted scraping of facial images from the internet or CCTV footage.[50] This was the business model of Clearview AI, an American tech company that offered law enforcement bodies the possibility to identify persons from their public social network profiles and similar sources. Prohibited are also biometric categorisation systems that categorise natural persons based on their biometric data to discern their race, political opinions, trade union membership, religious or philosophical beliefs, sex life or sexual orientation, but here law enforcement is exempted from this prohibition.[51] Among the prohibited AI practices listed in the AI Act, most space is devoted to so-called real time remote biometric identification. But instead of making it prohibited, AI Act in art. 5(1)(h) and 5(2) to 5(8) stipulates the conditions by which this practice can be used for the purpose of law enforcement.

This kind of biometric surveillance has strong negative effects for fundamental rights of any person subjected to it, which the AI Act itself recognizes.[52] The use of surveillance with facial recognition has been deemed to cause a *chilling effect* on human rights, a legal term denoting the idea that persons do not engage in legal behaviour such as gathering in public places or expressing their political opinions due to the fear of being subjected to repression.[53] Nevertheless, real time remote biometric identification is expressly allowed by the AI Act, in its art. 5(d) and further, subject to conditions stated there. What is more, these provisions act as *lex specialis* in relation to Law Enforcement Directive.[54] This means AI Act explicitly allows biometric surveillance even if by an interpretation of LED, it would have been illegal. All this naturally helps Frontex to keep its biometric options open in contemplating the future.

Finally, AI Act grants special status to large scale information systems of the EU by giving those systems an extra time to comply with the provisions of AI Act.[55] These include the biometric based systems of Eurodac, Schengen Information System, Visa Information System and other, in which Frontex has a certain role, as mentioned previously.

In conclusion, AI Act will be another factor that Frontex has to consider while conducting its biometric policy and practices. Unfortunately, in the opinion of this Author, AI Act will not provide an effective new means of control of Frontex in relation to biometrics and fundamental rights. This is obvious from the effort of the legislator to carve special status for EU's own biometric information systems, further from the special consideration of biometric (AI) systems used for migration, asylum and border control and finally from

[50] Art. 5(1)(e) Regulation (EU) 2024/1689 cit.

[51] Art. 5(1)(g) Regulation (EU) 2024/1689 cit.

[52] Recital 32 Regulation (EU) 2024/1689 cit. states that real-time remote biometric identification "may affect the private life of a large part of the population, evoke a feeling of constant surveillance and indirectly dissuade the exercise of the freedom of assembly and other fundamental rights".

[53] *Glukhin v Russia* App. no. 11519/20 [4 July 2023].

[54] Recital 38 Regulation (EU) 2024/1689 cit.

[55] Art. 111 Regulation (EU) 2024/1689 cit.

the fact that some of the most notorious practices, such as real time remote biometric identification, have been given a green light by the AI Act.

On the brighter side for fundamental rights of individuals, AI Act brings a newer, deeper understanding of biometrics by introducing new concepts into EU law as well as by recognizing in its recitals the dangers for privacy, non-discrimination and human dignity raised by biometrics. Finally, unlike previous drafts, AI Act does not exclude EU large scale biometric systems, such as Eurodac, from its meagre obligation, but instead gives those systems merely a longer period to comply with AI Act's conditions. Frontex will have to at least notionally consider this additional set of basic rules (additional to GDPR and LED) when using biometric identification systems in its "supportive" roles in migration, asylum and border control roles as well as law enforcement.

III. Frontex's Biometric Policy and Fundamental Rights

III.1. Frontex's role and legal obligations concerning biometrics

Frontex is an essential element in the EU biometric network spanning Member States, multiple EU bodies, and information systems. It is an EU agency involved in border checks and border surveillance which coordinates, assists, and monitors how Member States control their borders if those are also the EU's external borders. It leads research and innovation regarding the application of modern technologies for border control.[56] Besides research and innovation, the importance of Frontex for biometrics is its role in assisting Member States at their borders, which includes the use of biometric technologies for identification and other purposes. This EU agency is an integral component of European integrated border management (EIBM).[57] EIBM's purpose is to help manage regular and irregular migration, at the same time upholding fundamental rights.[58] Frontex is particularly responsible for contributing to research and innovation related to EIBM and in helping Member States to develop their technological capacities.[59] The idea of EIBM is to incorporate all the elements needed for protection of the border: border checks, control and surveillance, search and rescue operations as well as using "state of the art technology" and "remaining abreast of the latest developments in technologies for border management".[60] The duties of Frontex are many but are often ancillary in character: it is obliged to "monitor", provide "support", "assist", "provide assistance" or "cooperate".[61]

[56] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard (Frontex Regulation), art. 3(2).

[57] *Ibid*. art. 4.

[58] *Ibid*. Recital 1.

[59] *Ibid*. art. 66.

[60] Frontex, 'Technology Foresight on Biometrics for the Future of Travel' 3.

[61] Art. 10(1) Frontex Regulation cit.

Frontex has such a large and growing number of responsibilities that the Article remunerating the tasks assigned to Frontex runs out of letters of the alphabet.[62] Given the ancillary nature of its tasks, it is difficult to pin legal responsibility on Frontex directly.[63] However, since the changes made to its mandate in 2019, Frontex has evolved from a border control agency to a "powerful information hub" alongside Europol.[64] Frontex cooperates with other organisations, primarily Eurojust and Europol, but also national law enforcement bodies to facilitate the exchange of information.[65] The processing of personal data in the context of the Frontex regulation is governed by a tailor-made regulation concerning the processing of personal data by EU authorities, which combines the provisions of LED and GDPR.[66]

Frontex is obliged to respect fundamental rights in all its activities.[67] To drive home this message, "fundamental right(s)" are mentioned over 200 times in the Frontex regulation. Frontex Technology Foresight on Biometrics for the Future of Travel (Frontex Study or Study) states that "fundamental rights are a cross-cutting component" of EU border management.[68] Despite this, Frontex has been associated with scandals concerning fundamental rights, notably in a report by the European Anti-Fraud Office in 2022.[69] Frontex has repeatedly been accused of facilitating pushbacks.[70] In response to the perceived fundamental rights deficiencies, Frontex has been reformed more than once. Some of the newer developments for this purpose have been the creation of a consultative forum to advise Frontex on fundamental rights issues,[71] as well as the establishment of a Fundamental Rights Officer at Frontex.[72] There is also a complaints mechanism to address the perceived lack of effective remedy for the actions of Frontex.[73] Finally, Frontex

[62] S Hartwig, 'Frontex: From Coordinating Controls to Combating Crime' (2020) EUCRIM 134.

[63] M Gkliati, 'The Next Phase of The European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece' (2022) European Papers www.europeanpapers.eu.

[64] T Quintel, *Data Protection, Migration and Border Control The GDPR, the Law Enforcement Directive and Beyond* (Hart 2022) 24.

[65] *Ibid*. 175.

[66] *Ibid*.

[67] Art. 1(1) Frontex Regulation cit.

[68] Frontex, *Technology Foresight on Biometrics for the Future of Travel* cit. 16.

[69] OLAF, Final Report on Frontex OC/2021/0451/A1 (2021) fragdenstaat.de.

[70] M Gkliati, 'The Next Phase of the European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece' cit.; E Tsourdi and P De Bruycker, 'The Evolving EU Asylum and Migration Law' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Elgar 2022) 177.

[71] Art. 108 Frontex Regulation cit.; C Loschi and P Slominski, 'Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue?' (2022) European Papers www.europeanpapers.eu.

[72] Art. 109 Frontex Regulation cit.; J Rijpma and M Fink, 'The Management of the European Union's External Borders' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* cit.

[73] Recital 104 Frontex Regulation cit.

maintains a "fundamental rights strategy" and a fundamental rights Action Plan.[74] However, instead of tracking how Frontex impacts the fundamental rights of migrants at the external border of the EU,[75] this paper brings to light another aspect of Frontex's activity: its activities concerning biometric technologies and their consequences for fundamental rights.

Frontex's activities relating to biometrics have multiple aspects. Frontex has been meeting with companies which develop biometric technologies, allegedly in secret, as a result of which human rights organisations have been accusing Frontex of promoting "militarisation" and the "border-industrial complex".[76] Frontex has since tried to explain its role concerning biometrics in terms of it being the "driving force in providing support and expertise to both Member States and the European Commission on the topic biometrics".[77] Related to the secretiveness of its activities, scholars have found that Frontex's public access to documents regime is restrictive and sometimes amounts to outright obstruction.[78]

Another activity of Frontex concerning biometrics was the Processing personal data for risk analysis (PeDRa) programme, by which sensitive personal data of migrants was processed, including genetic data, and exchanged between Frontex and Europol. The problem raised by the media and researchers was that Frontex tried to exclude EU data protection watchdogs from giving their input on PeDRa, even side-lining the critique stated by Frontex's own Data Protection Officer.[79] EDPS nevertheless issued a report on PeDRa and Frontex, in which it drew several conclusions: that privacy and data protection, stipulated in arts 7 and 8 CFR, are the cornerstones of a democratic society and that the rights extend to migrants and asylum seekers, not only to EU citizens. EDPS further stated that Frontex has grown exponentially in staff and resources, and so has its role

[74] *Ibid*. art. 80.

[75] S Tas, 'Fundamental Rights Violations in the Hotspots: Who Is Watching over Them?' (2022) European Papers www.europeanpapers.eu.

[76] The border–industrial complex is a name tag to explain the idea by which there is a flourishing industry which produces technologies for border control, and then uses resources and influence to push for greater implementation of the "security" solutions it has produced. In essence, the wider the public perception of security issues, the greater is the profit of the "border-industrial complex". Similar and more established is the well-known "military-industrial complex" in the US, which profits from the wars the US engages in. For the notion of the "border-industrial complex" in the context of Frontex, see M Douo, L Izuzquiza and M Silva Collis, 'Lobbying Fortress Europe: The Making of a Border-Industrial Complex' (5 February 2021) Corporate Europe Observatory corporateeurope.org.

[77] FragDenStaat*, Concept Note by Frontex, International Conference on Biometrics for Borders 2019: Morphing and Morphing Attack Detection Method* fragdenstaat.de.

[78] M Fink and M Hillebrandt, 'Access to Documents and the EU Agency Frontex: Growing Pains or Outright Obstruction?', in M Hillebrandt, P Leino-Sandberg and I Koivisto (eds), *(In)visible European Government: Critical Approaches to Transparency as an Ideal and a Practice* (Routledge 2024) 235.

[79] L Stavinoha, A Fotiadis and G Zandonini, 'EU's Frontex Tripped in Plan for Intrusive Surveillance of Migrants' (7 July 2022) Balkan Insight balkaninsight.com.

which has expanded from a supportive to an operational one. It went on to say that increased scrutiny of Frontex must follow this growth. EDPS commended the decision of Frontex to suspend further development of PeDRa pending previous critical opinions that EDPS published concerning PeDRa.[80]

III.2. Technology foresight on biometrics for the future of travel

In 2022, Frontex published a study on the future of biometrics in EU border checks (Frontex Study).[81] It identifies key biometric technologies and creates multiple hypotheses on how the security situation will unfold in the decades to come. The Study also analyses where patents and research into biometrics originate. The Study, covering over 600 pages, examines different biometric technologies, and finds several particularly promising biometric technologies for the future. It contains other useful insights, painting a global picture of relevant actors, countries, and technologies related to biometrics. In short, this Study is important for understanding the biometric policy of Frontex. This is not the first study on biometrics published by Frontex. For example, in 2007, Frontex conducted a study which concluded that biometrics, namely iris and fingerprint recognition, were mature enough to be used at European airports for identity checks.[82]

The Frontex Study from 2022 provides useful concepts for understanding various aspects of the application of biometric technologies, biometric systems, and technologies related to biometrics. For example, the Study defines biometric systems, which are combined software and hardware components. One example of such a biometric software and hardware package is an "e-gate" which is a corridor equipped with biometric cameras through which migrants pass for border checks. Another concept is the definition of "biometric enabling" technologies, examples of which include AI and machine learning.[83] These technologies are not exclusively biometric, but they enable the application of modern biometric technologies. Regarding AI, Frontex published an AI-focused report in 2020 which concludes that among the most promising AI technologies is "object recognition", a technology closely related to biometrics, which shows the technological common ground between AI and biometric technologies.[84] More recently, Frontex published a

[80] European Data Protection Supervisor, Hearing at Committee on Civil Liberties, Justice and Home Affairs (LIBE) (8 November 2022) edps.europa.eu.

[81] See above, footnote 2.

[82] Frontex, *BIOPASS: Study on Automated Biometric Border Crossing Systems for Registered Passenger at Four European Airports* (August 2007) frontex.europa.eu.

[83] The EU Agency for the Operational Management of Large-Scale IT Systems in the AFSJ (eu-LISA) has observed that EES "incorporates a component for automated biometric matching, which will rely on machine learning techniques for biometric matching". eu-LISA, Report 'Artificial Intelligence in the Operational Management of Large-scale IT Systems' (July 2020) 5.

[84] Frontex, *Artificial Intelligence-based Capabilities for the European Border and Coast Guard* (European Border and Coast Guard Agency 2021).

report concerning the potential of AI to reshape "the border landscape", with key trends for the border-guard community, including the metaverse, extended reality, and autonomous systems.[85] These lofty visions aside, AI has been important for the recent development of biometric technologies. Machine learning has contributed to facial recognition technologies by enabling the algorithms to process and learn from millions of examples. The AI fields crucial for biometrics include computer vision (which enables computers to process visual information) as well as research into pattern and object recognition (which enables the processing of images of faces or of fingerprint ridges into data).

As a further valuable input for biometrics researchers, a significant part of the Study is devoted to an analysis of where most patents concerning biometrics originate.[86] The short answer is that the US, followed by China, dominates the lists of country of origin of many biometric technologies, with the EU lagging far behind. The main patenting organisations concerning biometric technologies are corporations, such as Microsoft, Apple, or Samsung. This is an indicator that biometric technologies often originate in the private sector and are only later repurposed by public authorities. The EU lacks such technological behemoths, especially in the consumer sector, and, consequently, the EU is a technological laggard in biometrics. Let us take the example of the 3D facial recognition technological cluster, which is one of the five biometric technologies singled out by the Study as having the greatest potential for future use in the EU in border checks. According to the patentometrics and bibliometrics analysis of the Study, the US is the geographic origin of 84 percent of priority patents in this field, followed by China at 8.5 percent and the "European region" is the third at 5.7 percent.[87] The main organisations as the sources of patents in this technological cluster are Microsoft, Amazon, Google, Apple, etc. In the top 15 organisations as sources of patents for 3D facial recognition, besides these multinational companies, we also find the Chinese Academy of Science, but not a single EU company or academic institution. In other words, the technologies that the Frontex Study singles out as the most promising for the future of EU border control are mostly being developed outside the EU by private companies, by US technological behemoths. This has security implications which are not addressed in the Study.

However, the focus of the Frontex Study is on picking the most promising biometric technologies for the future. The main conclusion is that there are five biometric technologies that hold the greatest promise.[88] These are contactless friction ridge recognition (fingerprint or palm ridges recognition without physically touching a surface), two types of facial recognition, one where a 3D image of the face is used and the other where an infrared light is used to scan the face, and two iris recognition biometric technologies,

[85] Frontex, *Technology Horizon Scanning project* (European Border and Coast Guard Agency 2023).

[86] Frontex, *Technology Foresight on Biometrics for the Future of Travel*, Annex III: Patentometric and Bibliometric Analyses of Biometric Technologies (European Border and Coast Guard Agency 2022).

[87] *Ibid*.

[88] *Ibid.* 83.

one using visible spectrum light and the other using infrared light to scan the irises. These technologies were chosen for their practicality, the perceived adoption by the public, costs, security robustness, and other factors. Unfortunately, these technologies were not considered from the perspective of their impact on fundamental rights and data protection rights.

The Frontex Study recognises art. 9(2)(g) GDPR, art. 10 LED, and the fundamental rights framework as relevant for protecting personal and biometric data in the context of the Study.[89] However, the Study lacks legal reasoning on whether certain biometric technologies may infringe fundamental rights and data protection requirements, but merely acknowledges "risks" and defers the question to papers published by FRA.[90] It is interesting that the Frontex Study, in its Note on Fundamental Rights, mentions the possibility of conducting a "fundamental rights impact assessment". This is a hypothetical type of a rights impact assessment which was proposed in a paper published by FRA concerning the regulation of AI and other modern technologies.[91] The GDPR does require a data protection impact assessment if there are high risks for the rights and freedoms of natural persons, particularly when modern technologies are used.[92] But no legal assessment, either a data protection or a fundamental rights impact assessment, is even sketched out in the Frontex Study. It is a mistake not to include any legal reasoning on how biometric technologies analysed in the Study would impact data protection and the fundamental rights of individuals in an otherwise detailed study. The Frontex Study in multiple places mentions that its objective is to be "fully compliant with EU regulations and values", explaining in another place that this means compatibility with fundamental rights, data protection, general legal requirements, and even ethical requirements.[93] Therefore, it is not the case that the Study explicitly excludes legal considerations and focuses on technical or practical aspects alone. However, the problem with this technology-centred approach is that no study of the application of biometric technologies by public authorities makes sense without fully considering fundamental rights and legal requirements. Biometric technologies cannot be considered in a vacuum, but only in relation to how these technologies affect humans.

The attitude that the Frontex Study adopts towards fundamental rights is illustrated in one paradigmatic example. Table 20 on page 81 of the Study shows that, according to the Study, all twenty potential biometric technologies fulfil the legal and ethical requirements to be applied at border checks. Such a conclusion is absurd, especially since no analysis is made on how these biometric technologies potentially interact with fundamental rights. These twenty potential biometric technologies are considered for three

[89] *Ibid*. 16.
[90] *Ibid*.
[91] FRA, 'Getting the Future Right Artificial Intelligence and Fundamental Rights' (2020) 87.
[92] Art. 35 GDPR cit.
[93] Frontex, 'Technology Foresight on Biometrics for the Future of Travel' 26.

other factors besides legal and ethical suitability. Some biometric technologies are considered vulnerable to adversary attacks, some are not appropriate for application in times of pandemics, and some biometric technologies examined in the Study are considered to lack the potential to enable seamless border checks. Only for the category of satisfying legal and ethical requirements is every biometric technology considered compliant. This is unlikely to be true, as it is doubtful that, for example, examining the DNA profile of a person would be considered proportionate to the purpose of checking identity at a border crossing. DNA profiling raises great proportionality challenges. As already demonstrated, different biometric technologies have different levels of impact on the privacy of an individual.[94] Besides, if public authorities want to introduce DNA profiling or any new biometric technology, they must justify why such a modern technology is necessary in addition to or as a replacement for an existing technology, such as fingerprinting. Otherwise, this proportionality requirement, contained in the CFR as well as in the GDPR and LED concerning biometric and personal data processing, will not be satisfied. Proportionality challenges and the necessity for introducing any biometric technology should be a starting point for a discussion on the future of biometrics in the EU, which this report fails to address. Luckily for those averse to having their DNA profiled every time they cross EU external borders, DNA biometrics are (currently) considered merely impractical in the Study. It is false that such extreme biometric technologies would be deemed necessary in a democratic society, proportionate to the purpose of border checks and satisfying other legal requirements, as we have seen from the case law of ECtHR.[95] Worrying in this regard is that FRA experts contributed to the Frontex Study, but without raising these issues.[96] Frontex is obliged to respect fundamental (human) rights and the rule of law in all its activities.[97]

There are other potentially intrusive biometric technologies in the Frontex Study for which it would be important to consider the fundamental rights framework established for biometrics before proceeding to other aspects of their applicability. This would include considering questions such as whether eye-vein recognition is justified interference of private life in view of its legitimate purpose of border checks, or what margin of appreciation public authorities have when applying gait recognition for the purpose of border checks. The Study would then be more beneficial because many of the considered biometric technologies would be eliminated on the grounds of failing the fundamental rights or data protection frameworks. The Study implies but fails to address these crucial security challenges for public authorities in the EU, namely that the EU is dependent on importing biometric technologies which originate from abroad.

[94] *Supra,* section II.2.
[95] *Supra*, section II.2.*b).*
[96] The research was supported by FRA, according to Frontex www.frontex.europa.eu.
[97] Art. 81 Frontex Regulation cit.

When considering in abstract the legal implications of biometric technologies, a definitive assessment of the legality of a certain biometric technology cannot be made. There are other important questions that need to be answered in addition to the nature of biometric technology. These questions include for how long the biometric data are stored and whether they can be deleted, with whom the biometric data are shared and under what circumstances, the procedural safeguards that individuals can rely upon, and how clear the law is that regulates the operation of a biometric technology by public authorities.[98] These factors determine the assessment both before the ECtHR and courts in the EU, including the CJEU in relation to modern technologies, data protection and biometric data in particular.[99] There is additionally a special responsibility of public authorities in the case of the application of a novel technology.[100] The level of interference caused by the taking of fingerprints compared to DNA profiling is not the same. The Frontex Study, however, presumes all biometric technologies are equally compliant with fundamental rights, which is the wrong approach in assessing biometrics.

The Frontex Study is a failed opportunity for Frontex to critically compare technical and legal questions concerning biometrics. With its immense budget, staff, and responsibilities, but lacking appreciation of fundamental rights, Frontex may come to be perceived as a danger for fundamental rights. This must be avoided. To assert a positive role in relation to fundamental (human) rights and to ensure its own survival in a democratic and liberal society, Frontex must start to envisage its role from a fundamental rights perspective instead of a security one. It is easier to prevent abuse and the overreach of a biometric system when it is still a policy for the future than having to dismantle it once it is operational and perhaps uncontrollable.

IV. Conclusion

Current biometric technologies are fingerprint recognition and, to a lesser extent, facial recognition. Others, such as DNA biometrics, are used in narrower circumstances. But innovation, investment, and the need for data are accelerating. So, what are the biometric technologies for the future? The Frontex Study ultimately does not answer this question because it fails to consider the fundamental rights implications of modern biometric technologies. The biometric technologies that will be used in border control in the EU depend on innovation, security needs, and public acceptance. They also depend on the law, especially on the fundamental rights framework. Legal requirements are shaping the use of biometric technologies and the processing of biometric data, especially in the EU. This is a good thing since it guarantees the individual a certain level of protection against the use of their body to extract information for security or for the other needs of public

[98] Conditions of art. 9(2) GDPR cit. and art. 8 ECHR.
[99] *Supra,* section II.1.
[100] *Marper v UK* cit. para. 112.

authorities. Any study approaching biometric technologies either as a policy or a technological phenomenon should examine the legal requirements for their application, which Frontex in its Study fails to do. The future of biometric technologies in the EU will be determined by the quality of the law that regulates these technologies and the vigilance of courts and individuals in upholding individual rights against unrestricted use of biometrics.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

THE REVISED DRAFT AGREEMENT ON THE ACCESSION OF THE EU TO THE ECHR: THIRD TIME'S A CHARM?

STIAN ØBY JOHANSEN*, GEIR ULFSTEIN**, ANDREAS FOLLESDAL*** AND RAMSES A. WESSEL****

TABLE OF CONTENTS: I. Introduction. – II. Preparing the ground for another attempt? The judicial dialogue between the CJEU and ECtHR since *Opinion 2/13* – III. Negotiating the Revised Draft Accession Agreement. – IV. Appraising the Revised Draft Accession Agreement. - V. Conclusion.

ABSTRACT: A revised Draft Agreement on the Accession of the EU to the ECHR (revised DAA) was agreed upon in Mach 2023, after three years of (re-)negotiations in the shadow of *Opinion 2/13*. The contributors to this *Special Section* of European Papers analyse and assess the revised DAA. Once the EU side has finalised the EU-internal rules that will interface with the accession agreement, the CJEU will for a third time give its opinion on whether an envisaged accession to the ECHR is compatible with the EU treaties. This *Special Section* opens with an analysis of the immediate context of the negotiations and the accession process: the case law of the CJEU and the ECtHR since *Opinion 2/13*. Then, some of the key negotiators analyse the negotiations leading up to the revised DAA. Thereafter, three key aspects

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of the revised DAA are assessed: the co-respondent mechanism, the effect of *Opinion 1/17* on the revised agreement, and the yet unresolved Common Foreign and Security Policy issue. The final contribution concludes by interrogating the overarching issues of trust and mistrust, which permeated *Opinion 2/13*, the accession (re-)negotiations, and the final text of the revised DAA alike.

KEYWORDS: EU accession to the ECHR – Negotiations – Draft Accession Agreement – *Opinion 2/13* – Court of Justice of the European Union – European Court of Human Rights.

I. INTRODUCTION

The saga of the accession of the European Union to the European Convention on Human Rights (ECHR) is one for the ages. While the idea was first mooted in the late 1970s, the first proper push towards accession in the 1990s ran aground when the Court of Justice of the European Union (CJEU) found that the Union lacked the competence to accede.[1]

With the entry into force of the Treaty of Lisbon in 2009, the Union was not only conferred the necessary competence, but by virtue of art. 6(2) TEU also obliged to accede to the ECHR. Consequently, negotiations opened in 2010, and the text of the Draft Accession Agreement (DAA) was agreed roughly three years later, in April 2013. For a second time, the issue of EU accession to the ECHR went before the CJEU. After it, in Opinion 2/13,[2] infamously found that the 2013 DAA was incompatible with the EU treaties, years of near-silent reflection followed. Some probably thought that the very idea of accession would be abandoned – at least until the next major revision of the EU treaties.

However, new hope emerged in the second half of 2019, when rumours began to spread about the resumption of accession negotiations. Given the rather explicit laundry list provided by the CJEU in *Opinion 2/13*, we expected the negotiations to be extensive, but probably not long-winded. In the end, though, the (re-)negotiations of the DAA took about the same time as the initial negotiations. After a little over three years, the *ad hoc* negotiation group agreed on the final text of the revised DAA in March 2023.[3] Once the EU side has finalised the EU-internal rules that will interface with the accession agreement, the CJEU will for a third time give its opinion on whether an envisaged accession to the ECHR is compatible with the EU treaties.

The ten contributions that make up this *Special Section* of European Papers analyse and assess this revised DAA. The *Special Section* opens with an analysis of the immediate context of the negotiations and the accession process: the case law of the CJEU and the ECtHR since Opinion 2/13. Then, some of the key negotiators analyse the negotiations leading up to the revised DAA. Thereafter, three key aspects of the revised DAA are as-

[1] Opinion 2/94 *Accession by the Community to the ECHR* ECLI:EU:C:1996:140.

[2] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[3] Final consolidated version of the draft accession instruments as provisionally approved by the 46+1 Group at its 18th meeting, 46+1(2023)36 of 17 March 2023, available at: Council of Europe, 'Final Consolidated Version of the Draft Accession Instruments' (17 March 2023) rm.coe.int.

sessed: the co-respondent mechanism, the effect of *Opinion 1/17* on the revised agreement, and the yet unresolved Common Foreign and Security Policy issue. The final contribution concludes by interrogating the overarching issues of trust and mistrust, which permeated Opinion 2/13, the accession (re-)negotiations, and the final text of the revised DAA alike.

The initial idea for this *Special Section* arose on the sidelines of the European Society of International Law's annual conference in Athens all the way back in 2019. However, it would take a pandemic and then some time before the revised DAA was finalised by the negotiators in March/April 2023. After inviting contributors and receiving initial drafts, an author's workshop was held in February 2024. Papers were revised in the months thereafter, with final papers accepted between April and June. Later developments have thus not been taken into account.

II. Preparing the ground for another attempt? The judicial dialogue between the CJEU and ECtHR since Opinion 2/13

Almost six years passed from the rendering of Opinion 2/13 on the eve of Christmas in 2014 to the resumption of the negotiations on the EU's accession to the ECHR in late 2020. In those years, and during the more than two years of negotiation meetings, the judicial dialogue between the CJEU and the ECtHR continued uninterrupted. In their two contributions Rick Lawson and Adam Lazowski explore the case law of the two courts.

Taking the Strasbourg perspective, *Lawson* charts the evolution of "post-2/13" jurisprudence of the ECtHR in cases that raise issues of EU (and EEA) law. His main finding is that, rather than "take revenge", ECtHR continued to support the EU and its legal order – despite some discontent from its president immediately following Opinion 2/13. Notably, the *Bosphorus* doctrine is still alive and kicking. The ECtHR thus continues to trust that the EU and its courts provide a level of human rights protection equivalent to that of the ECHR system. By continuing to apply and refine the *Bosphorus* doctrine, the ECtHR has been able to avoid a clash with the CJEU.

Taking the Luxembourg perspective, *Lazowski* charts the CJEU's case law involving the Charter of Fundamental Rights since Opinion 2/13. He argues that, while the CJEU case law has proceeded on a trajectory established well before Opinion 2/13, there are important novelties. Among them are the extension of the fundamental tenets governing enforcement of EU law (direct effect and primacy) to the Charter, and the surgical precision with which the CJEU has had to draw the line between the Charter's field of application and that of TEU art. 19(1) in the rule of law cases.

Each in their own way, the two courts thus through their case law, prepared the ground for the accession (re-)negotiations in the decade following Opinion 2/13. At the same time, they created a dilemma for the negotiators: Should they slavishly follow the rather explicit instructions issued by the CJEU in Opinion 2/13? Or should they rather attempt to read the tea leaves of the post-2/13 jurisprudence of both courts and perhaps

assume that the evolution of the case law has solved some of the issues – in whole or in part? As we shall see, these questions loomed in the background of the second round of negotiations.

III. Negotiating the Revised Draft Accession Agreement

The second round of accession agreement negotiations kicked off in 2020, following a request by the EU to reopen the negotiations. Negotiating in the shadow of Opinion 2/13 and the years of judicial dialogue on European human rights law between the CJEU and ECtHR, the negotiators had a difficult task ahead of them.

In her contribution, president of the ad hoc group renegotiating the DAA *Tonje Meinich* gives an overview of this second round. She explains how the negotiations were organised into "baskets", reflecting the different objections voiced by the CJEU in Opinion 2/13, and how the negotiators addressed those objections. At the end she also briefly summarises some other issues that were discussed and agreed during these (re)negotiations.

The next three contributions, coming from others directly involved in the negotiations, provide us with different perspectives on the negotiation process.

The EU chief negotiator, Felix Ronkes Agerbeek, opens his contribution by explaining the peculiarities of that role, due to the complex internal dynamics between the Union and its Member States. As he explains, negotiating on behalf of the EU means negotiating not only with the "counterparty" but also extensive discussion and coordination within "team EU". He also sets out the lessons the Commission drew from Opinion 2/13, and how those lessons affected the negotiations. Finally, he briefly reviews the amendments made to the DAA from an EU negotiator's perspective.

Negotiator on behalf of Switzerland and coordinator of the informal group of Non-EU Member States of the Council of Europe (NEUMS), Alain Chablais, analyses the negotiations from the perspective of the EU's counterparties. His contribution first maps out some key structural features of these rather complex negotiations, and explains how the NEUMS organised themselves in an attempt to overcome coordination challenges similar to those of the EU. He then assesses the process and outcome under the four "baskets" that the negotiations were primarily structured around, before concluding with an overall assessment of the revised DAA from a non-EU Member State perspective.

EU accession to the ECHR also impacts the Council of Europe (CoE), because its organs act as treaty bodies under the ECHR. In their contribution, CoE Legal Director *Jörg Polakiewicz* and CoE Legal Adviser *Irene Suominen-Picht* analyse these institutional aspects of the revised DAA. While institutional considerations were relevant for all the four negotiation baskets, they also discuss in depth two additional issues with direct institutional implications for the CoE. Firstly, the participation of the EU in the Committee of Ministers, which *inter alia* supervises the execution of the ECtHR's judgments, and the participation of a delegation from the European Parliament in the Parliamentary Assembly of the CoE when ECtHR judges are elected.

All these contributions demonstrate that, while the negotiations were difficult, the parties managed to work as a collective that in the end found consensus. They also reveal that the key points of contention were whether and to what extent the DAA should contain provisions regulating what appears to third parties as EU-internal problems, such as mutual trust, the CJEU's lacking jurisdiction over the Union's Common Foreign and Security Policy, and ECHR protocol 16. Such externalisation of seemingly EU-internal issues seems to be required by the CJEU's negative Opinion 2/13, as the Commission repeatedly emphasised during the negotiations. Still, as the NEUMS argued, the extent to which such externalisation is necessary was debatable – especially when one considers the developments in the CJEU's case law in the decade that has passed since Opinion 2/13.

IV. Appraising the Revised Draft Accession Agreement

The next contributions assess the revised DAA, focusing on three distinct issues that will be highly relevant when the CJEU will opine for the third time on the compatibility of the EU treaties with a proposed accession of the Union to the ECHR.

Jennifer Buckesfeld and Ramses A. Wessel assess the revised DAA in light of the CJEU's evolving case law in the external relations field. The CJEU in recent years has softened its approach to autonomy, compared to the rather rigid approach taken in the negative Opinion 2/13. They demonstrate this by outlining the autonomy test used by the CJEU in *Opinion 1/17*, which concerned the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[4] and explaining its relevance for the DAA. They conclude that, although the negotiators seem to have drawn key lessons from *Opinion 1/17*, it is probable that the CJEU will subject the DAA to stricter scrutiny than the CETA.

Demi-Lee Franklin and Vassilis P. Tzevelekos identify some "gaps" and "cracks" in the co-respondent mechanism – a central piece of the DAA's procedural machinery. They argue that cases falling into those "gaps" or "cracks" could offer space for the ECtHR to allocate responsibility between the Union and its Member States, rather than holding them jointly responsible. This would undermine the very purpose of the co-respondent mechanism, as the ECtHR could then be forced to (provisionally) determine the distribution of competences between the Union and its Member States. They argue that such "gaps" or "cracks" are unavoidable unless one significantly compromises the Union's accountability for human rights violations – which in turn should lead the CJEU to accept the revised DAA.

Stian Øby Johansen examines the one obstacle to accession that the negotiators were unable to overcome in the revised DAA: the CJEU's limited jurisdiction over the Union's Common Foreign and Security Policy. Carving out CFSP cases from the ECtHR's jurisdiction was taken off the table already during the first round of DAA negotiations back in 2010–2013. During the renegotiations the parties made several attempts at drafting a DAA provision

[4] Opinion 1/17, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* ECLI:EU:C:2019:341.

that would otherwise solve the issue. Ultimately, the EU side conceded and promised to resolve it internally. After abandoning the idea of an interpretative declaration that would "clarify" that the CJEU has jurisdiction over human rights violations in the CFSP area, negotiators are awaiting the outcome of the *KS and KD* case. Their hope seems to be that the CJEU will follow AG Ćapeta's lead and conclude that it indeed has jurisdiction over all fundamental rights cases in the CFSP area. However, Johansen argues, there are several objections to AG Ćapeta's line of reasoning, which could lead the CJEU to dismiss the case for lack of jurisdiction – forcing the EU side to find a proper solution to the CFSP issue.

V. Conclusion

This *Special Section* concludes with a contribution by Vassilis Pergantis on the overarching relevance of the concept of trust to the accession negotiations. He demonstrates how the lack of trust (or even mistrust) looms in the background of Opinion 2/13 and thus the DAA (re)negotiations. Not only does the CJEU seem to lack trust in the ECtHR, but it appears quite mistrustful of the EU Member States as well. The changes in the revised DAA are primarily aimed at accommodating the CJEU's mistrust. On the other hand, the revised DAA requires the ECtHR to show a considerable amount of trust towards the Union and the CJEU. Arguing that this mismatch is unsatisfactory, and recognising the need to (re)build trust post-accession, he suggests ways in which trust may be built – for example, if the CJEU gradually articulates doctrines that give more leeway to the ECtHR in applying the procedural mechanisms in the DAA. Ultimately, he concludes, trust will be (re-)built only if the CJEU and the ECtHR adopt a constructive attitude by respecting due process/rule of law guarantees or showcasing jurisprudential consistency and accommodating mutual trust, respectively.

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ATLAS SHRUGGED: AN ANALYSIS OF THE ECTHR CASE LAW INVOLVING ISSUES OF EU LAW SINCE *OPINION 2/13*

RICK LAWSON*

TABLE OF CONTENTS: I. Introduction: "The disappointment that we felt". – II. *Connolly* continued: complaints about acts of the EU institutions. – III. Back to real *Bosphorus*: complaints about EU Member States implementing EU law. – IV. No blind trust: complaints about cooperation between EU Member States. – IV.1. *Avotiņš*: *Bosphorus* in a horizontal setting, too. – IV.2. *Avotiņš* II: mutual recognition not to be applied automatically and mechanically. – IV.3. The clash that never happened. – V. Applying EU law as a fact of life. – VI. Seeking shelter: addressing the rule of law backsliding in Poland. – VII. Atlas shrugged.

ABSTRACT: How did the European Court of Human Rights respond to *Opinion 2/13*? Or, more precisely, how did its "post-2/13" jurisprudence evolve in cases that raised issues of EU law? In answering this question, various aspects of the Strasbourg case law are analysed: cases where the Court dealt with complaints about acts of the EU institutions themselves; complaints about the conduct of EU Member States when implementing EU law or about situations where they cooperated with one another in the context of EU law; cases where an interpretation of EU law is required, and finally cases where an interesting substantive synergy between the ECtHR and the CJEU can be detected. One conclusion is that the *Bosphorus* doctrine, which was developed by the ECtHR in 2005, is still alive and kicking. It has been applied in a growing number of scenarios, and has been refined over the years. A second conclusion is that clashes between the two European Courts have been avoided. Thirdly, the Strasbourg Court has continued to support the EU and its legal order. Thus, it has recognised that the need to comply with obligations under EU law is "a legitimate general-interest objective of considerable weight" that may justify restrictions on, for instance, property rights; found that the refusal to execute a European Arrest Warrant (EAW) was insufficiently justified; qualified a criminal conviction in breach of EU law as a manifest error of law; and continued to support the judicial dialogue between domestic courts and the CJEU.

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I. INTRODUCTION: "THE DISAPPOINTMENT THAT WE FELT"

How did the European Court of Human Rights respond to *Opinion 2/13*? Or, more precisely, how did its "post-2/13" jurisprudence evolve in cases that raised issues of EU law?

It seems safe to assume that the *njet* from Kirchberg, on that fateful day in December 2014, took the Strasbourg Court by surprise. An outside observer might be forgiven for thinking that the Court must have been dismayed; dismayed by the contents as much as by the tone of *Opinion 2/13* … the endless list of objections against the proposed accession agreement, the repeated emphasis on the autonomy of the EU legal order (17 hits), the insistence on the need to preserve the exclusive jurisdiction of the Court of Justice (5 hits) – and indeed, the *distrust* towards the Court in Strasbourg that permeated the Opinion.[1] Is it strange to assume that the Strasbourg judges were taken aback by what was said by their colleagues in Luxembourg? Not only did the Opinion derail the Union's accession for the foreseeable future, but the CJEU also behaved as, well, an unreliable partner. It had been involved in the accession negotiations behind the scenes, and sometimes in broad daylight as well – and at no point did it signal its opposition to the draft agreement.[2] Talking about mutual trust (4 hits), Strasbourg must have felt betrayed.

Indeed: Dean Spielmann, at the time the President of the European Court of Human Rights, did not hide his discontent. At the solemn hearing for the opening of the judicial year 2015, just a few weeks after *Opinion 2/13* had been issued, he stated: "Let us be clear: the disappointment that we felt on reading this negative opinion mirrored the hopes that we had placed in it – hopes shared widely throughout Europe".[3]

Still, the idea of accession could not, and should not, be abandoned:

> "In deciding that the Union would accede to the European Convention on Human Rights, the drafters of the Lisbon Treaty clearly sought to complete the European legal area of human rights; their wish was that the acts of EU institutions would become subject to the same external scrutiny by the Strasbourg Court as the acts of the States. They wanted above all to ensure that a single and homogenous interpretation of human rights would prevail over the entire European continent, thereby securing a common minimum level of protection. The opinion of the Court of Justice does not render that plan obsolete; it does not deprive it of its pertinence. The Union's accession to the Convention is above all a

[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 20 ff.

[2] See *e.g.* ECHR, *Joint communication from presidents Costa and Skouris* www.echr.coe.int as mentioned by A Drzemczewski, 'The EU Accession to the ECHR: The Negotiation Process' in V Kosta, N Skoutaris and VP Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 20. See also the observations in CWA Timmermans, 'A View From the CJEU' in V Kosta, N Skoutaris and VP Tzevelekos (eds), *The EU Accession to the ECHR* cit. 336.

[3] See ECHR, Opening address, www.echr.coe.int.

political project and it will be for the European Union and its member States, in due course, to provide the response that is called for by the Court of Justice's opinion".[4]

But that was clearly a long-term project. What about the short term? How, if at all, should "this negative opinion" translate into the Court's case law? President Spielmann ventured a few thoughts on that matter:

"For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution.

Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.

The essential thing, in the end, is not to have a hierarchical conception of systems that would be in conflict with each other. No, the key is to ensure that the guarantee of fundamental rights is coherent throughout Europe.

For, let us not forget, if there were to be no external scrutiny, the victims would first and foremost be the citizens of the Union".[5]

How did this play out in actual practice? Did the Court, to use a hyperbole, "seek revenge" for the "betrayal" of *Opinion 2/13*? Or did it continue business as usual?
A quick reply: *Opinion 2/13* itself is mentioned only once in the Court's case law, and only in a rather matter-of-fact way.[6] But we do not give up so easily. There must be other ways to find out if the Court has changed the way in which it deals with cases that raise issues of EU law.

The obvious starting point for our exploration, the *ex ante* point of reference, is the well-known *Bosphorus* case.[7] In this case – decided in 2005, *i.e*. well before *Opinion 2/13* – the Court developed its general approach *vis-à-vis* international organisations. It then applied this approach to the EU (or, to be more precise, to the Community, as the case was decided before the Lisbon Treaty entered into force). In doing so, it tried to strike a balance between two potentially conflicting interests: on the one hand, the need to protect human rights and to preserve the integrity of the system set up under the European Con-

[4] *Ibid*.

[5] *Ibid*.

[6] ECtHR *Avotiņš v Latvia* App n. 17502/07 [23 May 2016] para. 114; see section IV of this *Article*. To complicate matters, a search in the HUDOC search engine (on the Court's website, www.echr.coe.int) using "Opinion 2/13" yields no hits. The term "EU accession" does give some results, but these lead to cases where mention is made of a State acceding to the EU, *e.g*., "Hungary's EU accession" (ECtHR *Somorjai v Hungary* App n. 60934/13 [28 August 2018] para. 6). All cases referred to in this article are judgments, unless specified differently. All cases can be found through HUDOC.

[7] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App n. 45036/98 [30 June 2005] paras 152–157.

vention of Human Rights (ECHR); on the other hand, the need to create space for international cooperation and, more in particular, the process of European integration with its unique dynamics.

It is convenient briefly to recall the Court's *Bosphorus* doctrine, because it will be a recurring theme in this overview. The starting point is that the ECHR does not prohibit the Contracting Parties from establishing international organisations, from transferring sovereign power to these organisations, or indeed from performing actions in compliance with legal obligations flowing from their membership of these organisations. In essence this is not much different from the situation where a State Party to the Convention is requested to extradite an individual pursuant to an extradition treaty with a third state: the obligation to comply with that treaty continues to exist. Yet, as the example illustrates, the States Parties remain responsible under art. 1 ECHR for all acts and omissions of their own organs – and so the decision to extradite may lead to the State's responsibility under the Convention.[8]

It is at this point that *Bosphorus* adds a new dimension. If an international organisation protects fundamental rights at a level which is at least equivalent – that is, not identical but "comparable" – to the Convention standards, a presumption arises that the State has not departed from the requirements of the Convention when carrying out its obligations as a Member State. This presumption can be rebutted if, in the circumstances of a particular case, the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation will be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[9]

As regards the Community in particular, the Court found in *Bosphorus* that the protection of fundamental rights by Community law could be considered to be "equivalent" to that of the Convention system, both as regards the substantive guarantees of fundamental rights and the mechanisms of control in place to ensure their observance.[10] It will be noted that the Court arrived at this conclusion at a point in time that the EU Charter of Fundamental Rights had merely declaratory status; it would only acquire force of law four years later, with the entry into force of the Lisbon Treaty. It was the kind of benevolence towards the EU that the Strasbourg Court had also displayed before. In the earlier case of *Pafitis* it held that the time spent on a preliminary ruling procedure (two years, seven months and nine days!) should not be taken into account when determining if court proceedings had been completed "within a reasonable time": "even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article".[11]

[8] ECtHR *Soering v UK* App n. 14038/88 [7 July 1989] para. 91. Conversely, the decision not to extradite may lead to the State's responsibility under the extradition treaty.

[9] See also ECtHR *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands* App n. 13645/05 [20 January 2009], admissibility decision.

[10] *Bosphorus* cit. paras 159–165.

[11] ECtHR *Pafitis v Greece* App n. 20323/92 [26 February 1998] para. 95.

The question is to what extent the Court maintained this *courtoisie* towards the EU after *Opinion 2/13* was issued. In an attempt to answer this question, we will explore the "post-2/13" Strasbourg case law. About a dozen cases stand out and will be subjected to closer scrutiny. The following roadmap will be used. We will start, in section II, with a series of cases where the Court dealt with complaints about acts of the EU institutions themselves. In section III the focus shifts to complaints about the conduct of EU Member States when implementing EU law, for instance when transposing a directive or complying with a judgment of the CJEU. A special group of cases features in section IV: situations where EU Member States cooperate with one another in the context of EU law, for instance by surrendering a suspect on the basis of a European arrest warrant. This section will take most of our time. We will end the tour with two short stops. In section V we will see how the Strasbourg Court tackles cases where an interpretation of EU law is required, for instance to know if an interference with a particular right was "in accordance with the law", or if proceedings were unfair because a domestic court declined to refer preliminary questions to the CJEU. The focus of section VI will be on the Strasbourg Court's involvement in the Polish rule of law crisis, which was also the subject of a series of judgments from the CJEU. The parallel involvement of the two European Courts has led to an interesting synergy, which can also be detected in other areas. Finally, some conclusions will be drawn in section VII.

II. *Connolly* continued: complaints about acts of the EU institutions

Prior to *Opinion 2/13*, the Court dealt with several complaints about acts of the EU institutions. Labour disputes, for instance between officials and the European Commission, acting as their employer, were a clear example. The EU not being a contracting party to the ECHR, complaints that were addressed against the EU – or the Communities before them – have always been rejected *ratione personae*.[12] Unsurprisingly, this did not change after *Opinion 2/13*.[13]

[12] See *e.g.* European Commission of Human Rights, *CFDT v the European Communities, alternatively: their Member States, a) jointly and b) severally* App n. 8030/77 [10 July 1978], and European Commission of Human Rights, *Dufay contre les Communautés européennes, subsidiairement, la collectivité de leurs Etats membres et leurs Etats membres pris individuellement* App n. 13539/88 [9 January 1989]. This seemingly obvious outcome was questioned in the literature (*e.g.* EA Alkema, 'The EC and the European Convention on Human Rights – Immunity and Impunity for the Community?' (1979) CMLRev 501–508; P Pescatore, 'La Cour de justice des Communautés européennes et la Convention européenne des Droits de l'Homme' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension* (Cambridge University Press 1988) 441–455. Yet, the approach was confirmed by the Court in *Bosphorus* cit. para. 152: "[...] even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party".

[13] See *e.g.*, ECtHR *Andreasen v the United Kingdom and 26 other member States of the European Union* App n. 28827/11 [31 March 2015], admissibility decision, para. 62 (quoting *Bosphorus* cit. para. 152).

Applicants have tried to work their way around this obstacle by bringing complaints against the EU Member States collectively.[14] Prior to *Opinion 2/13*, these attempts remained unsuccessful. In the case of *Senator Lines*, a company complained that it did not enjoy an effective right of access to court when trying to challenge a fine imposed by the European Commission. The case was pending before the Grand Chamber of the Strasbourg Court; a principled decision seemed to be in the making. But an anti-climax occurred: the EU Court of First Instance quashed the impugned fine and then Strasbourg was quick to reject the case.[15] Complaints concerning labour disputes, such as the relatively well-known case of Mr Connolly, were unsuccessful, too.[16] Cases that involved other international organisations – such as Eurocontrol and NATO, or indeed the Council of Europe itself – met with a similar fate.[17]

The adoption of *Opinion 2/13* did not bring about a change in the Court's hands-off approach. The case of *Andreasen*, which was based on a remarkable course of events, provides an example.[18] In 2002, Ms Andreasen was appointed by the European Commission to the posts of Director for Execution of Budget and Chief Accountant. She quickly identified a number of weaknesses and incoherencies in the European Union's accounting system. However, her proposals to change the system were rejected by her superior, the Director-General, who did not contest that there were shortcomings, but wanted "to proceed in a more orderly way to improve the current system than that proposed by the applicant".[19] Within weeks the situation escalated completely. Bypassing her DG, Ms Andreasen wrote directly to the Commissioner for Finances and Budget to share her concerns. When criticised for this, she addressed all of the Directors General in the Commission, and subsequently the President and the two Vice-Presidents of the Commission, the President of the European Court of Auditors and several MEPs. Within four months of her appointment, she was "released from her duties" and transferred to the DG Personnel and Administration to assume the somewhat undefined post of Adviser. Undeterred, she started to talk to the press, despite instructions not to do so. Disciplinary procedures

[14] An avenue explored at length, with minimal impact on the Court's case law, in RA Lawson, *Het EVRM en de Europese Gemeenschappen* (PhD Leiden 1999).

[15] ECtHR *Senator Lines GmbH v Austria a.o.* App n. 45036/98 [10 March 2004], admissibility decision.

[16] See *e.g.*, ECtHR *Connolly v 15 Member States of the European Union* App n. 73274/01 [9 December 2008), admissibility decision. Mr Connolly, an official of the Commission working on monetary policies, was dismissed after publishing the book The Rotten Heart of Europe. The Dirty War for Europe's Money. He may have found some consolation in the warm praise that his book received from a Brussels-based journalist named Boris Johnson.

[17] See ECtHR *Boivin v 34 Member States of the Council of Europe* App n. 73250/01 [9 September 2008], admissibility decision; ECtHR *Gasparini v Italy and Belgium* App n. 10750/03 [12 May 2009], admissibility decision; ECtHR *Beygo v 46 Member States of the Council of Europe* App n. 36099/06 [16 June 2009], admissibility decision. More recently, this line of case law was reconfirmed: ECtHR *Dalvy contre les 47 États membres* App n. 61548/21 [23 May 2023], admissibility decision.

[18] *Andreasen v the United Kingdom and 26 other member States of the European Union* cit.

[19] *Ibid*. para. 9.

followed, during which it emerged that she had failed to disclose that she had been suspended by her former employer, OECD, when she applied for the position at the Commission. In the end she was dismissed. She challenged her dismissal at the EU Civil Service Tribunal, lost her case, appealed to the General Court and lost again. At this point she lodged an application to the European Court of Human Rights, addressed against the EU Member States. She claimed that she was denied an effective remedy.

The Court rejected her complaint as inadmissible *ratione personae*. It quoted its earlier *Bosphorus* judgment at length and recalled that it had observed in that case "that the protection of fundamental rights afforded by Community law was, *at the relevant time*, 'equivalent' to that of the Convention system".[20] It left it at that, and made no explicit attempt to examine the *current* level of EU protection. Yet, the Court was prepared to find, by implication, that the EU continued to meet the *Bosphorus* test:

> "In the present case the Court does not consider that the applicant has 'complained in a substantiated manner either that there were manifest deficiencies in the internal appeal proceedings' of the European Union or that in transferring their powers to that organisation the Member States failed to fulfil their obligations under the Convention by not providing an 'equivalent' system of fundamental rights protection. As such, the present case can be distinguished from both Gasparini and Perez, in which the applicants made detailed submissions about the failings of the internal appeal procedures and explicitly argued that these amounted to manifest deficiencies which the Member States ought to have been aware of at the time they transferred powers to the organisation.
>
> Indeed, [...] the applicant in the present case has not identified any specific act or omission on the part of the Member States or their authorities which would be capable of engaging their responsibility under the Convention (see Beygo, cited above). On the contrary, her complaints were essentially directed at the decision of the Disciplinary Board and the proportionality of the disciplinary measures taken against her (see Connolly, cited above). As this decision emanated from an international tribunal outside the jurisdiction of the respondent States, no act or omission could be attributed to them so as to engage their responsibility under the Convention".[21]

All in all the *Andreasen* saga allows us to conclude that, by 2015, the Strasbourg Court has continued the line of case law that pre-dates *Opinion 2/13*: the EU Member States will not be held accountable for issues that "lay entirely within the internal legal order" of the EU. The EU was still considered to pass the *Bosphorus* test as an organisation that offers an "equivalent protection" of human rights.

[20] *Ibid*. para. 63, emphasis added.

[21] *Ibid*. paras 70–71. Three of the cases to which reference is made are *Boivin v 34 Member States of the Council of Europe* cit. *Gasparini v Italy and Belgium* cit. *Beygo v 46 Member States of the Council of Europe* cit. The fourth is ECtHR *Perez v Germany* App n. 15521/08 [29 January 2015], admissibility decision, concerning the UN. For a similar approach, as regards the European Patent Office (EPO), see ECtHR *Klausecker v Germany* App n. 415/07 [6 January 2015], admissibility decision.

At the same time, a keen observer will have noted that *Bosphorus* was actually used "out of context". At the time, in 2005, the *Bosphorus* test was developed in a situation where a Member State implemented a binding measure: Ireland seized an aircraft pursuant to sanctions that had been imposed "by Brussels". The Court found that Ireland could safely do so. But in *Andreasen* the situation was quite different: no Member State was involved at all. Still the Court used the *Bosphorus* test – one could say: by analogy. A complaint about a procedure before the CJEU was "translated" into the question whether the Member States, in creating that court and in transferring powers to it, failed to provide an "equivalent" system of fundamental rights protection. It seems safe to assume that the Court will be slow to accept that, back in the 1950s, the founding fathers failed to anticipate how the Communities, and much later the Union, would develop over the decades to come.

Be that as it may, the fact that *Andreasen* was decided by a Committee of three judges suggests that the decision was not seen as particularly complex. This is confirmed in a relatively recent Norwegian case, where a complaint was made about the fairness of a procedure before the EFTA Court. In rejecting this complaint, the European Court of Human Rights first distinguished between EU and EEA law:

> "the Court emphasises that the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework of the EEA Agreement, due to the specificities of the governing treaties, compared to those of the European Union. For the purpose of the present analysis, two distinct features need to be specifically highlighted. Firstly, and in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy (contrast *Bosphorus* [...] § 164). Secondly, and although the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights" in order to enhance coherency between EEA law and EU law (see, *inter alia*, the EFTA Court's judgment in its case E-28/15 *Yankuba Jabbi* [2016] par. 81), the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention".[22]

This observation might signal that the Court will take a more critical approach to international organisations other than the EU; similar remarks were not made in earlier cases involving Eurocontrol and so on. Meanwhile, the role that EU law plays in the Court's comparison with EEA law can only mean that the EU is still seen as meeting the *Bosphorus* test.

Yet, in the Norwegian case at hand no breach of the Convention was found. The Strasbourg Court continued to assess whether the "organisational and procedural regime of the EFTA Court" is "manifestly deficient" when compared with the Convention requirements. In reaching a negative answer (that is, no deficiency) the Court used a remarkable line of reasoning:

[22] ECtHR *Konkurrenten.no AS v Norway* App n. 47341/15 [5 November 2019] para. 43. This analysis was later nuanced in ECtHR *LO & NTF v Norway* App n. 45487/17 [10 June 2023] para. 107.

> "Taking into account the fact that the EFTA Court was set up to operate as a judicial body *similar to the CJEU, and* that the essential procedural principles governing the operation of the EFTA Court were *inspired by those of the CJEU*, *the only starting point can be that there are no such manifest deficiencies.* This is indeed confirmed by specific provisions in the EEA and ESA/Court Agreements, the EFTA Court's Rules of Procedure and its case law as the parties and the ESA have presented it. In this connection, the Court notes in particular that the EFTA Court is a body of independent and impartial judges who deliver reasoned decisions based on proceedings that are public and adversarial".[23]

In conclusion, the Strasbourg Court still finds that the EU passes the *Bosphorus* test as an organisation that offers an "equivalent protection" of human rights. Indeed, almost 20 years have passed since *Bosphorus* – but the Strasbourg Court did not even find it necessary to check if its finding that the Community legal order offered an "equivalent protection" still holds water today. The Norwegian case suggests that, without further ado, the EU is seen as *the* benchmark in this field. No trace of any hard feelings towards Luxembourg – it is as if *Opinion 2/13* never happened!

III. Back to real *Bosphorus*: complaints about EU Member States implementing EU law

In the present section we will explore how the Strasbourg Court deals with complaints about the way in which EU Member States implement EU law – the scenario in which the original *Bosphorus* test was first developed.

First the point of reference. In December 2012, two years before the CJEU delivered its *Opinion 2/13*, the Strasbourg Court gave the EU a nice present, wrapped in a judgment: the case of *Michaud*.[24] The case concerned a newly introduced obligation for lawyers to report suspected money laundering by their clients. Mr Michaud argued that this jeopardised legal professional privilege and the confidentiality of exchanges between lawyer and client, in breach of art. 8 ECHR. France replied that it was merely implementing EU law – in this case EU Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Invoking the *Bosphorus* presumption, France maintained that the Strasbourg Court should not review the French implementation measures. On this occasion the Court recalled its *Bosphorus* judgment, in which it found that the protection of fundamental rights afforded by the EU was in principle equivalent to that of the Convention system, and added (in a sentence that does not seem entirely correct): "*A fortiori* since 1 December 2009, the date of entry into force of Article 6 (amended) of the Treaty on European Union, which gave the Charter of Fundamental Rights of the European Union the force of law and made fundamental rights,

[23] *Konkurrenten.no AS v Norway* cit. para. 45, emphasis added.
[24] ECtHR *Michaud v France* App n. 12323/11 [6 December 2012].

as guaranteed by the Convention and as they resulted from the constitutional traditions common to the member States, general principles of European Union law".[25]

Yet the Court found that France could not rely on the *Bosphorus* presumption. Distinguishing the present case from *Bosphorus*, the Court noted, somewhat cautiously, that the directive left discretion to France.[26] In addition, "and above all", the Court noted that the French courts had never bothered to ask preliminary questions to the CJEU:

> "The Court is therefore obliged to note that because of the decision of the *Conseil d'Etat* not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the *Conseil d'Etat* ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply".[27]

The Strasbourg Court then filled the gap that had remained in the EU system of fundamental rights protection and proceeded to determine whether the interference was necessary for the purposes of art. 8 ECHR. A nice present for the EU: the Strasbourg Court provided an obvious incentive for domestic courts to refer matters to the CJEU for a preliminary ruling, enabling *that* court to review EU law for compliance with fundamental rights. The fact that the Strasbourg Court subsequently concluded – unanimously – that no violation had occurred in the case of Mr Michaud makes the ruling all the more interesting: the Court really went out of its way to strengthen the position of their good colleagues in Luxembourg. Little did they know.

Two years later they found out. How would the *Bosphorus*/*Michaud* line develop "post 2/13"?

A temporary prohibition on commercial mussel-seed fishing gave an opportunity to find out. An Irish company, O'Sullivan McCarthy Mussel Development, was engaged in the cultivation of mussels in Castlemaine harbour, on the west coast of Ireland. In 2007 the CJEU found that Ireland had failed to fulfil its obligations under two EU environmental directives.[28] In view of the judgment, the authorities considered that it was not legally possible to permit commercial activity in Castlemaine harbour until some necessary assessments had been completed. Mussel-seed fishing was therefore prohibited from June 2008. In October 2008, following successful negotiations between the Government and

[25] *Ibid*. para. 106.

[26] *Ibid*. para. 113: "the question whether France, in complying with its obligations resulting from its membership of the European Union, had a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection is not without relevance". See also *M.S.S. v Belgium and Greece* cit. para. 338.

[27] *Michaud v France* cit. para. 115.

[28] Case C-418/04 *Commission v Ireland* ECLI:EU:C:2007:780.

the European Commission, mussel-seed fishing could resume. By that time, however, natural predators had already decimated the mussel seed. Since mussels need two years to grow to maturity, Messrs. O'Sullivan and McCarthy had no mature mussels to sell in 2010, causing a loss of profit. The company instituted unsuccessful compensation proceedings against the State, then lodged a complaint in Strasbourg.[29]

Like the French government in *Michaud*, the Irish government argued that the *Bosphorus* case law should apply. But the Court was not persuaded. Adopting a more straightforward formulation than in *Michaud*, it observed that the application of *Bosphorus* presumption is subject to two conditions:

> "The first is that the impugned interference must have been a matter of strict international legal obligation for the respondent State, to the exclusion of any margin of manoeuvre on the part of the domestic authorities. The second condition is the deployment of the full potential of the supervisory mechanism provided for by EU law, which the Court has recognised as affording equivalent protection to that provided by the Convention [...]".[30]

As to the first condition, the Court noted that Ireland "was not wholly deprived of a margin of manoeuvre": while it was clear that Ireland had to comply with the directive and, with immediacy, the CJEU judgment, both required results to be achieved. Neither mandated how compliance was to be effected. The Strasbourg Court made sure to avoid categorical statements about EU law: "[t]he Court leaves open the question whether a CJEU judgment under Article 258 TFEU could in other circumstances be regarded as leaving no margin of manoeuvre to the Member State in question, but finds in the circumstances of the present case in relation to the need to comply with the relevant EU directive that the *Bosphorus* presumption did not apply".[31]

At first sight, then, it appeared that the Court was making life more difficult for EU Member States which seek to comply with their obligations under EU law. But the opposite is true. The Court considered that, in addition to the need to protect the environment, the Irish authorities had acted to comply with Ireland's obligations under EU law – which it readily recognised as "a legitimate general-interest objective of considerable weight".[32] In its assessment of the Irish measures, the Court did take into account the need to achieve compliance on a nation-wide scale, and within an acceptable timeframe, with the State's obligations under EU environmental law.[33] No violation of the Convention was found.

This overview confirms the conclusion of section II. The Court is willing to grant considerable leeway to domestic authorities that seek to comply with their obligations under EU law ("a legitimate general-interest objective of considerable weight"). The *Bosphorus* test is still alive and kicking, even if the Court introduced a somewhat stricter formulation

[29] ECtHR *O'Sullivan McCarthy Mussel Development Ltd v Ireland* App n. 44460/16 [7 June 2018].
[30] *Ibid*. para. 110. Reference to the *Avotiņš* case, to be discussed in section IV of this *Article*, omitted.
[31] *Ibid*. para. 112.
[32] *Ibid*. para. 109.
[33] *Ibid*. paras 115–129.

of the requirements that have to be fulfilled before a Member State can rely on the presumption of "equivalent protection".

IV. No blind trust: complaints about cooperation between EU Member States

Within the wider group of cases where Member States seek to comply with their obligations under EU law, cases involving judicial cooperation between EU Member States take a special position. Here one may think of the surrender of individuals based on a European Arrest Warrant (EAW), the recognition of foreign judgments, or the removal of an asylum-seeker family to another Member State under the Dublin II Regulation. In order to facilitate and accelerate these forms of cooperation, various instruments *require* the Member States to cooperate when requested. The core principle on which these systems are based is mutual recognition, which in turn depends on mutual trust between the EU Member States. Of course this may lead to tensions in practice, as has become clear in the case law of the CJEU as well, for instance if one Member State adopts a higher level of protection than another,[34] or if the mutual trust between Member States erodes, as happened when the rule of law and judicial independence in Poland were undermined in the period 2015–2023.[35]

This area has given rise to some interesting Strasbourg cases. In our review we will focus on two issues: the Court's overall approach, where – once again – the *Bosphorus* doctrine will play an important role (section IV.1), and the specific issue of whether the mutual recognition mechanisms are compatible with the ECHR (section IV.2).

IV.1. *Avotiņš: Bosphorus* in a horizontal setting, too

The potential clash between the principle of mutual trust and the realities on the ground emerged in the Strasbourg case law, too, well before *Opinion 2/13* was adopted. The case of *M.S.S. v Belgium and Greece* concerned an asylum-seeker from Afghanistan who had entered the European Union through Greece and then moved on to Belgium. Using the so-called Dublin II system, Belgium returned the person to Greece, the port of first entry, where the asylum claim should be processed. At that time, however, the asylum system in Greece was severely overburdened. In its judgment the Strasbourg Court held that the Belgian authorities should not have removed the asylum-seeker to Greece on the simple assumption that he would be treated in conformity with Convention standards. The Belgian authorities – who "knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities" – should have

[34] Case C-399/11 *Melloni* ECLI:EU:C:2013:107 paras 55–64.

[35] See, among many cases, case C-216/18 *Ministry of Justice and Equality v LM* ECLI:EU:C:2018:58 and joined cases C-354/20 and C-412/20 *L and P* ECLI:EU:C:2020:1033.

verified how the Greek authorities applied their asylum legislation in practice. Instead they had simply, and systematically, relied on the possibilities of the Dublin II system.[36]

Although this was not a case of an EU Member State transposing a directive in domestic law (as in *Michaud*) or complying with a CJEU judgment (as in *O'Sullivan McCarthy Mussel Development*), the *Bosphorus* presumption popped up. Intervening in the *M.S.S.* case, the government of the Netherlands argued that it had to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the Greek courts and subsequently, if necessary, to the Court: "[t]o reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Dublin Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in *Bosphorus* [...], in assessing the responsibility of the States when they applied Community law".[37]

This did not convince the Court. Like in *Michaud*, the Court found that the *Bosphorus* presumption did not apply. The Dublin II system simply did not oblige the Belgian authorities to transfer the asylum-seeker to Greece.[38] It merely obliged Greece to accept asylum-seekers if the conditions for transfer in the Dublin II Regulation were fulfilled.

But ever since *M.S.S.*, the *Bosphorus* presumption continues to play a role in cases that feature some form of judicial cooperation between EU Member States. The most prominent example is the case of *Avotiņš*, in which the applicant argued that the Latvian courts should have refrained from enforcing a Cypriot judgment. The latter judgment had been delivered in Mr Avotiņš's absence; in his view, it was clearly defective as it had been delivered in breach of his defence rights. However, the Latvian courts felt that the so-called Brussels I Regulation, as interpreted by the CJEU, did not allow them to refuse the enforcement of the Cypriot judgment.[39]

The European Court of Human Rights agreed with the Latvian courts. It found in essence that the *Bosphorus* presumption of equivalent protection applied, as the Latvian courts had done no more than implement Latvia's legal obligations arising out of its membership of the European Union. In a generous mood the Court accepted that the Latvian courts had not requested a preliminary ruling from the CJEU: "this second condition should be applied without excessive formalism".[40]

[36] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] paras 344–359. The "response" from Luxembourg came later that year: joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:610 paras 88–106.

[37] *M.S.S. v Belgium and Greece* cit. para. 330.

[38] *Ibid*. paras 338–340. For a "pre-2/13" case with a different outcome, see ECtHR *Povse v Austria* App n. 3890/11 [18 June 2013], admissibility decision. The case concerned the enforcement under the Brussels IIa Regulation of an Italian court order for the return of a child who had been taken to Austria by its mother.

[39] *Avotiņš v Latvia* cit.

[40] *Ibid*. para. 109: "it would serve no useful purpose to make the implementation of the Bosphorus presumption subject to a requirement for the domestic court to request a ruling from the CJEU in all cases

In a dissenting opinion, Judge Sajó expressed unease about the application of the *Bosphorus* presumption in this "horizontal" context. But he remained a lone dissenter in a Grand Chamber of 17 judges.[41]

IV.2. *Avotiņš* II: mutual recognition not to be applied automatically and mechanically

This was not the end of the *Avotiņš* story, though. Having determined that the *Bosphorus* presumption applied, the Court proceeded to examine whether in the case at hand there had not been a "manifest deficiency". This led to an important passage: the Court reviewed the EU principle of mutual recognition from the perspective of the Convention. It started with the good news: "[t]he Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice [...] and of the mutual trust which they require. [...] it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention".[42]

But then came the twist: "the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms". It is here that the Strasbourg Court referred to *Opinion 2/13* – to my knowledge the only time that the Court did so. And it took issue with part of the CJEU's position:

> "[...] the CJEU stated recently in Opinion 2/13 that 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that [...], save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU' [...]. Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".[43]

For the Court the conclusion was clear. Despite the "spirit of complementarity" in which it took into account the manner in which these mechanisms operate as well as the aim of effectiveness which they pursue: "it must verify that the principle of mutual recognition is

without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights".

[41] *Ibid*. paras 58–59 of the judgment. Two other judges argued, based on the facts of the case, that it was not necessary to have recourse to the Bosphorus presumption.

[42] *Ibid*. para. 113.

[43] *Ibid*. para. 114.

not applied automatically and mechanically to the detriment of fundamental rights".[44] This implied that there was work to be done by the domestic courts of the EU Member States, too. When called upon to apply a mutual-recognition mechanism established by EU law,

> "they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law".[45]

And so, with the *Avotiņš* judgment delivered by the Grand Chamber of the Strasbourg Court, we did get a genuine "post-2/13" confrontation. The consequences for the instant case were very limited, as the Court in the end did not find a breach of the Convention. But the potential for clashes between Strasbourg and Luxembourg was clear.

IV.3. The clash that never happened

It may be a matter of well-disposed fortune, but these clashes never materialised. Just one month before *Avotiņš* was decided, the CJEU had delivered its *Aranyosi* judgment.[46] This case was triggered by the fact that the general conditions of detention of Hungary were so poor that the surrender of an individual pursuant to an EAW posed a real risk of exposing him to inhuman or degrading treatment. In its judgment the CJEU accepted that there are limitations of the principles of mutual recognition and mutual trust between Member States. "The consequence of the execution of such a warrant must not be", the CJEU ruled, "that that individual suffers inhuman or degrading treatment".[47] It then placed strict limits on the new exception, which was to operate alongside the grounds set out by the Framework Decision for mandatory and optional non-execution of an EAW, and introduced a number of steps that the domestic authorities had to take in order to try and bring about the surrender anyway. But the message was clear: the obligation to respect fundamental rights could not be sidelined by the system established by the EAW framework.[48]

[44] *Ibid*. para. 116. With the expression "automatically and mechanically" the Court refers, "mutatis mutandis", to a precedent where it used the same formula in connection to a classic international law instrument, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (See ECtHR, *X v Latvia* App n. 27853/09 [26 November 2013] para. 98).

[45] *Avotiņš v Latvia* cit. para. 116.

[46] Joined cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[47] *Ibid*. para. 88.

[48] *Ibid*. para. 83. Confirmed in case C-220/18 *Generalstaatsanwaltschaft* ECLI:EU:C:2018:589 (Conditions of detention in Hungary), and case C-128/18 *Dorobantu* ECLI:EU:C:2019:857.

This created a space for the European Court of Human Rights to develop the reasoning of the *Avotiņš* judgment in a series of EAW cases, without engaging in a direct confrontation with the CJEU. In the case of *Pirozzi*, the Court found that the Belgian system of implementing European arrest warrants was compatible with the Convention, because the Belgian courts had examined the merits of the complaints raised under the Convention.[49] In the case of Mr Pirozzi, they had verified that the enforcement of the EAW did not give rise to a manifestly deficient protection of his rights under the Convention, and the Court agreed with that assessment.

In the case of *Romeo Castaño*, by contrast, the Belgian courts refused to execute a European arrest warrant. They based their decision on the risk that Ms N.J.E., if surrendered to Spain, would be detained in conditions contrary to art. 3 ECHR. This refusal triggered a case in Strasbourg from an unexpected corner. Ms N.J.E. was wanted in connection with the assassination, back in 1981, of an army officer by a commando unit belonging to the terrorist organisation ETA. Over the years all the members of this unit were convicted by the Spanish courts, with the exception of N.J.E., who had fled to Belgium. When the Belgian courts refused to surrender her, Mr Romeo Castaño – the son of the murdered army officer – argued that Belgium was frustrating the on-going murder investigation in Spain. This, he claimed, was in breach of art. 2 ECHR (right to life), which includes a duty to undertake an effective investigation into any unlawful killing.[50]

In these unusual circumstances, the Strasbourg Court sent a double message. On the one hand, the Belgian courts had done the right thing: they had refrained from an "automatic and mechanical" execution of a European arrest warrant. Indeed, the Court confirmed the obligation for the Belgian authorities to verify that N.J.E. would not run the risk of ill treatment if she were surrendered to Spain. Such a risk could constitute a legitimate ground, from the standpoint of the Convention, for refusing to execute the arrest warrant and thus for refusing cooperation with Spain.[51]

[49] ECtHR *Pirozzi v Belgium* App n. 21055/11 [17 April 2018] para. 67. For those who like details: the judgment (which is available only in French) reads: "la Cour estime que le contrôle effectué par les autorités belges, ainsi limité, ne pose pas de problème en soi avec la Convention *dès lors que* les juridictions belges ont examiné le bien-fondé des griefs tirés de la Convention par le requérant" (emphasis added). The Court's press release in English (ECHR 146 (2018) puts it differently: "the Court considered that the review carried out by the Belgian authorities, thus limited, did not in itself give rise to any problem in relation to the Convention, *provided that* the Belgian courts examined the merits of the complaints raised under the Convention" (emphasis added). The Court quoted extensively from the Avotiņš judgment, adding one sentence to it: "Il leur [i.e., the domestic courts] appartient dans ce cas de lire et d'appliquer les règles du droit de l'UE en conformité avec la Convention" (para. 64). This "new sentence" was later repeated in ECtHR *Bivolaru and Moldovan* App n. 40324/16 and 12623/17 [25 March 2021] para. 97, and thus "made it" to the Court's recapitulation of general principles in this area.

[50] ECtHR *Romeo Castaño v Belgium* App n. 8351/17 [9 July 2019].

[51] *Ibid*. paras 84–85 and 92.

On the other hand, such a decision should not be taken lightly. In earlier case law the Strasbourg Court had clarified that art. 2 ECHR imposes, where applicable, an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of a killing and to bring the perpetrators to justice.[52] Hence, a refusal to cooperate must be justified on a sufficient factual basis. This was not the case here. The Belgian courts had based their decisions on old information and a general reference to "Spain's contemporary political history". They had failed to conduct a detailed, updated examination of the situation, and they had not sought to identify a real and individual risk of a violation of N.J.E.'s Convention rights or any structural shortcomings with regard to conditions of detention in Spain. All in all, the scrutiny performed by the Belgian courts during the surrender proceedings had not been sufficiently thorough. Belgium had therefore failed in its obligation to cooperate under art. 2 ECHR.

It is clear that *Romeo Castaño* was decided solely on the basis of arts 2 and 3 ECHR, as interpreted by the Strasbourg Court. The Court did not venture to interpret or apply the EAW system – but the outcome of the case seems very much in line with the purpose of the EU framework. In a concurring opinion, Judge Spano referred to the "symmetry" between Convention and EU law, and he acknowledged the need "not to undermine the delicate balance of duties and obligations embedded in the EAW framework of cooperation".[53]

The last case that deserves to be mentioned here, *Bivolaru and Moldovan*, is from 2021. It provided the Court with an opportunity to recapitulate the "general principles relating to the presumption of equivalent protection in the legal order of the European Union", and the application of those principles to European arrest warrant cases.[54] The case concerns two applicants who were surrendered by France to Romanian authorities, on the basis of European arrest warrants, to serve prison sentences. In one case there was a real risk of exposure to poor detention conditions. In the other case there was no such risk, but the applicant, Mr. Bivolaru – featured in the Court's judgment as the leader of a spiritual yoga movement, the Movement for Spiritual Integration into the Absolute – had been recognised as refugee by the Swedish authorities.

[52] ECtHR *Güzelyurtlu a.o. v Turkey and Cyprus* App n. 36925/07 [29 January 2019] paras 222–238.

[53] *Romeo Castaño v Belgium* cit. para. 28 of the judgment, Concurring opinion of Judge Spano joined by Judge Pavli. It may be noted that the EAW did play a role in the Court's analysis, when examining whether the applicant, who resided in Spain, was "within the jurisdiction" of Belgium (as required by art. 1 ECHR): "In the context of the mutual undertakings given by the two States in the sphere of cooperation in criminal matters, in this instance under the European arrest warrant scheme [...], the Belgian authorities were subsequently informed of the Spanish authorities' intention to institute criminal proceedings against N.J.E., and were requested to arrest and surrender her" (para. 41). These "special features of the case" sufficed for the Court to consider that a jurisdictional link existed between the applicant and Belgium.

[54] *Bivolaru and Moldovan v France* cit. paras 96–106. On this case see J Callewaert, 'The European arrest warrant under the European Convention on Human Rights: A matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) ZEuS-Sonderband 105–114. Callewaert, Deputy Grand Chamber Registrar at the ECtHR, is a long-time observer of the ECHR–EU relationship.

The two cases have different outcomes. In the case of Mr. Moldovan the Court held that the *Bosphorus* presumption applied, since the national authorities were obliged to execute the EAW (so there was an absence of any margin of manoeuvre) and there had not been a need to refer preliminary questions to the CJEU (the law on the subject being sufficiently clear). Yet, in dealing with the case, the national authorities had not given sufficient weight to the evidence that Mr. Moldovan would be subjected to detention conditions in Romania contrary to art. 3 ECHR, and they allowed themselves to be reassured by the Romanian authorities' use of "stock language". Hence a violation was found.

In the second case, the opposite happened. The case raised new questions of interpretation, but the French courts had, once again, decided not to refer preliminary questions to the CJEU. This meant – as in the case of *Michaud*, discussed in section III– that France could not rely on the *Bosphorus* presumption. As a result, the Court reviewed "directly", without any thresholds or presumptions, if Mr. Bivolaru's surrender to Romania would expose him to a real risk of ill treatment. This was not the case, and so no violation of the Convention was found.

The judgment brings two new elements of more general interest. Firstly, as regards the establishment of a real risk to the individual, the Strasbourg Court notes that the requirements laid down by the CJEU since its ruling in *Aranyosi* "are to the same effect as those arising out of its own previous judgments".[55] So the two courts are on the same page! At least, that is what Strasbourg says.[56]

Secondly, a further nuance has been added to the *Bosphorus* test. As mentioned before, the first leg of the test is whether the Member State "does no more than implement legal obligations flowing from its membership of the organisation" (as stated in the *Bosphorus* judgment), which was later paraphrased as "the absence of any margin of manoeuvre on the part of the national authorities" (*Avotiņš*). How did this play out in the case of Mr Moldovan, where the French courts had to collect and weigh the facts in order to establish whether the surrender might pose a real risk to him? Here the Court added a new dimension:

> "this power of the judicial authority to assess the facts and circumstances and determine the legal consequences properly attaching thereto is exercised within the parameters strictly delineated by the judgments of the CJEU [...] Accordingly, the executing judicial authority, in deciding whether to grant or refuse execution of an EAW, cannot be said to enjoy *an independent* margin of manoeuvre such that the presumption of equivalent protection does not apply [...]".[57]

[55] *Bivolaru and Moldovan v France* cit. para. 114.

[56] As J Callewaert, 'The European arrest warrant under the European Convention on Human Rights' cit., rightly points out, there is still a difference, the ECtHR offering a more protective approach. For the Strasbourg Court, an overall assessment of the general situation prevailing in a country is not a pre-condition to any findings regarding the individual circumstances of the person concerned and the risks incurred in the event of their surrender.

[57] *Bivolaru and Moldovan v France* cit. para. 114, emphasis added.

What can we say at the end of this lengthy analysis? As was noted before, the *Bosphorus* doctrine is alive and kicking, it continued to evolve and in 2021 it reached a stage where the Court felt confident to recapitulate the "general principles relating to the presumption of equivalent protection in the legal order of the European Union" and the application of those principles to European arrest warrant cases.

Admittedly, a rather complex kind of jurisprudence has come into existence, which is not easy to penetrate for the uninitiated. But there is an internal logic in the system and, what is perhaps more relevant for present purposes, clashes between the two European Courts have been avoided. That was not obvious when the Strasbourg Court referred to *Opinion 2/13* in the *Avotiņš* case and expressed its reservations as regards the position of the CJEU. The Strasbourg Court put it quite firmly – and understandably so, from its point of view: the principle of mutual recognition is not to be applied automatically and mechanically to the detriment of fundamental rights. But as it happened the CJEU, confronted with real problems on the ground in Hungary (and later, as we will see in section VI, in Poland), simultaneously arrived at the same conclusion.

V. Applying EU law as a fact of life

At the end of what is becoming more than a short excursion, two issues remain that must be dealt with – briefly. The first is the apprehension of the CJEU, as expressed emphatically in *Opinion 2/13*: the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law, and the Strasbourg Court should not be allowed to encroach upon that position.[58]

In principle there is no risk that this will happen. Under art. 19 ECHR, the Court has been set up to ensure observance of the rights and freedoms guaranteed in the Convention and its Protocols. Art. 32 ECHR states that the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto. It is settled case law, therefore, that the Court does not have jurisdiction to rule on the interpretation of, or compliance with, domestic law, other international treaties or European Union law.[59] In line with this, the Court stated for instance in the case of *Jeunesse*:

> "the Court emphasises that, under the terms of Article 19 and Article 32 § 1 of the Convention, it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply

[58] Opinion 2/13 cit. paras 186 and 246.

[59] See, among many authorities, ECtHR *Jersild v Denmark* App n. 15890/89 [23 September 1994] para. 30.

domestic law, if necessary in conformity with EU law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention".[60]

Yet, the Strasbourg Court cannot always avoid interpretations of EU law. We will briefly look at three scenarios.

The first one already became apparent in the previous paragraphs. As we have seen, EU Member States can rely on the *Bosphorus* presumption subject to two conditions, namely *i)* the absence of any margin of manoeuvre on their part and *ii)* the deployment of the full potential of the supervisory mechanism provided for by EU law. The former condition requires the Court to determine whether EU law, in a particular situation, leaves any margin of manoeuvre to the Member States (as the Court did in *O'Sullivan McCarthy Mussel Development*). As to the latter condition, the Court accepted that no preliminary rulings were asked in some cases (such as *Avotiņš* and *Moldovan*), but withheld reliance on the *Bosphorus* presumption in other cases (like *Michaud* and *Bivolaru*). Assessments like these can only be based on an evaluation of EU law: was the case at hand clear from an EU law perspective (*Moldovan*), or did it raise new questions (*Bivolaru*)?

The second scenario occurs when an applicant complains of a violation of the right to a fair trial (art. 6 ECHR), in that the domestic courts refused to refer a question to the CJEU for a preliminary ruling. Already before *Opinion 2/13* was issued, the Strasbourg Court had developed a test, according to which it will examine why the national considered it unnecessary to seek a preliminary ruling.[61] The Court has emphasised time and again that the purpose of this exercise is merely to ascertain whether the refusal constituted in itself a violation of art. 6 ECHR, and that, in so doing, it takes into account the approach already established by the case law of the CJEU. Yet, when examining the reasons advanced by the domestic courts, it cannot avoid an interpretation of EU law.

[60] ECtHR *Jeunesse v the Netherlands* App n. 12738/10 [3 October 2014] para. 110. See also *Avotiņš v Latvia* cit. para. 100: "[t]he task of interpreting and applying the provisions of the Brussels I Regulation falls firstly to the CJEU, in the context of a request for a preliminary ruling, and secondly to the domestic courts in their capacity as courts of the Union, that is to say, when they give effect to the Regulation as interpreted by the CJEU. The jurisdiction of the European Court of Human Rights is limited to reviewing compliance with the requirements of the Convention, in this case with art. 6 § 1. Consequently, in the absence of any arbitrariness which would in itself raise an issue under art. 6 § 1, it is not for the Court to make a judgment as to whether the Senate of the Latvian Supreme Court correctly applied art. 34 § 2 of the Brussels I Regulation or any other provision of European Union law".

[61] See ECtHR *Ullens de Schooten and Rezabek v Belgium* App n. 3989/07 and 38353/07 [20 September 2011] para. 62: "[t]his means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt". In similar vein ECtHR *Dhahbi v Italy* App n. 17120/09 [8 April 2014] para. 31.

This line of case law continued after *Opinion 2/13*. Most complaints were rejected, as the Court did not find that the domestic courts had arbitrarily refused to start a preliminary ruling procedure. Yet in 2020, in the case of *Sanofi Pasteur*, the Court did find a breach of art. 6 ECHR because the French Court of Cassation had dismissed, without providing reasons, the company's request for a preliminary reference to the CJEU.[62] That ought to be considered a positive development from the Luxembourg perspective – but again, the Strasbourg Court cannot entertain these complaints without interpreting EU law.

The third scenario ties in with a more general issue. The exercise of several rights of the Convention, such as the right to respect for private life (art. 8), can be restricted, provided that certain conditions are fulfilled. One of these is that any restriction must be in accordance with the law. Likewise, the arrest of a person has to be "lawful" (art. 5 ECHR), and art. 7 provides that there shall be no punishment without law. When analysing complaints that the legal basis for an interference was lacking, the Strasbourg Court cannot avoid a review of the domestic law in question. This is no different if the respondent State argues that EU law provided the basis for an interference.[63]

A variation to this theme occurred in the recent case of *Spasov*. A Bulgarian vessel was caught fishing inside Romania's exclusive economic zone in the Black Sea. The owner, Mr Spasov, argued that the fish in question (around twenty turbots) was part of Bulgaria's catch quota under the EU Common Fisheries Policy. However, the Romanian court held that EU law was not applicable and convicted Mr Spasov on the basis of domestic law. As it happened, the European Commission – to which the Bulgarian authorities had applied – intervened and told the Romanian authorities that the proceedings against Mr Spasov were contrary to EU law. In the light of the applicable Regulation and the "very clear" opinion of the European Commission, the Strasbourg Court held that the Romanian court had committed a manifest error of law and that the applicant had been the victim of a violation of art. 6 ECHR and art. 1 of Protocol No. 1.[64]

VI. Seeking shelter: addressing the rule of law backsliding in Poland

Much has been written about the rule of law crisis in Poland in the period 2015–2023, and how both the EU and the Council of Europe responded to that crisis. This is not the place to recount that story. But it is mentioned here because the various legal proceedings against Poland led to a series of politically charged cases before both the Luxembourg Court and its Strasbourg counterpart. This in turn triggered a strong intensification of the cross-references between the two courts. The CJEU referred extensively to the

[62] ECtHR *Sanofi Pasteur v France* App n. 25137/16 [13 February 2020].

[63] A (not so very good) example is ECtHR *Cantoni v France* App n. 17862/91 [15 November 1995] para. 30. For a more recent example, see ECtHR *Thimothawes v Belgium* App n. 39061/11 [4 April 2017] paras 68–73.

[64] ECtHR *Spasov v Romania* App n. 27122/14 [6 December 2022]. On this case: J Krommendijk, 'Straatsburg als hoeder van het EU-recht' (2023) Nederlands Juristenblad 2462–2471.

Strasbourg case law, and the European Court of Human Rights relied extensively on the Luxembourg case law. It would merit a separate examination whether the two courts were always on exactly the same page, for instance about the question when a lack of independence translates into a judge or even an entire court losing its status as a judge or court.[65] But the larger picture is that the two courts seek to harmonise their positions – arguably because they feel that together they may stand.

A nice example of these good neighbourly relations is offered by the recent Strasbourg case of *Pajak v Poland*. The case is about the Polish law that had lowered the retirement age for judges from 67 to 60 for women, and to 65 for men – a rather obvious case of discrimination, and in addition an arbitrary and unlawful interference with judicial independence. The CJEU came to that conclusion already in 2019.[66] Four years later the Strasbourg Court delivered its judgment. When describing the legal context of the case, the judgment (which is available in French only) clarifies that in Poland a distinction is made between "stan spoczynku" (which the Court translates as "l'état de repos", which in English would be something like "the state of rest") and "emerytura" (which is translated as "la retraite", retirement). This subtlety (which does not have any consequences for the case at hand) had apparently been overlooked by the CJEU. So what does the Strasbourg Court say, in a footnote that could be characterised as snobby or loyal (or both)? "Pour des raisons de cohérence par rapport aux arrêts de la CJUE, le présent rapport emploie le terme « la retraite des juges »".[67]

The pursuit of substantive coherence can also be found in very different contexts. An example is offered by two Finnish data protection cases. They were unrelated on the facts, but similar in one respect: the Supreme Administrative Court had sought a preliminary ruling from the CJEU concerning the interpretation of the Data Protection Directive 95/46/EC. In both cases the Strasbourg Court concurred with the findings of the Finnish court, the approach of which "found support in the relevant jurisprudence of the CJEU". The ECtHR quoted extensively from the preliminary rulings and added as a general consideration: "[t]he Court has regularly emphasised the importance, for the protection of fundamental rights in the EU, of the judicial dialogue conducted between the domestic courts of EU member States and the CJEU in the form of references from the former for preliminary rulings by the latter".[68]

[65] Compare for instance case C-132/20 *Getin Noble Bank* ECLI:EU:C:2023:366 with the earlier pronouncement ECtHR *Reczkowicz v Poland* App n. 43447/19 [22 July 2021] – the apparent difference was only rectified in case C-718/21 *L.G. v KRS* ECLI:EU:C:2023:1015 para. 58.

[66] Case C-192/18 *European Commission v Poland* ECLI:EU:C:2019:924 (Independence of ordinary courts).

[67] ECtHR *Pajak a.o. v Poland* App n. 25226/18 [24 October 2023] para. 2 footnote 2. This passage would translate into English as "For reasons of consistency with the CJEU rulings, this report [sic] uses the term 'retirement of judges'", author's translation.

[68] ECtHR *Jehovah's Witnesses v Finland* App n. 31172/19 [9 May 2023] para. 85. See also the earlier Grand Chamber judgment ECtHR *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App n. 931/13 [27 June 2017].

The message is clear: the Strasbourg Court values the cooperation between domestic courts and the CJEU, and will be inclined to respect its outcome. In both cases the Court found that there were "no strong reasons" to substitute its view for that of the domestic courts, suggesting that the preceding judicial dialogue entailed a wide margin of appreciation.

This comity resurfaced recently in a Belgian case about ritual animal slaughter. The case came before the ECtHR only after the Belgian courts had made a preliminary reference to the CJEU. In dealing with the case, the CJEU relied quite extensively on the Strasbourg case law and acknowledged that the ECHR offers "the minimum threshold of protection" where its provisions correspond with those of the EU Charter of Fundamental Rights.[69] Once again the Strasbourg Court accepted the outcome of the interplay between the domestic courts and the CJEU.[70] The result was, in the words of Johan Callewaert, "a welcome unisono".[71] As he rightly pointed out, the fact that the CJEU was prepared to rely on the Strasbourg case law was quite helpful when the case finally came before the ECtHR. It created enough space for the latter to rely on the principle of subsidiarity, and defer to the outcome of the "double control" which had already taken place in Brussels and Luxembourg prior to its own scrutiny.

Examples galore of the good neighbourly relations, with the Strasbourg Court citing Luxembourg jurisprudence on a wide variety of issues, ranging from the right to be forgotten[72] to "foreign agent acts"[73] to secret surveillance regimes.[74] The European Commission was welcome, too, and granted leave to intervene in several cases.[75] The one sobering thought is that, amidst all the display of warm friendship, the CJEU apparently continues to feel the need to emphasise "the autonomy of EU law *and that of the Court of Justice of the European Union*" when interpreting fundamental rights.[76] The quote admittedly derives from the official explanations relating to art. 52(3) of the EU Charter of Fundamental Rights. But the CJEU could also have chosen to put more emphasis on another part of these explanations: "[p]aragraph 3 is intended to ensure the necessary consistency between the Char-

[69] Case C-336/19 *Centraal Israëlitisch Consistorie van België a.o.* ECLI:EU:C:2020:1031 para. 56, 57, 67 and 77.

[70] ECtHR *Executief van de Moslims van België a.o. v Belgium* App n. 16760/22 [13 February 2024] paras 112–116.

[71] J Callewaert, *Successive scrutiny of the same legislation in Luxembourg and Strasbourg: judgment of the ECtHR in the case of Executief van de Moslims van België and Others v Belgium* johan-callewaert.eu.

[72] ECtHR *Hurbain v Belgium* App n. 57292/16 [3 July 2023] paras 71–87 and 195 ff.

[73] ECtHR *Ecodefence a.o. v Russia* App n. 9988/13 [14 June 2022] paras 45–47 and 166.

[74] ECtHR *Big Brother Watch v UK* App n. 58170/13 [25 May 2021] paras 209–241.

[75] See, *e.g*., ECtHR *Xhoxhaj v Albania* App. n. 15227/19 [9 February 2021] paras 271–275, and ECtHR *S.A. Casino a.o. v France* App n. 59031/19 [7 September 2023], admissibility decision. See also the pending case of ECtHR *Italmoda Mariano Previti a.o. v the Netherlands* App n. 16395/18, communicated on 13 October 2020.

[76] Emphasis added. See *e.g*. case C-294/16 *JZ* ECLI:EU:C:2016:610 para. 50; case C-524/15 *Menci* ECLI:EU:C:2018:197 para. 23; case C-336/19 *Centraal Israëlitisch Consistorie van België a.o.* ECLI:EU:C:2020:1031 para. 56; Case C-117/20 *bpost SA* ECLI:EU:C:2022:202 para. 23.

ter and the ECHR". Apparently, ten years after *Opinion 2/13*, there is still a bit of a cold shoulder in Luxembourg. And indeed, although it falls outside the scope of this paper to analyse more in general the CJEU's stance towards the ECtHR case law, the impression does exist that the Luxembourg Court is less than faithful in following the jurisprudence of the colleagues in Strasbourg.[77] Which brings us back to our point of departure.

VII. Atlas shrugged

How did the European Court of Human Rights respond to *Opinion 2/13*? Or, more precisely, how did its "post-2/13" jurisprudence evolve in cases that raised issues of EU law? A somewhat wild hypothesis was that the Court might "seek revenge" for the "betrayal" of *Opinion 2/13*. It did not.

The recurring theme in the case law was the *Bosphorus* doctrine. Developed by the Court in 2005, it was conceived as an approach to complaints about the conduct of EU Member States when implementing EU law. It continued to be used for that purpose after *Opinion 2/13* was delivered (section III). But the field of application of the *Bosphorus* doctrine expanded. In the past years it has also been applied in cases about acts of the EU institutions themselves (section II) and in situations where EU Member States cooperate with one another in the context of EU law, for instance by surrendering a suspect on the basis of a European arrest warrant (section IV).

It is beyond the remit of this contribution to speculate about the future of the *Bosphorus* test once the EU has acceded to the ECHR. But we can say with confidence that, for the time being, the test is alive and kicking. It evolved and became more nuanced. In 2021 it reached a stage where the Court felt confident to recapitulate the "general principles relating to the presumption of equivalent protection in the legal order of the European Union" and the application of those principles to European arrest warrant cases.

Meanwhile, clashes between the two European Courts have been avoided. That was not obvious when the Strasbourg Court referred to *Opinion 2/13* in the *Avotiņš* case and expressed its reservations as regards the position of the CJEU. The Strasbourg Court put it quite firmly – and understandably so, given its position: the principle of mutual recognition is not to be applied automatically and mechanically to the detriment of fundamental rights. But, as it happened, the CJEU, confronted with real problems on the ground in Hungary and, later, in Poland, simultaneously came to the same conclusion. All's well that ends well: in 2021 the Strasbourg Court noted with apparent satisfaction that its own jurisprudence in this area aligns with the requirements laid down by the CJEU since its ruling in *Aranyosi*.

[77] To refer once more to the indefatigable Callewaert: J Callewaert, *Trends 2021-24: Taking stock of the interplay between the European Convention on Human Rights and EU Law* johan-callewaert.eu. Callewaert rightly points out that divergent case law may put the domestic courts in a difficult position, especially when the CJEU offers a lower level of protection than the ECtHR.

Another conclusion is that Strasbourg has been more than supportive of the EU. The *Bosphorus* doctrine was always an example of this (and has been praised in some quarters, and criticised in others, exactly for that reason). But there are many more examples from recent years: the recognition that the need to comply with obligations under EU law is "a legitimate general-interest objective of considerable weight" that may justify restrictions on, for instance, property rights (*O'Sullivan McCarthy Mussel Development*, 2018); the finding that the refusal to execute an EAW was insufficiently justified (*Romeo Castaño*, 2019); the willingness to find a breach of art. 6 ECHR when the domestic court did not explain why it refused to make a preliminary reference to the CJEU (*Sanofi Pasteur,* 2020); the decision to deny states the benefit of the *Bosphorus* presumption if the domestic courts failed to make a preliminary reference to the CJEU (*Michaud*, 2012, and *Bivolaru*, 2021); the qualification of a criminal conviction in breach of EU law as a manifest error of law (*Spasov*, 2022); the enduring support for the judicial dialogue between domestic courts and the CJEU (*Executief van de Moslims*, 2024). It is actually an impressive list. It would be worth exploring if the CJEU is equally supportive of the Strasbourg case law. But we have to leave that exercise to another occasion. Here we have confined ourselves to the approach of the European Court of Human Rights when confronted with issues of EU law since *Opinion 2/13*.

And so, Atlas shrugged. He continued to do what he was charged to do: to carry the sky on its shoulders, pretending not to hear all the noise that came from the surface of planet earth. As if *Opinion 2/13* never happened.

Perhaps Atlas entertains this one sobering thought. He may think about Ms. Andreasen, the bold Chief Accountant who picked a fight with all her bosses at the European Commission – we read about her fate in section II. Of all the cases discussed in this contribution, hers is arguably the only one that would have had a different outcome if *Opinion 2/13* had been positive and if EU accession had taken place. In that scenario the *Andreasen* case would not have been declared inadmissible *ratione personae* – it would have been rejected on the merits.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

TEN YEARS ON: THE CHARTER OF FUNDAMENTAL RIGHTS IN THE JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION SINCE *OPINION 2/13*

ADAM ŁAZOWSKI*

TABLE OF CONTENTS: I. Introduction. – II. Seeing the wood for the trees: the background. – III. How did the Court of Justice of the European Union use the extra time? – IV. Conclusions.

ABSTRACT: Ten years ago, when the Court of Justice delivered Opinion 2/13, the author of the present *Article*, together with Ramses A Wessel, argued that one of the consequences of the deferral of accession to the ECHR was that the Court of Justice gained extra time to develop case law based on the Charter of Fundamental Rights without being fully exposed to the direct influence of the European Court of Human Rights. This *Article* provides a tour d'horizon of the existing jurisprudence, showing the key patterns and tendencies, which can be characterised as development by continuity, with the biggest milestones being the application of the Charter in rule of law cases, the gradual determination of the essence of rights, and the application of the key tenets of primacy and direct effect to the Charter.

KEYWORDS: Charter of Fundamental Rights – European Convention on Human Rights – *Opinion 2/13* – validity of EU law – interpretation of EU law in the light of the Charter – direct effect of the Charter.

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I. Introduction

18 December 2024 marks ten years since the Court of Justice issued its *Opinion 2/13*.[1] As is well known and well documented in the academic literature, this Opinion effectively blocked, at least for now, the accession of the European Union to the European Convention on Human Rights.[2] In contrast to its previous Opinion on the matter,[3] this time around the Court of Justice provided a comprehensive and, at least in many places, robust argumentation as to why the Draft Accession Treaty had failed to cut the mustard. Yet, as it often is the case with judicial decisions, there is more to it than meets the eye. In a commentary to *Opinion 2/13*, the present author, together with Ramses A. Wessel, argued that this was precisely the case here.[4] The argument that we put forward was that by delaying accession of the European Union to the ECHR, the Court of Justice gave itself time "to build sufficient case law on the Charter of Fundamental Rights and not be directly exposed to the Strasbourg Court's case law".[5] We claimed the existence of a rule of thumb: "The less-developed the Charter is, the more its interpretation would be influenced by the Strasbourg rulings".[6] With this in mind, the present article aims to juxtapose that yesteryear argument with the jurisprudence of the CJEU post-18 December 2014. It argues that over the past ten years the jurisprudence of the CJEU in dealing with the Charter of Fundamental Rights may be best described as development by continuity.[7] While, on the one hand, the judges proceeded on the trajectory established well before *Opinion 2/13* was delivered, on the other they introduced important novelties, in particu-

[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[2] Not surprisingly, Opinion 2/13 has triggered a flurry of academic commentary. See, *e.g.*, D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) German Law Journal 105; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) German Law Journal 147; S Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) German Law Journal 169; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) German Law Journal 213; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) FordhamIntlLJ 955; B de Witte and S Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) ELR 683; BH Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy: Opinion 2/13, the Protection of Fundamental Rights and the Autonomy of EU Law' (2015) Cambridge Yearbook of European Legal Studies 168. More generally on the accession of the EU to the ECHR see, *inter alia*, P Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013).

[3] Opinion 2/94 *Accession of the European Union to the ECHR* ECLI:EU:C:1996:140.

[4] A Łazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) German Law Journal 179.

[5] *Ibid*. 190.

[6] *Ibid*.

[7] For a comprehensive assessment of the period 2009–2014 see S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing* (Hart Publishing 2025).

lar the extension of fundamental tenets governing the enforcement of EU law (direct effect and primacy) to the Charter and its application in rule of law cases. As far as the present analysis is concerned, though, two caveats are fitting. To begin with, given the limited space, the analysis that follows does not have the ambition of serving as a comprehensive guide to existing case law. It would be a task of gargantuan proportions more fitting for a book, than a wordcount-restricted journal article.[8] From this, the second caveat inevitably emerges. In order to sketch the main trends and patterns in the case law of the CJEU, the author had to resort to sampling and follow Cervantes's law of statistics – that by a small selection of examples, one may judge the whole piece.[9]

II. Seeing the wood for the trees: the background

Before the contemporary jurisprudence of the CJEU is put under the microscope, it is essential to set the scene. As the starting point, I should like to step back to the genesis of the Charter of Fundamental Rights and the *raison d'être* of its appearance in the EU legal order. The story goes back many decades and has been inextricably linked to the clash of Titans: the battle over the primacy of EU law. Without rehashing the familiar details, it suffices to return briefly to the *Solange* saga and the famous words of the German *Bundesverfassungsgericht* that, as long as the then EEC had no bill of rights of its own, the German Constitution would be the supreme law of the land.[10] Like a red rag to a bull, it triggered the reaction from the Court of Justice, which has been, since then – albeit incrementally – developing the general principles of EC law, building on and using as sources of inspiration the constitutional traditions of the Member States as well as international treaties, in particular the European Convention on Human Rights (ECHR).[11] This judicial gap-filling served its purpose, yet with the ever-increasing competences of the European Communities and the emergence of the European Union, it became clear that a bill of

[8] For comprehensive coverage of the Charter, including the voluminous case law of the Court of Justice of the European Union see, *inter alia*, S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2021).

[9] See H Rawson, *The Unwritten Laws of Life* (Carbolic Smoke Ball 2008) 55.

[10] [1974] 2 CMLR 540. This stood in stark contrast to the CJEU's take on primacy in case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114. For a detailed account of the historical jurisprudence see, *inter alia*, J Kokott, 'Report on Germany' in A-M Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Courts & National Courts. Doctrine and Jurisprudence* (Hart Publishing 1998).

[11] See, for instance, case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* ECLI:EU:C:1974:51; case 228/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206; case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECLI:EU:C:1991:254; case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434; case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* ECLI:EU:C:2003:333.

rights of sorts was required.[12] As already noted at the beginning of the present contribution, the option of joining the ECHR was taken out of the equation by the Court of Justice in *Opinion 2/94*. Subsequently, the development of the EU's own bill of rights became the talk of the town. Despite the good intentions, it did not materialise without political fireworks. Out of many bones of contention, two stood out. Firstly, the then Member States were quite divided as to the suite of fundamental rights to be included in the Charter, as well as the caveats necessary to ensure that the bill of rights would not serve as a vehicle for the expansion of EU competences and for its federalisation.[13] The adoption of the Charter in 2001 as a non-binding instrument was a necessary compromise, yet, in hindsight, it was merely a stepping stone on a long journey that culminated in the Treaty of Lisbon, which gave the Charter of Fundamental Rights binding force and status equivalent to EU primary law.[14] The rest, as they say, is history.

Be this as it may, it is unquestionable that the Charter has evolved since then. It had already made a firm mark during its first years of existence as soft law on steroids.[15] Since 1 December 2009 – that is, when it gained binding force – it has travelled a long way in the case law of the CJEU: from the modest beginnings of the *en passant* appearance in *Kücükdeveci*[16] to serving in hundreds of cases as a tool for the interpretation of EU law and a yardstick for the verification of legality of the EU's or Member States' actions. While several key decisions had been rendered prior to *Opinion 2/13*, many more have been delivered since. Arguably, in such decisions as *Åkerberg Fransson*,[17] *Test-Achat*,[18] and *Melloni*,[19] the Court of Justice elucidated not only its vision of the scope of application of the Charter to the Member States and the level of protection guaranteed by the Charter but also its capability to serve as a yardstick for the legality of EU actions. By the same token, the Court has set out navigation beacons for future case law. As the present author and Ramses A Wessel argued shortly after *Opinion 2/13* was delivered, the delay in the EU's accession to the ECHR indeed gave the CJEU extra time to build more jurisprudence and

[12] For a comprehensive analysis of how the human rights-related case law of the CJEU has evolved see E Frantziou, 'Human Rights as an Example of Cooperative Federalism? A Chronology of the Use of the Preliminary Reference Procedure in Human Rights Cases between 1957 and 2023' (2023) European Journal of Legal Studies 189.

[13] See, *inter alia*, G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) ELR 126.

[14] See, *inter alia*, M Borowski, 'The Charter of Fundamental Rights in the Treaty on European Union' in M Trybus and L Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012); D Anderson and CC Murphy, 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout and S Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012)

[15] See, *inter alia*, S Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) CMLRev 1565, 1569-1573.

[16] Case C-555/07 *Seda Kuc̈uk̈deveci v Swedex GmbH & Co. KG* ECLI:EU:C:2010:21.

[17] Case C-617/10 *Aklagaren v Hans Akerberg Fransson* ECLI:EU:C:2013:105.

[18] Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* ECLI:EU:C:2011:100.

[19] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* ECLI:EU:C:2013:107.

to construct an autonomous human rights regime. In doing so, the Court was of course constrained by the horizontal rules laid down in the Charter of Fundamental Rights, including the desideratum to interpret provisions deriving from the ECHR in a way that is compatible with the jurisprudence of the European Court of Human Rights.

III. How did the Court of Justice of the European Union use the extra time?

As the starting point, it is essential to reflect on the main factors determining the application of the EU's bill of rights and, in turn, on the key principles underpinning the jurisdiction of the CJEU. To begin with, the Charter applies, as per its art. 51(1), "to the institutions, bodies, offices and agencies of the Union". In other words, it is there to ensure that all actors forming the institutional fabric of the European Union act in a manner that is Charter compliant. Of course, this is not where it ends. The Charter applies also to the Member States of the European Union. However, in this respect, art. 51(1) of the Charter is the gatekeeper. It provides that the Charter applies only to the extent that the Member States "are implementing EU law". The latter notion has proven to be particularly problematic for a host of reasons. Firstly, there are considerable differences between various language versions of the Charter. Secondly, art. 51(1) suffers from an unfortunate lack of coherence between the text of the Charter itself and the Explanatory Notes which serve as navigation beacons when it comes to its application in practice.[20] Not surprisingly, starting from the judgment in *Åkerberg Fransson*, the Court of Justice has been busy interpreting art. 51(1) of the Charter. As argued by Sara Iglesias Sánchez, the case law is far from clear as the Court "captured in a formula of beautiful simplicity the enormous complexity of the matter".[21] Here, the Court has had to balance a number of factors. On the one hand, it has had to consider the linguistic cacophony explained above and, on the other hand, the judges have had to follow the horizontal rules underpinning the application of the Charter, in particular the crucial caveat that it does not expand EU competences. Still, the *Åkerberg Fransson* formula has meant that the Charter applies extensively to the Member States and, in the past ten years, the Court has had many opportunities to deal with the matter in question. In this respect, a good exemplar are cases on VAT fraud.[22]

For the application of the Charter, the main rules governing the jurisdiction of the CJEU are of pivotal importance. The legality of actions of EU institutions and other organs may be determined *qua* two main procedural vehicles: the annulment procedure (art.

[20] Explanations relating to the Charter of Fundamental Rights [2007].

[21] S Iglesias Sánchez, 'Article 51: The Scope of Application of the Charter' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020) 401, 401.

[22] Good examples. See, for instance, cases on breach of VAT obligations. See, *inter alia*, case C-310/16 *Criminal proceedings against Petar Dzivev and Others* ECLI:EU:C:2019:30; joined cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Criminal proceedings against PM and Others* ECLI:EU:C:2021:1034.

263 TFEU) and references for a preliminary ruling from national courts on the validity of EU secondary legislation (art. 267 TFEU).[23] As the *Gascogne* litigation has shown, action for damages for a serious breach of EU law attributable to an EU institution, including the CJEU itself, may be of use, too.[24] In the realm of the external relations of the European Union, the procedure for *ex ante* verification of the compliance of international treaties with the EU Founding Treaties also has a role to play.[25] Be that as it may, such cases constitute only a small percentage of litigation reaching the CJEU which, of course, translates into a number of instances in which the Charter, in the past ten years, has made its appearance. It stands in stark contrast to the number of preliminary rulings on the interpretation of EU law coming from domestic courts (art. 267 TFEU). Year by year, they occupy a large share of the Court's docket.[26] Bearing in mind that many of them touch upon the Charter of Fundamental Rights, it is reasonable to argue that since its adoption, and – in particular – since it has gained binding force, it has been making its way into domestic litigation in the Member States.

When it comes to the jurisdiction of the CJEU, one last general point is fitting as it is highly relevant for the analysis that follows. Irrespective of the Court procedure employed, the Court of Justice of the European Union – unlike courts sitting at the apex of domestic judiciaries – does not dine *à la carte*. Without a generally applicable filtering system in place, it proceeds on the presumption of admissibility, which means that if the applicants in direct actions or national courts in preliminary rulings raise arguments based on the Charter, we are likely to see the Court's engagement with the EU's bill of rights.[27] Yet, as further elaborated upon in this *Article*, the judges do indeed have some room for manoeuvre. Under the circumstances, they may opt not to touch upon the Charter or, to the extent that acts *ex officio* are permitted, they may draw it into the equation.

[23] See, for instance, case C-13/23 *cdVet Naturprodukte GmbH. v Niedersächsisches Landesamt für Verbraucherschutz und Lebensmittelsicherheit (LA-VES)* ECLI:EU:C:2024:175.

[24] Art. 340 TFEU. See, for instance, case T-577/14 *Gascogne Sack Deutschland GmbH and Gascogne v European Union* ECLI:EU:T:2017:1 para. 78.

[25] Art. 218(11) TFEU. For an academic appraisal see, *inter alia*, G Butler, 'Pre-Ratification Judicial Review of International Agreements to be Concluded by the European Union' in M Derlén and J Lindholm (eds), *The Court of Justice of the European Union. Multidisciplinary Perspectives* (Hart Publishing 2018).

[26] See M Broberg and N Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Oxford University Press 2021).

[27] As is well-established in the case law of the Court, references for a preliminary ruling are admissible only if the national court is able to prove that the answer of the CJEU is necessary to enable the domestic judges to adjudicate in the case at hand. This caveat has proven to be critical in several rule of law cases where the national courts of affected Member States, in particular Poland, submitted numerous references touching upon art. 47 of the Charter (and art. 19(2) TEU) that had been rejected as inadmissible by the Court of Justice, as the domestic judges had failed to explain such links. See, for instance, joined cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others* ECLI:EU:C:2020:234.

Another important factor determining the extent to which the Charter is employed by the CJEU is its actual content. As is well known, the rights, freedoms, and principles contained in the Charter hardly constitute an original amalgam: it is, subject to a few exceptions, a patchwork of the ECHR and of rights pre-existing in the EU Founding Treaties. With this in mind, it is scarcely surprising that some of the rights, freedoms, and principles are frequently invoked by the CJEU, while others are highly unlikely to play any practical role whatsoever. A good example of the former is art. 47 of the Charter, which provides for the principle of effective judicial protection. There is a constant flow of cases unlocking the meaning of art. 47 and its scope.[28] This has not always come easy – the rules on the application of the Charter to the Member States have proven to be particularly problematic in a series of rule of law cases where the Court of Justice, with the precision of a surgeon, has had to draw the line between the scope of application of art. 47 of the Charter, on the one hand, and the scope of application of art. 19(1) TEU on the other.[29] At the other end of the equilibrium we find, for example, art. 45 (1) of the Charter. It is a carbon copy of art. 21 TFEU, vesting EU citizens with the right to move and reside in other Member States. Apart from purely decorative purposes, it is hard to imagine why national courts or the CJEU would add the Charter to the mix.

So, bearing in mind the above, how did the Court of the Justice of the European Union use the extra time gained by the rejection of the terms of accession to the ECHR? It may be a fair and straight-forward question, yet, at the same time, one that is notoriously difficult to respond to with a bulletproof answer. One thing seems certain, though. Whatever the answer, it ought to be couched in a long list of ifs and buts.

Perhaps one of the most useful methods to begin with is a quantitative assessment: the determination of a number of judgments of the CJEU in which the Charter of Fundamental Rights has made its appearance. Statistical data are indeed a convenient point of reference, yet one needs to remember the limited power of bare numbers. In the words of M Bobek and J Adams-Prassl, "numbers in and of themselves do not tell much of a story, of course, especially in the law".[30] Thanks to technological advances, the days of laboriously ploughing through voluminous European Court Reports belong now to history (unless, of course, one is an *afficionado* of such exercises). The required data are

[28] See, *inter alia*, case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117; joined cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* ECLI:EU:C:2019:982; case C-824/18 *A.B. and Others v Krajowa Rada Sądownictwa and Others* ECLI:EU:C:2021:153. For an academic appraisal see, *inter alia*, M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection. Volume 1. The Court of Justice's Perspective* (Hart Publishing 2022).

[29] See, *inter alia*, S Prechal, 'Article 19 and National Courts: A New Role for the Principle of Effective Judicial Protection?' in M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection* cit. 28.

[30] M Bober and J Adams-Prassl, 'Conclusions' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* cit. 560.

available with a few clicks of a computer mouse, all served on platter by the database of the Court of Justice of the European Union. For the purpose of the present exercise, the initial search covered the period from 18 December 2014 (the date *Opinion 2/13* was handed down) to 7 July 2024 (the cut-off date). It encompasses the jurisprudence of both - the Court of Justice and the General Court.[31] Furthermore, it was limited to cases that were closed at the cut-off date. The documents sifted through included judgments and orders of both courts,[32] *ex ante* opinions of the Court of Justice on the legality of international treaties as well as opinions of advocates general at the Court of Justice. By applying these basic parameters, the number stood at 2,441 documents in which the Charter of Fundamental Rights was mentioned in the grounds of the judgment/opinion and/or in their operative parts.[33] What does this tell us? Arguably, relatively little, as this figure includes cases where the Charter was of paramount importance for the solution in the issue at hand,[34] as well as instances where it was mentioned *en passant* and therefore had no real impact on the reasoning and/or the outcome of the case.[35] It surely did not cover judgments where the Charter was not explicitly mentioned, yet, the members of the Court may have been inspired by it but – during the *délibéré* – agreed that this should not be trumpeted. Overall, such a basic quantitative test is a good indicative first step, but without an in-depth analysis of every single document, it is not terribly insightful. One thing, though, merits attention even at this stage. While, *prima facie*, the figure provided may look considerable, the early assessment changes when one juxtaposes it with the sheer number of cases handled by the CJEU in the same period.[36] This sows a seed of doubt: perhaps the Charter of Fundamental Rights is not as frequent a visitor in Kirchberg courtrooms as one would have initially anticipated. But then again, what figure would satisfy someone eager to prove that the CJEU is making good use of the Charter or, perhaps, claiming the opposite, that the Charter is not used often enough? Is it quantity over quality, or the other way around?

Leaving such subjective assessments aside, for the purposes of this contribution it will suffice to identify the main trends emerging from the case law of the CJEU and juxtapose them with the already discussed *raison d'être* of the Charter. Analysis of the jurisprudence shows that the objectives behind the Charter are being gradually achieved and

[31] This included judgments and orders.

[32] Procedural and reasoned orders of both courts.

[33] This number should be treated as indicative. For reasons which are beyond the present author's knowledge and comprehension, repeated checks using the same criteria, kept on giving different results. Man v. technology is not the kind of battle that can be easily won by humans.

[34] See, for instance, case C-235/17 *European Commission v Hungary* ECLI:EU:C:2019:432.

[35] See, for instance, case C-25/23 *AL v Princess Holdings Ltd* ECLI:EU:C:2023:786.

[36] For instance, in the period 2014–2024, the Court of Justice received 5284 new references for preliminary ruling. This number includes references that, in one way or another, were processed by the Court. It should be noted that even if references are withdrawn or declared inadmissible, they keep *juge rapporteur* and designated advocate general busy.

the case law of the CJEU in the period following *Opinion 2/13* is largely a continuation of previously established patterns with new elements brought into the equation. To begin with, it has been used as a yardstick for verification of the legality of EU legal acts. This has included not only EU regulations and directives[37] but also decisions on the conclusion of international agreements[38] and international agreements themselves.[39] The Charter has also been employed to ensure the accountability of bodies forming the institutional fabric of the EU for breaches of the Charter. As already alluded to, this has extended to the non-contractual liability of the EU for breach of art. 47 of the Charter attributable to the General Court itself.[40] Bearing in mind that the Charter also applies to the Member States (albeit subject to the caveats noted above), it has also been used as a yardstick for the verification of the compliance of domestic law with EU law.[41] While reliance on the Charter by the European Commission in infringement cases is relatively scarce,[42] a recent judgment finding that Hungary, a recidivist rule of law breaker, had failed to comply with a previous decision of the CJEU is worth noting. The fact that the breach extended to several provisions of the Charter of Fundamental Rights has contributed to the choice of a coefficient for the seriousness of a breach and thus to the calculation of the penalties imposed by the Court.[43] From the procedural point of view, references for a preliminary ruling have served as vehicles for the verification of the compliance of national law with the Charter. What stands out are many instances in which the Charter has been used as

[37] See, for instance, *Association Belge des Consommateurs Test-Achats* cit. para. 18.

[38] See case C-716/22 *EP v Préfet du Gers, Institut national de la statistique et des études économiques (INSEE)* ECLI:EU:C:2024:339; case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems* ECLI:EU:C:2020:559. In the former case, the CJEU ruled that the contested decision on the conclusion of the EU-UK Withdrawal Agreement was compliant with the Charter (decision 2020/135 of the European Council of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community). However, in the latter ruling, the CJEU declared as invalid Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Parliament and Council Directive 95/46/EC on the adequacy of the protection provided by the EU-US Privacy Shield.

[39] Opinion 1/15 *Draft Agreement between Canada and the European Union on Transfer of Passenger Data* ECLI:EU:C:2017:592.

[40] *Gascogne Sack Deutschland GmbH and Gascogne* cit. para. 24.

[41] See, *e.g.*, case C-53/23 *Asociația 'Forumul Judecătorilor din România', Asociația 'Mișcarea pentru Apărarea Statutului Procurorilor' v Parchetul de pe lângă Înalta Curte de Casație și Justiție – Procurorul General al României* ECLI:EU:C:2024:388.

[42] See, for instance, *European Commission v Hungary* cit. para. 34; case C-78/18 *European Commission v Hungary* ECLI:EU:C:2020:476; case C-66/18 *European Commission v Hungary* ECLI:EU:C:2020:792. For a commentary focusing on the European Commission's reluctance see A Łazowski, 'Decoding a Legal Enigma: the Charter of Fundamental Rights of the European Union and Infringement Proceedings' (2013) ERA Forum 573.

[43] Case C-123/22 *Commission v Hungary (Accueil des demandeurs de protection internationale II)* ECLI:EU:C:2024:493.

a tool for the interpretation of secondary legislation.[44] Not surprisingly, it has spread to many areas of EU law, starting with the groundbreaking rule of law cases already mentioned and ending with EU criminal law. In this respect, voluminous jurisprudence on the essence of rights listed in the Charter is also worthy of particular interest. Thus far, the Court has dived into provisions of the Charter concerning privacy, freedom of expression, the principle of *ne bis in idem*, or the right to asylum.[45] Furthermore, by extending the application of the doctrines of primacy and direct effect to the Charter, the Court of Justice has also given additional thrust to its enforcement at the national level. Not surprisingly, the application of horizontal direct effect to the Charter has attracted the attention of academic commentators.[46] Yet, this does not mean that judges are willing to extend the application of direct effect to all provisions of the Charter. *Au contraire*, as the judgment in *AMS* shows, the standard direct effect test applies also to the Charter and, should its provisions fail to meet any limbs of the test, they cannot be directly invoked by individuals in national courts.[47]

Regardless of the *AMS* case, this brief *tour d'horizon* could give the impression that the CJEU might be using every opportunity to employ the Charter and to increase its prominence as a foundation of EU law. Indeed, the analysis conducted for the purposes of this short contribution proves that instances can be found when the Charter is not mentioned by a national court in a reference, but is added to the mix *ex officio* by the Court of Justice.[48] Yet, case law also reveals other scenarios. For instance, a group of cases may be distinguished where the Charter of Fundamental Rights has been mentioned in the questions

[44] See, *e.g.*, case C-1/23 PPU *X, Y, A, legally represented by X and Y, B, legally represented by X and Y v État belge* ECLI:EU:C:2023:296; case C-638/22 *T.C., Rzecznik Praw Dziecka, Prokurator Generalny interested parties: M.C., Prokurator Prokuratury Okręgowej we Wrocławiu* ECLI:EU:C:2023:103; case C-636/22 *PY v Procura della Repubblica presso il Tribunale di Lecce* ECLI:EU:C:2023:899; case C-15/24 *Criminal proceedings against CH* ECLI:EU:C:2024:399; case C-299/23 *Criminal proceedings against HYA, IP, DD, ZI, SS* ECLI:EU:C:2024:505.

[45] See, for example, case C-362/14 *Maximillian Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650. For an academic appraisal see, *inter alia*, T Tridimas, 'What the Essence of a Right?' in C Barnard, A Łazowski and D Sarmiento (eds), *Pursuit of Harmony in Turbulent Europe. Essays in Honour of Eleanor Sharpston* (Hart Publishing 2024).

[46] See, for example, case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:257. See further, *inter alia*, E Frantztiou, *The Horizontal Effect of Fundamental Rights in the European Union. A Constitutional Analysis* (Oxford University Press 2019); S Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) Revista de Derecho Comunitario Europeo 407; D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) ELR 479; M Szpunar, 'Horizontality of the Charter: Imposing Rights on Individuals or Making Directives Directly Applicable?' in C Barnard, A Łazowski and D Sarmiento (eds), *The Pursuit of Legal Harmony In a Turbulent Europe: Essays in Honor of Eleanor Sharpston* (Hart Publishing 2024) 45.

[47] Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2.

[48] See, *e.g.*, case C-722/22 *Sofiyski gradski sad* ECLI:EU:C:2024:80 paras 28–29; case C-25/23 *AL v Princess Holdings Ltd* ECLI:EU:C:2023:786 para. 34; case C-656/22 *Askos Properties EOOD v Zamestnik izpalnitelen direktor na Darzhaven fond 'Zemedelie'* ECLI:EU:C:2024:56 paras 57–60.

submitted by national courts but that part of the reference has been declared inadmissible. It can therefore be said that the Charter has not been dealt with by the Court. Case C-222/23 *'Toplofikatsia Sofia' EAD* is a good example. While two pieces of EU secondary legislation were duly interpreted by the Court of Justice, it held that the part of the reference dealing with art. 47 of the Charter was not admissible as the national court had failed to prove that it was required to adjudicate in the case at hand.[49] Analysis of the jurisprudence also shows that in some instances the Court tends to rule on other grounds, quietly leaving the Charter behind, even though it had been mentioned by a referring court. A recent example is case C-116/23 *XXXX* where the Court of Justice focused on the interpret action of Regulation 883/2004, tacitly staying away from the interpretation of art. 7 of the Charter (and, for that matter, also art. 18 TFEU).[50] In several instances the Court has opted for a similar move, but it has made it clear that it could provide a useful interpretation of EU law without the need to resort to the Charter of Fundamental Rights.[51]

IV. Conclusions

The ten-year period since the CJEU delivered *Opinion 2/13* has given it ample opportunities to build case law and to cement the already established function of the Charter as a pillar and a constitutional foundation of EU law. This is an opportunity that the Court has used gladly, though, as the examples provided in this article show, the judges have shied away from employing the Charter at every opportunity. The typology of judgments indicates that the EU's bill of rights serves the two main objectives it had initially been created for: it applies to the bodies forming the institutional fabric of the European Union, on the one hand, and to the Member States when they apply EU law, on the other. Looking at the procedural apparatus governing the jurisdiction of the CJEU, it can be easily seen that the vast majority of cases where the Charter plays a role are preliminary rulings from national courts. This proves that the Charter is gradually making its way into domestic courtrooms. As for the Court of Justice of the European Union, its engagement with the Charter of Fundamental Rights, is indeed one of development by continuity.

[49] Case C-222/23 *'Toplofikatsia Sofia' EAD* ECLI:EU:C:2024:405. Similarly, see case C-649/22 *XXX v Randstad Empleo ETT SAU, Serveo Servicios SAU, formerly Ferrovial Servicios SA, Axa Seguros Generales SA de Seguros y Reaseguros* ECLI:EU:C:2024:156.

[50] Case C-116/23 *XXXX* ECLI:EU:C:2024:292. See also case C-746/22 *Slovenské Energetické Strojárne a.s. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* ECLI:EU:C:2024:403.

[51] See, for instance, case C-770/22 OSTP *Italy Srl v Agenzia delle Dogane e dei Monopoli, Ufficio delle Dogane di Genova 1, Agenzia delle Dogane e dei Monopoli, Ufficio delle Dogane di Genova 2, Agenzia delle Entrate – Riscossione – Genova* ECLI:EU:C:2024:299.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

FROM *OPINION 2/13* TO THE 2023 DRAFT ACCESSION AGREEMENT: THE CHAIR'S PERSPECTIVE

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TABLE OF CONTENTS: I. Introduction. – II. Basic principles in the negotiations. – III. Negotiating the issues deriving from Opinion 2/13. – III.1. EU-specific mechanisms of the procedure before the ECtHR. – III.2. Interstate applications and advisory opinions. – III.3. Mutual trust and mutual recognition. – III.4. CJEU competence over EU acts in the field of CFSP. – IV. Other issues.

ABSTRACT: In this *Article* I first briefly touch on the history of EU accession to the European Convention on Human Rights, and the negotiations in 2010 to 2013. I then go through the main objections from the Court of Justice of the European Union in *Opinion 2/13*, and explain how these were addressed in the revised Draft Accession Agreement.

KEYWORDS: EU accession to the ECHR – negotiations – *Opinion 2/13* – human rights – Council of Europe – European Union.

I. INTRODUCTION

EU accession to the European Convention on Human Rights (ECHR) has been discussed since the 1970s, but it was first with the adoption of the Lisbon Treaty that the EU got a firm legal basis for accession. Art. 6(2) of the Treaty on European Union (TEU) clearly states that the EU shall accede to the ECHR, while Protocol no. 8 sets out further requirements for accession. On the Council of Europe side, Protocol no. 14, which was adopted in 2002 and entered into force in 2010, amended art. 59 of the ECHR in order for the EU to be able to accede.

On a request from the EU, the negotiations on the modalities for EU accession started in 2010. The negotiations first took place in an expert group with seven members from

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states not members of the EU, seven members from EU Member States, and the Commission. The negotiations later took place in a full negotiating group (47+1) where the Commission and all members of the Council of Europe participated. The negotiators agreed on a draft set of accession instruments in April 2013:[1]

- Draft Accession Agreement.
- Draft Declaration from the EU on the use of the co-respondent mechanism and prior involvement.
- Draft MoU between the EU and a non-EU Member State concerning intervention by the EU according to ECHR art. 36.
- Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments when the EU is a party.
- Draft Explanatory Report.

The EU Commission submitted the draft accession instruments to the Court of Justice of the European Union (CJEU) for an opinion on the compatibility of the accession instruments with the EU treaties in July 2013. The CJEU issued its opinion in December 2014, and concluded that the draft negotiation instruments were not compatible with TEU art. 6(2) and Protocol no. 8.[2]

On request from the EU the negotiations were reopened in mid-2020, and were concluded in March 2023.

In this paper, I will go through the main objections from the CJEU as formulated in *Opinion 2/13* and explain how these objections have led to amendments in the new draft agreement. I will not further analyse *Opinion 2/13*, nor will I try to predict the outcome of a new opinion from the CJEU on the 2023 Draft Accession Agreement.[3] I would, however, like to say that the full negotiating group has been positive to EU accession to the ECHR, and have actively and constructively participated in the negotiations in order for such accession to take place.

II. Basic principles in the negotiations

Since the EU is not a state but a supranational organisation with its own legal order acceding to the Convention alongside its Member States, it was early understood and agreed that it was necessary to elaborate some EU-specific rules. This specifically relates to procedural rules, where it was deemed necessary to have rules ensuring that the EU and/or its Member States would become parties to all cases where the participation in the case was necessary for a proper execution of the judgment or friendly settlement.

In both the first and second round of negotiations, the parties agreed to a number of principles underlying the negotiations. The agreement should aim to:

[1] 47+1 Ad hoc group, "Report to the CDDH", 47+1(2013)008rev2 (2013 DAA), 10 June 2013.
[2] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.
[3] 46+1 Ad-hoc group, "Report to the CDDH", (2023)35FINAL, 30 March 2023.

- Preserve the equal rights of all individuals, the rights of applicants in the Convention procedures and the equality of all High Contracting Parties.

- Leave unaffected the existing rights and obligations of the EU Member States, *i.e.*, the substantive rights should not be under discussion.

- As far as possible, preserve and apply to the EU the current control mechanisms of the Convention in the same way as to other High Contracting Parties to the Convention, making only those adaptations necessary.

- Respect the distribution of competences between the EU Member States and the EU institutions.

- Allow the European Court of Human Rights (ECtHR) to remain the master of its proceedings.[4]

These principles were repeated and strengthened in a declaration by the non-EU Member States at the beginning of the second round of negotiations.[5]

III. Negotiating the issues deriving from *Opinion 2/13*

When negotiating the second round, the negotiators divided the CJEU objections into four "baskets":

i) EU-specific mechanisms of the procedure before the ECtHR

ii) Operation of inter-party applications (art. 33 of the Convention) and of references for an advisory opinion (Protocol no. 16)

iii) The principle of mutual trust between Member States

iv) CJEU competence for EU acts in the field of Common Foreign and Security Policy (CFSP)

III.1. EU-specific mechanisms of the Procedure before the ECtHR

The main principle for participating in the proceedings, and being liable for any violation of the ECHR, is that the party that has acted or failed to act is responsible for its acts or omissions before the ECtHR. The Draft Accession Agreement does not change this. For an EU Member State, this applies whether or not that state has applied EU law or not. Likewise, any act or omission by the EU's institutions or agencies is the responsibility of the EU. Still, in order to provide for the EU-specific situation where the EU is becoming a

[4] Report to the CDDH cit. appendix 5 para. 7. The last principle is not mentioned there, but was repeatedly used during the negotiation.

[5] The statement is annexed to the meeting report of the 6th meeting, 47+1(2020)R6, 22 October 2020. Common Statement of the Informal Group of Non-European Union Member States (NEUMS): Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Norway, Russian Federation, San Marino, Serbia, Switzerland, Turkey, Ukraine and United Kingdom, Report from the 6th meeting, appendix III rm.coe.int.

party to the ECHR alongside its Member States, while respecting the distribution of powers between the EU and its Member States, both the 2013 and the 2023 drafts contain provisions on a so-called co-respondent mechanism.

According to art. 3(2) and (3) of the Draft Accession Agreement, if an EU Member State has acted or omitted to act and the alleged violation could have been *avoided only by disregarding EU law*, the EU may (or shall) become a co-respondent to the case and, unlike a third-party intervener, thereby become a party to the case and be bound the judgment of the ECtHR. Conversely, if the EU has acted and was obliged to do so under the TEU or the Treaty on the Functioning of the European Union (TFEU), the EU Member States may (or shall) become co-respondents to the case, since their participation is needed in order to amend the treaties.

If the EU is a respondent, the case will have to be adjudicated by the CJEU in order for the applicant to have exhausted domestic remedies.[6] If the EU is a co-respondent, the domestic remedies will have to be exhausted in the respondent Member State. In this national procedure the courts of last instance of the Member State concerned are obliged to send a request for a preliminary ruling to the CJEU if the case raises a question of the interpretation of the treaties or the validity and interpretation of acts of the institutions, bodies, agencies of the EU.[7] If the national court has failed to do so, it was agreed that this should not be detrimental to the applicant, and a preliminary ruling by the CJEU should therefore not be seen as a national remedy that the applicant must exhaust. Nevertheless, it was deemed desirable that the CJEU should be able to assess the compatibility between the applicable EU law and the Convention before the ECtHR made its assessment. Art. 3(7) of the Draft Accession Agreement therefore allows for the CJEU to assess the case, if it has not previously done so, before the ECtHR issues its judgment (prior involvement). The ECtHR is not in any way bound by the assessment of the CJEU in the same way that it is not bound by the findings of the courts of a state party.

The reasoning behind the co-respondent and prior involvement mechanisms is to ensure that the parties who are able to remedy the breach are bound by the judgment. If the ECtHR finds a violation against a Member State, and it could not have acted otherwise according to EU law, it will be necessary to amend EU law in order to prevent further violations. This a Member State cannot do by itself. Ensuring that the EU is also responsible and bound by the judgment therefore ensures that the judgment can be properly executed. By allowing the CJEU to assess the question in a prior involvement procedure, the subsidiarity principle is ensured. Also, for the ECtHR it was seen beneficial that the CJEU had the possibility to make this assessment before the ECtHR made its assessment.

In *Opinion 2/13* the CJEU did not object to the co-respondent mechanism as such. However, it did have three objections concerning the functioning of the mechanism. The first objection concerned the triggering of the co-respondent mechanism, *i.e.*, who shall

[6] Art. 35(1) ECHR.
[7] Art. 267 TFEU.

decide whether the criteria for becoming a co-respondent are fulfilled or not. The 2013 Draft Accession Agreement art. 3(5) provided that it was the ECtHR that made the final decision on whether or not the criteria for the EU to become a co-respondent were met. The decision was to be taken after receiving an assessment by the EU of whether the criteria for becoming a co-respondent were met, but it was up to the ECtHR to decide whether the reasons given were plausible or not.

In *Opinion 2/13* the CJEU held that in reviewing whether the reasons given by the EU were plausible or not, the ECtHR would be required to assess EU law governing the division of powers between EU and its Member States as well as the attribution of their acts or omissions. The CJEU found that "such a review would be liable to interfere with the division of powers between the EU and its Member States".[8]

In the 2023 Draft Accession Agreement, cf. art. 3(5), it will still be the ECtHR that takes the formal decision to admit the EU (or its Member State(s)) as a co-respondent, in accordance with the principle that the ECtHR shall remain the master of its proceedings. It is, however, clarified that the ECtHR shall admit the EU (or its Member State(s)) as a co-respondent if the EU in a reasoned assessment of the question concludes that the criteria for becoming a co-respondent are met. If the EU concludes that the criteria are not met, the ECtHR cannot admit the EU (or its Member State(s)) as a co-respondent.

The 2023 Draft Accession Agreement also has a new provision on the termination of the co-respondent mechanism. This was not particularly addressed by the CJEU, but was seen as necessary to mirror the provision on the triggering of the co-respondent mechanism. Art. 3(6) therefore states that the co-respondent mechanism shall be terminated if a reasoned assessment by the EU sets out that the criteria for becoming a co-respondent no longer are met.

The second of the CJEU's objections against art. 3 and the co-respondent mechanism concerned the responsibility of the respondent and the co-respondent for remedying the situation if the ECtHR found a breach of the Convention. Art. 3(7) of the 2013 Draft Accession Agreement provided that the EU and the Member States parties to the case as a rule were jointly responsible for the violation. The ECtHR could, however, decide otherwise on the basis of the reasons given by the respondent and co-respondent and after having heard the views of the applicant.

The CJEU pointed out that this paragraph did not exclude the possibility of a Member State being responsible for a violation of a provision of the ECHR to which it had made a reservation, thereby not fulfilling the provision in Protocol no. 8 stating that nothing in the accession agreement shall affect the situation of Member States in relation to the ECHR.[9]

It is clear that an application concerning a possible breach of a provision to which a party has made a valid reservation will be declared inadmissible *ratione materiae* with regard to that party, to the extent that the issue falls within the scope of the reservation.

[8] Opinion 2/13 cit. paras 224–225.
[9] *Ibid*. paras 227–228.

Since the co-respondent mechanism is a new mechanism, the negotiators agreed to clarify that this principle also applies in a co-respondent case, in art. 2(3).

The CJEU further concluded that the apportionment of responsibility must be solved solely in accordance with the rules of EU law, and be subject to review by the CJEU. Allowing the ECtHR to decide on the apportionment of responsibility between the EU and its Member States, would give the ECtHR competence to settle a question that falls exclusively within the competence of the CJEU.[10]

In the 2023 draft the negotiators therefore agreed that the ECtHR in its judgment always shall hold the respondent and co-respondent jointly responsible for a violation, cf. art. 3(8). The apportionment of responsibility will be decided by the EU and its Member State(s), under the supervision of the CJEU. Since both the EU and its Member States will remain jointly responsible towards the applicant, the applicant can, however, be rewarded any monetary claim by both the Member State(s) and the EU.

III.2. INTER-STATE APPLICATIONS AND ADVISORY OPINIONS

a) Inter-state applications – ECHR art. 33

According to art. 344 TFEU, states cannot submit a dispute concerning a question of EU law to an EU-external method of international dispute settlement. In other words, the CJEU has exclusive jurisdiction.

Art. 33 ECHR, which governs inter-state applications, does not have any special rules on possible inter-state applications between EU Member States. Neither did the 2013 Draft Accession Agreement have any special rules on inter-state applications between EU Member States or between the EU and a Member State.

The CJEU stated in its opinion that "the fact that the EU Member States or the EU are able to submit an application to the ECHR is liable to undermine the objective of art. 344 TFEU and, moreover, goes against the very nature of EU law".[11]

The negotiators spent a long time finding an acceptable solution to this part of *Opinion 2/13*.

For a number of reasons, it was not seen as viable to amend art. 33 by excluding the ECtHR's jurisdiction in these cases. Neither was it seen as viable to create a new ground for inadmissibility in art. 35, nor an additional ground for the ECtHR to strike out a case in art. 37. Many delegations also expressed that this was a question that should be solved internally between the EU and its Member States.

The negotiators finally agreed to insert two paragraphs in art. 4 of the Draft Accession Agreement obliging the EU Member States not to avail themselves of art. 33 in the Convention, insofar as the dispute concerns the application or interpretation of EU law. Furthermore, the ECtHR shall provide the EU with sufficient time to assess, as a matter of

[10] *Ibid*. paras 229–235.
[11] *Ibid*. para. 212.

priority, whether a case between two Member States does concern a matter of interpretation or application of EU law, if the EU so requests.

b) Advisory opinions – Protocol no. 16

Protocol no. 16 was adopted in October 2013 and entered into force on 1 August 2018. At the time of writing, 22 states have ratified the Protocol, among them 11 EU Member States.[12] The Protocol provides for a possibility for the highest courts or tribunals of a contracting party to request that the ECtHR give an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

According to art. 267 TFEU, the courts of the EU Member States shall submit any questions relating to the interpretation of the EU treaties or validity or interpretation of secondary law to the CJEU for a preliminary ruling. In *Opinion 2/13* the CJEU stated that, since the ECHR would become an integral part of EU law after accession, the mechanism established by Protocol no. 16 could affect the autonomy and effectiveness of the preliminary ruling procedure provided for in art. 267 TFEU. Furthermore, the CJEU did not rule out that an advisory opinion made pursuant to Protocol no. 16 could trigger the prior involvement procedure, creating a risk that the preliminary ruling procedure in TFEU art. 267 could be circumvented. By failing to have any provision on the relationship between Protocol no. 16 and art. 267 TFEU, the CJEU found that the draft agreement was liable adversely to affect the specific characteristics of EU law.[13]

After long discussions, the negotiating group agreed to insert a new art. 5 in the Draft Accession Agreement providing that when the highest courts or tribunals of an EU Member State encounters a question that falls within the field of EU law, it shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of Protocol no. 16.

III.3. Mutual Trust and Mutual Recognition

The principle of mutual trust and mutual recognition is a basic principle in the EU, especially in the field of justice and home affairs. According to the case law of the CJEU, the principle means that when cooperating with each other on the basis of implemented EU law, the EU Member States are required to consider, save in exceptional circumstances, that fundamental rights have been observed by the other EU Member States. The ECtHR is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice and the mutual trust they require, and consider these mechanisms – if not applied automatically and mechanically in the event of certain substantiated human rights concerns – to be wholly legitimate in principle from

[12] The following EU Member States have ratified Protocol no. 16: Belgium, Estonia, Finland, France, Greece, Lithuania, Luxembourg, Netherlands, Romania, Slovak Republic and Slovenia.

[13] Opinion 2/13 cit. paras 197–199.

the standpoint of the Convention.[14] Both the CJEU and the ECtHR have adjudicated a number of cases concerning the boundaries of this principle.[15] Although the methodology used differs, there has been an increasing convergence in the case law between the two courts.

The 2013 Draft Accession Agreement did not have any provisions concerning the application of the principle of mutual trust and mutual recognition. In *Opinion 2/13* the CJEU states that insofar the ECHR would "require a Member State to check whether another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between them, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law".[16]

Negotiating how this principle should be reflected in the draft accession instruments was not easy, and many proposals were discussed. Although delegations acknowledged the principle itself, there was at the outset disagreement both on the placement of a reference to the principle and on the actual wording. For example, the negotiating group discussed whether an operative article in the draft agreement was necessary or whether this should be better placed in the explanatory report or in a declaration from the EU and its Member States.[17]

The result of the negotiations is found in art. 6 of the 2023 Draft Accession Agreement. The article states that accession of the European Union shall not affect the application of the principle of mutual trust within the European Union and that, in this context, the protection of human rights shall be observed.

III.4. CJEU competence over EU Acts in the field of CFSP

The CJEU has limited jurisdiction in CFSP matters. Art. 24(1) TEU states that the CJEU shall not have jurisdiction with respect to the CFSP provisions except for monitoring compliance with art. 40 TEU and to review the legality of decisions provided for in art. 275 TFEU (restrictive measures).

Already when negotiating the 2013 draft, there was awareness of the question of what impact the limited jurisdiction of the CJEU in CFSP matters should or could have on EU accession. Since there was no appetite either from the EU and its Member States or from the non-EU Member States to have any special rules for these matters, let alone have a "carve out" of CFSP matters from the jurisdiction of the ECtHR, there were no special rules concerning CFSP matters in the 2013 Draft Accession Agreement. The regular

[14] See particularly ECtHR *Avotiņš v Latvia* App n. 17502 [23 May 2016] paras 113–166.

[15] For an overview and analysis of this case law, see A Łazowski, 'Ten Years On: The Charter of Fundamental Rights in the Jurisprudence of the Court of Justice of the European Union Since Opinion 2/13' (2024) European Papers 673 www.europeanpapers.eu; R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' (2024) European Papers 647 www.europeanpapers.eu.

[16] Opinion 2/13 cit. para. 194.

[17] 47+1 Ad-hoc group, 'Meeting Report of the 9th Meeting, 47+1(2021)R9' (25 March 2021).

rules in the ECHR and in the Draft Accession Agreement would therefore also apply to CFSP matters.

In *Opinion 2/13* the CJEU merely states that it has not yet had the opportunity to define its limitations in CFSP matters. However, the CJEU states that certain acts adopted in the context of CFSP will fall outside the jurisdiction of the CJEU. Furthermore, EU accession to the ECHR will give the ECtHR jurisdiction over acts, actions or omissions of the EU that might fall outside the jurisdiction of the CJEU. Referring to earlier case law, the CJEU states that judicial review of acts or omissions of the EU cannot be referred exclusively to an international court outside the institutional and judicial framework of the EU, and that the Draft Accession Agreement therefore fails to have regard to the specific characteristics of EU law.[18]

The EU proposed a system with a so-called re-attribution clause which would enable the EU to allocate responsibility for an EU CFSP act to one or more Member State(s) if such an act would be excluded from the jurisdiction of the CJEU.[19] The proposal was met with criticism, especially for being complex, unclear and detrimental to the applicant. Finally, the EU concluded that this question could not be solved in the accession agreement, but would have to find its solution within the EU. The 2023 Draft Accession Agreement does therefore not have any provisions concerning CFSP.

At the time of writing, a case is pending before the CJEU where the judgment hopefully will clarify the limits of the jurisdiction of the CJEU in cases where there has been an alleged breach of the EU Charter on fundamental rights and the ECHR by an EU institution.[20]

IV. Other issues

In addition to the questions raised by *Opinion 2/13*, the negotiating group discussed some other matters relating to EU accession. Firstly, the ratio of the EU's financial contribution was updated to reflect the situation in 2023, cf. art. 8 in the 2023 Draft Accession Agreement.

Secondly, the voting rules in the Committee of Ministers on supervision of the execution of judgments and friendly settlements in cases to which the European Union is a Party were amended. Already in 2013 the negotiating group saw the need for special voting rules in these cases, given the fact that the EU and its Member States are obliged to coordinate their positions, and their votes, when the Committee of Ministers supervises the execution of cases to which the EU is a party, either as the respondent or as a co-respondent. However, the negotiating group did not find these rules fully satisfactory in 2023, since there still could be some situations where the EU and its Member States, with the support of only a small number of non-EU Member States, would have the necessary number of votes to determine whether a decision concerning the execution of a

[18] Opinion 2/13 cit. paras 249–257.

[19] See 47+1 Ad-hoc group, 'Meeting Report of the 9th Meeting, 47+1(2021)R9' cit. paras 11-16.

[20] Joined cases C-29/22 and C-44/22 P *KS and KD v Council & Others* ECLI:EU:C:2023:901.

judgment to which the EU was a party was to be adopted or not. The new voting rules are proposed to be included in a new Rule 18 in the rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.[21] They may seem complicated, but they will ensure that exercise of the combined votes of the EU and its Member States will not prejudice the effective exercise of the supervisory function of the Committee of Ministers in cases to which the EU is a party.

[21] Adopted by the Committee of Ministers at the 964th meeting of the Ministers' Deputies on 10 May 2006 and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies, and on 6 July 2022 at the 1439th meeting of the Ministers' Deputies.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A NEW HOPE

FELIX RONKES AGERBEEK*

TABLE OF CONTENTS: I. Introduction. – II. How the EU and its Member States worked together. – III. Lessons from *Opinion 2/13*. – IV. State of play. – V. Conclusion.

ABSTRACT: This *Article* discusses three aspects of the negotiations on EU accession to the ECHR that took place between 2020 and 2023. First, it describes the way in which the EU and its Member States worked together during the negotiations. Second, it discusses *Opinion 2/13* and argues that it reflects the Court of Justice's profound attachment to the EU's own constitutional space as a precondition for "the process of integration that is the raison d'être of the EU itself". Third, it provides a short overview of the amendments to the accession instruments. It concludes that the negotiations were an exercise in collective problem solving and an essential step forward on the road towards EU accession to the Convention.

KEYWORDS: Fundamental rights – EU accession to the European Convention on Human Rights – *Opinion 2/13* – mutual trust – autonomy of EU law – negotiations.

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I. Introduction

Mission: Impossible. That is how the editors of a prestigious law journal once described the European Union's accession to the European Convention on Human Rights.[1] It is too soon to say whether they were right or wrong. One thing is certain: the EU has not abandoned its longstanding aspiration to accede to the Convention.[2]

Between 2020 and 2023 – ten years after the negotiations that had led to the first Draft Accession Agreement – delegates from the EU and from the Member States of the Council of Europe worked out a revised set of accession instruments. This happened out of the limelight, but in full transparency. Almost every negotiating document was published on the website of the Council of Europe.[3] Most importantly, the outcome is available online for everyone to scrutinise.[4]

This is a strange moment to take stock of the negotiations. The agreement is provisional and its fate is still uncertain. Even in the best of scenarios, EU accession to the Convention is likely to require several years, if only because every Member State of the Council of Europe will have to ratify the agreement. Nevertheless, it is also a logical moment to assess the situation. The fact that there is now a revised set of draft accession instruments is a noteworthy development and an essential step forward on the road towards accession. To borrow a title from another famous movie franchise: the talks that took place in Strasbourg from September 2020 to March 2023, and the outcome of those talks, represent neither the first nor the last episode in the saga of the EU's accession to the Convention; they do, however, represent "A New Hope".

In this *Article*, I will address three aspects of the negotiations. First, I will shed some light on how the EU and its Member States worked together during the negotiations. Second, I will discuss *Opinion 2/13*, which served as the EU's lodestar throughout the negotiations. Finally, I will briefly describe the current state of play.

II. How the EU and its Member States worked together

The process of negotiating an international agreement on behalf of the EU, as described in art. 218 TFEU, seems straightforward: upon a recommendation of the Commission, the Council authorises the opening of negotiations; it adopts negotiating directives and appoints a "special committee" with which the Commission, as EU negotiator, must consult throughout the negotiations; the European Parliament, meanwhile, is kept regularly and

[1] Editorial comments, 'The EU's Accession to the ECHR – a "No" from the ECJ!' (2015) CMLRev 1, 14.

[2] Enshrined, since 2009, as an obligation in art. 6(2) TEU.

[3] Council of Europe, *EU Accession to the ECHR ("46+1" Group)* www.coe.int.

[4] Final consolidated version of the draft accession instruments as provisionally approved by the 46+1 Group at its 18th meeting, 46+1(2023)36 of 17 March 2023, available at: Council of Europe, *Final Consolidated Version of the Draft Accession Instruments* rm.coe.int.

fully informed.[5] While this description is correct, it is also a tremendous understatement of what negotiating on behalf of the EU entails in practice. Being the voice of the EU in international negotiations requires, first and foremost, having an ear to the ground *within* the EU. While no two negotiations are the same, every negotiation on behalf of the EU involves a great deal of interaction with numerous interlocutors inside the EU – all the time, at every step of the process.

The EU's delegation to the "46+1 Group" – the Strasbourg-based forum for the negotiations[6] – was relatively small. It consisted of a few colleagues from the Commission and the European External Action Service (EEAS). Behind the scenes, however, many people were involved, from different parts of the Commission and from the EEAS.[7] The European Parliament's Committee on Constitutional Affairs (AFCO) and its Committee on Civil Liberties, Justice and Home Affairs (LIBE) regularly received detailed technical debriefings. The Council held frequent discussions on the accession negotiations. Most of those discussions took place within the Working Party on Fundamental Rights, Citizens Rights and Free Movement (FREMP), which also acted as the "special committee" during the negotiations. The FREMP delegates, in turn, involved the relevant departments, ministers and parliamentary committees in their respective Member States. Moreover, since the Member States of the EU are also Members of the Council of Europe, they each had their own representative in the 46+1 Group. Those were often their "Strasbourg experts", many of whom had experience as agents before the European Court of Human Rights. The representatives of the EU and its Member States worked closely together and held daily coordination meetings during the negotiating rounds. All of this was complemented by emails, rounds of phone calls, brainstorming sessions, and so forth. A continuous back-and-forth occurred before and in parallel to the negotiation process.

For the EU's negotiating partners, but also for outside observers, it can be difficult to appreciate the impact and the complexity of the EU's internal dynamics. For instance, if you have followed the media coverage on the negotiations for an EU-UK Trade and Cooperation Agreement, the picture that you might have is that of sombre exchanges between Michel Barnier and David Frost, of their teams sitting across each other in windowless rooms, and of the occasional high-stakes phone call between UK Prime Minister Boris Johnson and Commission President Ursula von der Leyen. Certainly, those were important aspects of the process. However, due to the prominence of those images in the media it is easy to

[5] Art. 218 TFEU sets out the default procedure for negotiating, signing and concluding agreements. The Commission negotiates on behalf of the EU, unless the envisaged agreement relates exclusively or principally to the Common Foreign and Security Policy.

[6] The number "46" stands for the Member States of the Council of Europe; "+1" stands for the European Union. The group was called the "47+1 Group" until Russia's exclusion from the Council of Europe, in March 2022, due to its military aggression against Ukraine. In this *Article*, I will, for the sake of simplicity, refer to it as the 46+1 Group, also for the period before March 2022.

[7] Vice-President Jourová (Values and Transparency) lead the work on the EU accession to the Convention.

overlook a simple fact. As one British journalist wrote in retrospect: "What is striking [...] is that Michel Barnier and his team spent more time talking to EU governments than to the UK".[8] Indeed, Michel Barnier spared no effort in involving everyone in the process and in building a symbiotic relationship between his task force, other parts of the Commission, the Council, the European Parliament and the Member States. This explains, in part, why the EU had such a united front in the Brexit talks. In the same vein, on one of my first trips to Strasbourg for the accession negotiations, the then EU ambassador to the Council of Europe, Milena Kuneva, herself a seasoned negotiator, gave me a valuable piece of advice. She told me: "You'll have to build good relationships with the non-EU states in the Council of Europe. You must invest in that. But never neglect our own Member States. When the negotiations get difficult, it's from them that you will draw your strength".

When the elaborate process of internal communication and coordination goes well – and especially when it bears fruit in the negotiations – it fosters unity and lifts the mood within the EU. It confirms the EU's self-understanding as a "Union". However, on the other side of the negotiating table, it often sparks a different sentiment. From the perspective of the Council of Europe in particular, a "Team EU" presents a difficulty. The self-understanding of the Council of Europe is much more that of a classic international organisation, in which each state acts on its own advice. With 27 EU Member States and 19 non-EU states, a unified EU front is likely to provoke a sense of unease. Even the mere sight of all EU-affiliated delegations working side by side can have this effect. I was reminded of that one morning in front of the Palais de l'Europe, the main building of the Council of Europe. Until well into the negotiations, travel restrictions were in place in several countries to contain the spread of COVID-19. Many delegates had no choice but to join the talks online. As a result, I had often entered the Palais alone or with just a few colleagues. After several negotiating sessions, the security guard at the main gate and I would recognise each other. He would greet me with a friendly smile and let me in – no questions asked. Then, one morning, after the travel restrictions had been lifted, I approached the Palais, but this time accompanied by every delegate from the EU Member States. We showed up together at the main gate. The guard was a bit flustered and started asking questions: Why exactly are you here? Who are these people you are with? Do you have an appointment? Of course, he eventually let us in. We might have been a large group, but we were not a security threat. Still, his initial hesitation entered my mind as a metaphor for how the EU and its Member States are sometimes perceived at the Council of Europe.

[8] Peter Foster in his foreword to: SD Rynck, *Inside the Deal: How the EU Got Brexit Done* (Agenda Publishing 2023) xiii.

III. Lessons from *Opinion 2/13*

It may seem strange to use the term "self-understanding" in connection with an organisation like the EU or the Council of Europe. However, I am going to take it a step further and apply it to the Court of Justice and to the European Court of Human Rights. Of course, a court is not an individual. Courts have a "composite rationality".[9] Judges may vary in their perspectives, motivations, or even in their understanding of the institution they serve. Yet, courts are also deliberately constructed social environments in which the emergence of a "corporate identity" is possible and indeed expected. The judges' robe is the visual manifestation of this phenomenon. It signals – to the wearer at least – that the judge is part of something bigger than herself, something with a "self" of its own. When I speak of the "self-understanding" of the Court of Justice or of the European Court of Human Rights, I refer to that corporate identity: an aggregate worldview and self-image, of which individual judges may or may not be fully aware, but which might help us better understand the overall case law, or a particular ruling, such as *Opinion 2/13*.[10]

When *Opinion 2/13* came out, the disappointment was immense, not least among legal scholars. Most academic commentary fiercely criticised the Opinion and, by extension, the Court of Justice. Quite a few articles written at the time employed not only the language of intellectual analysis but also that of disbelief and anger. The Opinion came as a shock, including for the Council of Europe. When the negotiations resumed – six years later – much of the disappointment was still present. It had lingered on, unaddressed. This meant that, when the 46+1 Group first gathered with a view to revising the accession instruments, it did so under the shadow of an implicit accusation: *Opinion 2/13* was misguided, maybe even irrational. This added another layer of complexity to the negotiating dynamics.[11]

For what it's worth: my own appraisal of *Opinion 2/13* differs markedly from the widespread criticism published in its wake. Perhaps that is because I once worked at the Court of Justice. Or perhaps it is a case of Stockholm syndrome – a negotiator becoming enamoured with the mandate by which he is bound. In any case, of the early academic writing on *Opinion 2/13*, one commentary always stood out to me as a critical but fair assessment: "It's the autonomy, stupid!" by Daniel Halberstam.[12] I would not go so far as to say that I agree with every detail in that article. However, its basic argument hit the nail right on the head: *Opinion 2/13* embodies a constitutional vision of the EU, which sits uneasily with the intergovernmental vision that underpins the Convention.

[9] M Poiares Maduro and L Azoulai, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) xiii.

[10] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[11] On "implicit accusations" in negotiations, see: C Voss and T Raz, *Never Split the Difference: Negotiating as if Your Life Depended on it* (Harper Collins 2016).

[12] D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) German Law Journal 105.

I would submit that the Opinion reflects a particular self-understanding of the Court of Justice, which has deep historical roots. At their origin, the Convention and the EU are both manifestations of the same political and moral enterprise: to make sure that Europe would not repeat the horrors that had taken place on its soil during the twentieth century.[13] However, they pursue that goal with different techniques.[14] The Convention technique is to set minimum standards for the protection of human rights with which the contracting states must comply, and the primary task of the European Court of Human Rights is to supervise them based on individual petitions.[15] By contrast, the Union technique is to integrate political communities into an "ever closer union",[16] and the primary task of the Court of Justice is, together with national courts, to weave the legal fabric that holds the overarching community together.[17] The Convention technique (of overseeing political communities) and the Union technique (of integrating them) are, generally speaking, complementary, as the long track record of constructive interaction between the two legal systems shows.[18] In certain respects, however, they stand in tension with each other. The main areas of tension are well known to anyone who has read *Opinion 2/13*: mutual trust, advisory opinions, inter-party applications between EU Member States, human rights protection in the Common Foreign and Security Policy, and the attribution of responsibility between the EU and its Member States for the purpose of applying the Convention. *Opinion 2/13* presses on these trigger points and insists that they be addressed. Not because they are *caused* by accession, but because accession of the

[13] M Segers, *The Origins of European Integration: The Pre-History of Today's European Union 1937–1951* (Cambridge University Press 2024).

[14] Early attempts to combine the two techniques faltered in 1953 with the rejection, by the French National Assembly, of the European Defence Community, and, by implication, of the European Political Community (the draft Statute for the European Political Community incorporated, by cross-reference, the rights and freedoms guaranteed under the Convention).

[15] For a more detailed and nuanced account: E Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010).

[16] See art. 1(2) TEU (cited in *Opinion 2/13* para. 167).

[17] E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) AJIL 1.

[18] That complementarity might also explain why, after Opinion 2/13, the European Court of Human Rights essentially continued "business as usual": see R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' (2024) European Papers 647 www.europeanpapers.eu. On the relationship between EU law and the Convention in general, see *e.g.*: J Wouters and M Ovádek, *The European Union and Human Rights* (Oxford University Press 2021); K Lenaerts, P Van Nuffel and T Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 659; M Claes, 'Fundamental Rights' in P Kuijper, F Amtenbrink, D Curtin and others (eds), *The Law of the European Union* (Wolters Kluwer 2018, 5th edn) 95; S O'Leary, 'A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg' (2018) CYELS 3; and F Ronkes Agerbeek, 'The Tale of Two Cities Continues: the Convention and the Expanding Scope of EU Law' (14 June 2024) www.echr.coe.int.

EU to the Convention might otherwise cement the existing situation while at the same time binding the EU inextricably into the Convention system.[19]

Consider, for instance, the much-debated topic of mutual trust in the Area of Freedom, Security and Justice (AFSJ). Throughout the AFSJ, fundamental rights issues are very salient. Fundamental rights considerations can form part of the rationale for *requiring* mutual trust.[20] However, fundamental rights considerations can also prompt difficult questions about the *limits* of mutual trust. Both the Court of Justice and the European Court of Human Rights have had to grapple with such questions.[21] Several academic studies chronicle the evolving case law of both courts on these matters and examine the influence that each court appears to be having on the other.[22] That process of evolution and interaction is complex, nuanced and does not follow a straight line.[23] Part of the reason for this is that the two courts approach the problem from a different frame of reference, which primes them to reach contradictory results, at least in theory. When the Convention's intergovernmental frame of reference is taken to its extreme, the result is "no trust", because there can be no horizontal division of legal responsibility between two states and no transfer of responsibility to an overarching political entity: each state must be held directly and severally accountable under the Convention, including for having

[19] The issue of "causation" is, in my view, the main analytical difference between the View of AG Kokott and the Opinion of the Court of Justice.

[20] For instance: rules on the recognition of judgments in civil and commercial matters aim to enhance the judicial protection of rights; rules requiring the execution of a judgment ordering the return of a child aim to deter child abductions; and rules requiring the execution of a European arrest warrant aim to ensure that open borders and free movement in the EU do not result in impunity.

[21] As regards the ECtHR, see for example: ECtHR *Avotiņš v Latvia* App n. 17502/07 [23 May 2016] (on the recognition and enforcement of judgments in civil and commercial matters); ECtHR *Povse v Austria* App n. 3890/11 [18 June 2013] (on child abduction); ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] and ECtHR *Tarakhel v Switzerland* App n. 29217/12 [4 November 2014] (on asylum); and ECtHR *Bivolaru and Moldovan v France* App n. 40324/16 and 12623/17 [March 2021] (on European arrest warrants). As regards the ECJ, see for example: case C-7/98 *Krombach* ECLI:EU:C:2000:164 (on the recognition of judgments in civil and commercial matters); case C-491/10 *PPU Zarraga* ECLI:EU:C:2010:828 (on child abduction); case C-163/17 *Jawo* ECLI:EU:C:2019:218 (on asylum); case C-261/22 *G.N.* ECLI:EU:C:2023:1017 and joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 (on European arrest warrants).

[22] *E.g.* C Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne: un principe essentiel à l'épreuve d'une crise des valeurs* (Bruylant 2020); C Ladenburger, 'The Principle of Mutual Trust between Member States in the Area of Freedom, Security and Justice' (2020) Zeitschrift für europarechtliche Studien 373; C Timmermans, 'How Trustworthy is Mutual Trust? Opinion 2/13 Revisited' in K Lenaerts, J Bonichot, H Kanninen and others (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart 2019) 21; K Lenaerts, 'La vie après l'avis: Exploring the Principle of Mutual (yet not Blind) Trust' (2017) CMLRev 805; N Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) European Papers www.europeanpapers.eu 93; and S Prechal, 'Mutual Trust before the Court of Justice of the European Union' (2016) European Papers www.europeanpapers.eu 75. See also R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' cit.

[23] C Ladenburger, 'The Principle of Mutual Trust between Member States in the Area of Freedom, Security and Justice' (2020) Zeitschrift für europarechtliche Studien 373–408 and 390–391.

placed trust in the other. When the Union's constitutional frame of reference is taken to its extreme, the result is "blind trust", because the requesting state and the cooperating state are components of a larger political entity that assumes responsibility under the Convention — analogous to the Länder of the Federal Republic of Germany or the cantons of the Swiss Confederation. In practice, neither court takes its own frame of reference to such an extreme. The European Court of Human Rights acknowledges that EU Member States must give "full effect" to mutual recognition mechanisms established by EU law and, when they do, reviews the compatibility of their actions with the Convention under the rubric of a "manifest deficiency" test.[24] The Court of Justice accepts that mutual trust between EU Member States has its limits[25] and that there are circumstances in which fundamental rights concerns preclude the authorities of a Member State from cooperating with the authorities of another Member State.[26] Differences in emphasis remain, but on the whole, the case law of the two courts reflects a careful, ongoing search for a middle ground in which each court tries to take the other's concerns into account.[27]

Prior to *Opinion 2/13*, however, the question of how the case law of the two courts on mutual trust would develop was very much up in the air. The pivotal judgments of that period were the ruling of the European Court of Human Rights in *M.S.S. v Belgium and Greece* (January 2011)[28] and that of the Court of Justice in *N.S. v Secretary of State for the Home Department* (December 2011).[29] Both cases concerned the sending of asylum seekers back to the country where they had made their first application for asylum: Greece. In *M.S.S. v Belgium and Greece*, the European Court of Human Rights found that, at the material time, the asylum process and conditions in Greece suffered from systemic deficiencies. Nevertheless, in its reasoning, the Court emphasised, first and foremost, the

[24] See *Avotiņš v Latvia* cit.; and *Bivolaru and Moldovan v France* cit. Moreover, it has held that there may be circumstances in which the Convention requires the authorities of a Member State to cooperate with the authorities of another Member State: ECtHR *Romeo Castaño v Belgium* App n. 8351/17 [9 July 2019].

[25] *E.g*. *Jawo* cit. and *Aranyosi and Căldăraru* cit.

[26] *E.g*. case C-699/21 *E.D.L.* ECLI:EU:C:2023:295; case C-578/16 PPU *C.K. and Others v Slovenia* ECLI:EU:C:2017:127; case C-633/22 *Real Madrid* ECLI:EU:C:2024:843.

[27] A development that raises the stakes for both courts – but also serves as a powerful reminder of the common political and moral enterprise to which they owe their existence – is the worrying phenomenon of "rule of law backsliding" in Europe. This issue was not yet at the forefront when the 2010–2013 accession negotiations took place. It places a strain on the EU legal order and on the AFSJ. The question of how to deal with European arrest warrants issued by Polish courts against a backdrop of "systemic deficiencies" in the Polish system of justice has given rise to several carefully calibrated preliminary rulings from the Court of Justice: *e.g*. case C-216/18 PPU *LM* ECLI:EU:C:2018:586; joined cases C-562/21 PPU and C-563/21 PPU *X and Y* ECLI:EU:C:2022:100; and joined cases C-354/20 PPU and C-412/20 PPU *LP* ECLI:EU:C:2020:1033. For an excellent overview and analysis: C Ladenburger, Y Marinova and J Tomkin, 'Institutional Report' of the 'Mutual Trust, Mutual Recognition and the Rule of Law', Proceedings of the XXX FIDE Congress' (2023) www.researchgate.net sections 4.1 and 4.2.

[28] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011].

[29] Joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:865. See also the judgment of 10 December 2013 in case C-394/12 *Abdullahi v Bundesasylamt* ECLI:EU:C:2013:813, opinion of AG Cruz Villalón.

need for "independent and rigorous scrutiny [by the sending state] of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to art. 3 [ECHR]".[30] In *N.S. v Secretary of State for the Home Department*, the Court of Justice was asked, essentially, whether a sending state could place blind trust in the EU Member State of destination. The Court answered: "No". In fact, it concluded that, in the circumstances under consideration, EU law precluded the transfer of asylum seekers to Greece.[31] However, in this connection, the Court of Justice relied entirely on the systemic deficiencies which the European Court of Human Rights had identified in its judgment in *M.S.S. v Belgium and Greece*.[32] Moreover, the Court of Justice seized the occasion to emphasise that the relevant EU asylum legislation was built on a presumption that the treatment of asylum seekers in all Member States would observe fundamental rights.[33] According to the Court, it would be incompatible with that legislation if "any infringement" would prevent the transfer of an asylum seeker to another EU Member State.[34] The Court added: "At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice".[35] Looking back, it is apparent that, although they had reached the same outcome, the two courts were giving off conflicting signals and that, for the Court of Justice, the concern at stake was existential. Yet, few had it on their radar at the time.[36] At any rate, the 2013 accession instruments made no reference to the principle of mutual trust. Accordingly, in *Opinion 2/13*, the Court of Justice forcefully repeated its concern and acted on it. I would summarise the message that emerges from the Opinion (and the task that the Court of Justice assigned to the negotiators) as follows: *The principle of mutual trust is a foundational principle of the relationship between the Member States of the EU: it follows from the raison d'être of the EU that EU law should be able to require its Member States to cooperate fully with each other. The accession instruments must preserve this feature of EU*

[30] *M.S.S. v Belgium and Greece* cit. para. 293. See also *Tarakhel v Switzerland* and *Sharifi and Others v Italy and Greece* App n. 16643709 [21 October 2014].

[31] Joined cases C-411/10 and C-439/10 *N.S. and Others* ECLI:EU:C:2011:865 para. 94.

[32] *Ibid*. para. 89.

[33] *Ibid*. para. 80.

[34] The Court of Justice again relied exclusively on the "systemic deficiency" criterion in case C-394/12 *Adbullahi* ECLI:EU:C:2013:813 para. 62, but later nuanced its position in *PPU C.K. and Others v Slovenia* cit. paras 71–75, 92–95 and in *Jawo* cit. para. 95. See also, in the context of European arrest warrants, *Aranyosi and Căldăraru* cit. para. 89. For insightful discussions of this case law: K Lenaerts, 'La vie après l'avis' cit. 805–840, and D Halberstam, 'The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade' (9 June 2016) Verfassungsblog verfassungsblog.de.

[35] *N.S. and Others* cit. para. 83.

[36] Asylum law experts had of course noticed that the two European courts were walking out of step: *e.g.* S Peers, 'Tarakhel v Switzerland: Another Nail in the Coffin of the Dublin System?' (5 November 2014) EU Law Analysis eulawanalysis.blogspot.com. However, only a few observers expressly recognised the problem as a possible obstacle to EU accession to the Convention: *e.g.* D Ritleng, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms: A Threat to the Specific Characteristics of the European Union and Union Law?' (Uppsala Faculty of Law Working Paper 1-2012) www.jur.uu.se.

law. In particular, the EU cannot accede to the Convention, insofar as the Convention could oblige one Member State to carry out an independent and rigorous scrutiny of any claim that another Member State, with whom EU law requires it to cooperate, infringes the Convention. The Court of Justice's concerns about mutual trust exemplify the Court's self-understanding as a constitutional court, which – like any constitutional court – must do more than protect fundamental rights; it must keep a political community together. In fact, that self-understanding permeates the entire Opinion.[37]

The Court expresses its constitutional vision in terms of the "autonomy" of the EU legal order. Autonomy, in the sense in which it is used in the Court's case law, is about creating and protecting a space in which the EU can flourish. As a legal concept, it answers a need that is very specific to the project of European integration. As Michel Gaudet[38] vividly put it in the early 1960s:

> "The peculiar legal system of the Community [the precursor of the EU] is rather unusual. [...] Scholars have been discussing warmly its legal nature [...]. Considered from the realistic point of view that law is made of experience and not of theory, these academic disputes are not so important after all. When a young child grows, the whole family discusses whether it is the very image of his father or the living portrait of his dear mother. And each one is probably right because the child does walk like his father but does smile like his mother; and each one is probably wrong because who can tell what the grown-up is going to be like? But the child does not care because he knows that his job is not to be alike but to live. The job of the European Community is to live, and the Community is doing it". [39]

In other words, the EU legal order is "a new legal order" that owes its existence to, but is distinct from, the international legal order and the legal orders of the Member States.[40] This two-sided assertion of autonomy (*vis-à-vis* the international legal order and *vis-à-vis* the legal orders of the Member States) is a precondition for the project of European integration and runs like a deep current through the case law.[41] In essence, "the autonomy of the EU legal order is part of the very DNA of that legal order, allowing the

[37] J Baquero Cruz, *What's Left of the Law of Integration: Decay and Resistance in European Union Law* (Oxford University Press 2018) 155–166.

[38] Michel Gaudet was recruited by Jean Monnet to become the first head of what is now the Legal Service of the Commission. See J Bailleux, *Penser l'Europe par le Droit: l'invention de droit Communautaire en France* (Dalloz 2014) 226–329 and J Bailleux, 'Michel Gaudet, A Law Entrepreneur: The Role of the Legal Service of the European Executive in the Invention of EC law and the Birth of the Common Market Law Review' (2007) CMLRev 359.

[39] M Gaudet, 'Address on the Legal Systems of the European Community' (13 February 1960) aei.pitt.edu.

[40] Case C-26/62 *Van Gend & Loos* ECLI:EU:C:1963:1; case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66; joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* ECLI:EU:C:2008:461.

[41] D Kukovec, 'The Court of Justice of the European Union for Hedgehogs' (Jean Monnet Working Paper 1-2021) jeanmonnetprogram.org.

EU to find its own constitutional space whilst interacting in a cooperative way with its Member States and the wider world".[42]

Carving out the EU legal order's "own constitutional space" is the Court of Justice's crowning achievement. However, it has always been – and continues to be – a delicate exercise that ultimately relies on the acceptance of the supremacy of EU rules over national constitutional rules. As a result, EU law has "a kind of contested or negotiated normative authority".[43] The authority of EU law sometimes faces political contestation[44] and has on occasion been challenged by powerful national courts.[45] The new legal order, created to overcome Europe's deep and perpetual divisions and in constant evolution ever since, has a "precarious mode of being".[46] It may now be a sprightly septuagenarian, but it remains "a delicately balanced structure that does its best to take all of the difficult and often opposing considerations into account", with the Court of Justice standing "fragile and alone at the center of the European maelstrom".[47]

While it is tempting to portray *Opinion 2/13* as indicative of the Court of Justice's attitude towards the European Court of Human Rights, it would be more accurate to say that the Opinion reflects the Court of Justice's keen awareness of the overall network in which it operates. The European Court of Human Rights figures prominently in that network, but larger in number, and more proximate to the Court of Justice, are the nodes of the network occupied by national courts, including national constitutional courts. National courts are the Court of Justice's direct interlocutors. The Court of Justice exercises authority over them and is also highly dependent on them. It is an intricate relationship, and fundamental rights adjudication often provides the context in which the strength of that relationship is put to the test.[48] Rights are interests that can be weighed by courts and

[42] K Lenaerts, J Gutiérrez-Fons and S Adams, 'Exploring the Autonomy of the European Union Legal Order' (2021) ZaöRV 49.

[43] M Poiares Maduro, 'Interpreting European Law – Judicial Adjudication in a Context of Constitutional Pluralism' (2007) European Journal of Legal Studies 137.

[44] Despite the unambiguous confirmation of the principle of primacy in Declaration 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. See also art. 20 of the Agreement on a Unified Patent Court.

[45] See *e.g.* D Sarmiento, 'An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course)' (2 February 2017) Verfassungsblog verfassungsblog.de.

[46] J Baquero Cruz, *What's Left of the Law of Integration* cit.

[47] M Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004) 359–360.

[48] This goes far back: see *e.g.* the preliminary reference in case C-29/69 *Stauder v Ulm* ECLI:EU:C:1969:57, in which the referring court stated that, if the European Court of Justice would not assume the responsibility for the protection of human rights that had previously been guaranteed by the national courts, those national courts would, "in spite of the disruption of such a result, feel compelled to reserve for themselves the ultimate power of examining the constitutionality of Community acts [...] according to the fundamental rights laid down in the [national] constitution." In its ruling, the Court of Justice famously held, for the first time, that "fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court". See *e.g.* M Poiares Maduro, 'Contrapunctual Law: Europe's

fundamental rights are a society's most "emphatically stated interests".[49] How a political community balances competing social goods in a case involving fundamental rights says something important about that community's collective identity.[50] The basic claim of the Court of Justice is that, in the field of EU law, a choice will have to be struck which derives from the values and characteristics that define the EU:

> "The Court is calling on its national counterparts to accept that it, the [Court of Justice], will do and has to do within the [EU] legal order what they, national courts, do, have to do, within the national realms. It is not about high or low standards. It is a call to acknowledge the [EU] as a polity with its own separate identity and constitutional sensibilities which has to define its own fundamental balances – its own core values even if these cannot be dissociated entirely from the context in which the [EU] is situated. The [EU] is its Member States and their citizens. The [EU] is, too, an autonomous identity".[51]

Thus, in *Opinion 2/13*, the Court of Justice is essentially asking the European Court of Human Rights to recognise what it is continually asking national courts to accept: that in the field of EU law, fundamental rights adjudication requires an EU-wide view of the relevant polity and of the competing social goods. Seen from that perspective, the Opinion's central message is as much directed to national highest courts as it is to the European Court of Human Rights.[52] In fact, *Opinion 2/13* is preoccupied, most of all, with what might happen if national constitutional courts and the European Court of Human Rights were to mutually reinforce each other's state-centric default approach to human rights adjudication.[53]

Constitutional Pluralism in Action' in N Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) 501; M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) 504; A Slaugher, AS Sweet and J Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998); B De Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in P Craig and GD Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 187.

[49] M Shapiro, 'The Success of Judicial Review and Democracy' in M Shapiro and AS Sweet (eds), *On Law, Politics and Judicialization* (Oxford University Press 2002) 149, 178.

[50] J Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999) 106.

[51] *Ibid*. 117. The original text refers to the "Community" instead of the "EU".

[52] See, to that effect, M Claes, 'Accession or no Accession? A National Perspective' in Š Imamović, M Claes and B De Witte, *The EU Fundamental Rights Landscape After Opinion 2/13* (Maastricht Faculty of Law Working Paper 2016) 75, 85, arguing that the Court of Justice's concerns show (excessive) "distrust" of national courts.

[53] Again, the issue of "mutual trust" provides a good example. At first sight, this issue presents itself as a problem of consistency between the case law of the two European Courts. However, given that national courts must respect the Convention, that problem is inseparable from the more general concern about what would happen to the EU's ability to balance competing social goods on an EU-wide scale if national courts were to adjudicate fundamental rights claims using a state-centric frame of reference. The emblematic case is case C-399/11 *Melloni* ECLI:EU:C:2013:107. See also: J Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony' (Jean Monnet Working Paper 10-2005) jeanmonnetprogram.org.

Troubled by the outcome of *Opinion 2/13*, certain commentators proclaimed that the Court of Justice fails to take human rights seriously.[54] But that is clearly an exaggeration. The Court of Justice regularly weighs fundamental rights arguments in the specific framework of the EU legal order.[55] It also takes care to respect the Convention[56] and to harmonise its case law with that of the European Court of Human Rights,[57] as art. 52(3) of the EU Charter of Fundamental Rights requires.[58] Now and again the Court of Justice's rulings prompt criticism and heated debate, as might be expected when fundamental rights are at stake.[59] The Court of Justice seems to take that form of feedback seriously too.[60] Of course, EU accession to the Convention would provide an *additional* layer of fundamental rights protection, with the European Court of Human Rights taking on the role of "fair and impartial spectator".[61] Accession to the Convention is not, however, a precondition for a genuine commitment on the part of the Court of Justice to protect fundamental rights in the EU legal order. Quite the contrary, the imperative to take human rights seriously fits the Court of Justice's self-understanding as a constitutional court.

It has also been suggested that the Court of Justice merely invoked "autonomy" as a pretext to resist supervision by the European Court of Human Rights.[62] I would simply point out that that allegation rests on three unproven assumptions: *i)* that many of the

[54] *E.g.* E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 56.

[55] A Rosas, 'The Court of Justice of the European Union: A Human Rights Institution?' (2022) Journal of Human Rights Practice 204.

[56] See *e.g.* case C-336/19 *Centraal Israëlitische Consistorie van België and Others v Vlaamse Regering* ECLI:EU:C:2020:1031, and the Judgment of 13 February 2024 of the European Court of Human Rights in Executief van de ECtHR *Moslims van België and Others v Belgium* App n. 16760/22 [4 July 2022].

[57] The Court of Justice follows and, where necessary, adapts its case law to that of the European Court of Human Rights: see *e.g.* J Callewaert, 'The Recent Luxembourg Case-Law on Procedural Rights in Criminal Proceedings: Towards Greater Convergence with Strasbourg' (2023) EU Law Live eulawlive.com.

[58] It has been rightly pointed out that the Court of Justice missed an opportunity to soften the impact of *Opinion 2/13* by failing to include art. 52(3) of the Charter in its reasoning: S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Bloomsbury 2020) 45. See also B Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy – Opinion 2/13, The Protection of Fundamental Rights and the Autonomy of EU law' (2015) CYELS 175.

[59] *E.g.* JD Coninck, 'Shielding Frontex 2.0' (30 January 2024) Verfassungsblog verfassungsblog.de.

[60] As evidenced by, for example, (subtle) shifts in the case law, extra-judicial writings of members of the Court, and, in particular, Opinions of Advocates General, which, unlike the judgments, often cite academic literature. Of course, the most important "feedback loop" for the Court of Justice is the preliminary reference procedure: see D Sarmiento, 'The "Overruling Technique" at the Court of Justice of the European Union' (2023) European Journal of Legal Studies 109.

[61] The term is borrowed from A Smith, *The Theory of Moral Sentiments* (1759). On the importance, in the context of justice, of Smith's device of the "impartial spectator": A Sen, *The Idea of Justice* (Allen Lane 2009).

[62] *E.g.* B De Witte and S Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) ELJ 704.

judges of the Court of Justice were opposed to EU accession to the Convention; *ii)* that those judges were prepared to put their personal preferences above art. 6(2) TEU; and *iii)* that, in reality, the judges were not so worried about the problems mentioned in *Opinion 2/13*. This reminds me of a tendency I often notice in negotiations: when we do not like and understand the position of the other party, often our first inclination is to assume that they have a hidden agenda. The reality is usually more benign and boring: the other party is sincere, but we fail to appreciate what the world looks like from their point of view. Likewise, the surest explanation for *Opinion 2/13* is also the least spectacular, namely that the Court of Justice simply meant what it said. Admittedly, *Opinion 2/13* is "risk-averse" and hammers the message home rather undiplomatically.[63] In that respect, the Opinion conveys a degree of anxiety on the part of the Court. However, it seems to me that the primary source of that anxiety is not the prospect of oversight by the European Court of Human Rights but the Court of Justice's profound attachment to the EU's own constitutional space as a precondition for "the process of integration that is the raison d'être of the EU itself".[64]

Opinion 2/13 translates into a to-do list of 11 items.[65] That list, in turn, revolves around three basic ideas:

a) First, insofar as the European Court of Human Rights becomes the *ultimate* arbiter of whether an act that emanates from EU law complies with the Convention, it must be ensured that the Court of Justice, as the apex court in the EU legal system, is the *penultimate* arbiter of whether that act complies with fundamental rights (Idea no. 1).

b) Second, within the scope of EU law, Member States have a special, federal-type relationship between them, which must be acknowledged and preserved within the context of the Convention system, since this is the raison d'être of the EU (Idea no. 2).

c) Finally, only EU law itself (i.e. with the Court of Justice as the ultimate arbiter) can delineate, in a manner that binds the EU and its Member States, the scope of EU law and thus, by implication, the division of powers between the EU and its Member States (Idea no. 3).

[63] A Łazowski and R Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) German Law Journal 211.

[64] Opinion 2/13 cit. para. 172. See also D Ritleng, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' cit. at 17 ("The shift in Union law, which the accession is likely to bring about, is liable to alter the EU legal order much more deeply than the accession of a state would normally affect its national legal order. [...] [W]hat is at stake here is the political and economic integration project of the Union as laid down in its constitutional charter.").

[65] *i)* Art. 53(186)-(189) ECHR; *ii)* mutual trust (paras 191–195); *iii)* advisory opinions under Protocol no. 16(196)–(200) ECHR; *iv)* inter-party applications under art. 33(201)-(213) ECHR; *v)* the co-respondent mechanism & division of competences (paras 220–225); *vi)* reservations under art. 57(226)-(228) ECHR; *vii)* joint responsibility (paras 229–234); *viii)* initiating the prior involvement procedure (paras 236–240); *ix)* systematic information for the purposes of the prior involvement procedure (para. 241); *x)* the prior involvement procedure & secondary law (paras 241–244); and *xi)* acts in the area of the Common Foreign and Security Policy (paras 249–257).

Each of these ideas is perfectly logical when seen through a constitutional lens. They express a valid and profound concern for the preservation of the project of European integration, whose unique feature is precisely that, unlike the Convention, it challenges the traditional notion of the nation state as the ultimate political unit. Fundamentally, the EU and the Convention are two systems stemming from a shared moral and political endeavour, each approaching that endeavour from its own perspective. The EU legal system integrates political communities; the Convention system oversees political communities. Reconciling these two perspectives was the main challenge of the negotiations.

IV. State of Play

On 17 March 2023, the 46+1 Group reached a provisional agreement on a revised package of accession instruments that seeks to address all issues arising under *Opinion 2/13*, except the issue of human rights protection in the Common Foreign and Security Policy (CFSP). By way of guidepost, I will briefly outline the main changes the Group made to the draft accession instruments.[66]

A first set of amendments relates to the "co-respondent mechanism".[67] This is the procedural device that makes it possible for the EU to be held accountable alongside its Member States in situations where an EU Member State implements EU law.[68] At present, when a Member State implements EU law, the European Court of Human Rights can, if it finds a violation, only rule against that Member State. The EU is treated as a third party and will not be held liable if the Court finds a violation of the Convention. As a result, a Member State might get caught between its obligations under EU law and those under the Convention. This would be problematic for everyone involved. After accession, the co-respondent mechanism will enable the EU to participate systematically in the proceedings in situations where an EU Member State implements EU law. If the European Court of Human Rights then finds a violation, the EU will be held liable under the Convention together with the respondent Member State and must help remedy the situation. The co-respondent mechanism already featured in the draft accession agreement of 2013. However, some alterations were needed in the light of *Opinion 2/13*, mainly to avoid that the European Court of Human Rights would have to take a binding decision about who is

[66] For a more detailed overview, see T Meinich, 'From Opinion 2/13 to the 2023 Draft Accession Agreement' (2024) European Papers 685 www.europeanpapers.eu. A compare-version of the accession instruments is available at *Final consolidated version of the draft accession instruments* rm.coe.int.

[67] Art. 3(2), (3), (5), (6) and (7) of the revised Agreement and paras 60–67, 68 and 71 of the Explanatory Report.

[68] And for the Member States to be held accountable alongside the EU in the event the European Court of Human Rights were to rule that a provision in EU primary law (notably the EU Treaties) is incompatible with the Convention. For a detailed explanation of the rationale of the co-respondent mechanism (and the prior involvement procedure), see H Krämer, 'Änderungen im Grundrechtsschutz durch den Beitritt der Europäischen Union zur EMRK' (2014) Zeitschrift für öffentliches Recht 235.

accountable for a violation of the Convention based on its own views about the division of powers between the EU and its Member States. Accordingly, the revised accession instruments place the responsibility for triggering the EU's co-respondent status clearly in the hands of the EU.[69] Furthermore, if the Court finds a violation, the Member State and the EU will always be jointly liable.[70] This set of amendments corresponds to Idea no. 3 mentioned above.

A second, smaller set of amendments relates to the "prior involvement procedure". This is a procedural device according to which, in cases that are about the compatibility of EU law with the Convention, the European Court of Human Rights can temporarily suspend the proceedings to make sure that the Court of Justice is ceased of the matter first. The prior involvement procedure aims to ensure that, in matters of EU law, the Court of Justice has spoken before the European Court of Human Rights fulfils its role under art. 34 ECHR, in full respect of the Convention principle of subsidiarity. Again, this mechanism already featured in the Draft Accession Agreement of 2013. A few refinements had to be introduced, however, to help ensure that no eligible cases would slip through the net.[71] This set of amendments corresponds to Idea no. 1.

A third set of amendments relates to cases brought by one High Contracting Party to the Convention against another pursuant to art. 33 ECHR ("inter-party applications"). Under EU law, when EU Member States have disputes with each other about the interpretation or application of EU law, or when there is a dispute between a Member State and an EU institution, the dispute must be settled within the EU, before the Court of Justice, using the procedures for settling disputes that exist under the EU Treaties.[72] According to *Opinion 2/13*, the accession agreement ought to have reflected this feature of the EU legal order by stipulating that art. 33 ECHR cannot be used for disputes between EU Member States, or between EU Member States and the EU, concerning the application of the Convention within the scope *ratione materiae* of EU law. The revised accession agreement contains additional provisions to that effect.[73] This set of amendments corresponds to Ideas no. 2 and no. 3.

A fourth, fifth and sixth set of amendments each introduce new provisions to deal with matters that came to light in *Opinion 2/13* and which the Draft Accession Agreement of 2013 did not address. The first of these new provisions relates to the matter of mutual trust, which I already discussed above. It stipulates that the accession shall not affect the application of the principle of mutual trust within the EU.[74] This amendment corresponds to Idea no. 2. The second is about art. 53 ECHR. Art. 53 ECHR essentially says that the

[69] Art. 3(5) and (6) of the revised Agreement and paras 60–67 of the Explanatory Report.
[70] Art. 3(7) of the revised Agreement and para. 71 of the Explanatory Report.
[71] Art. 3(2) and (3) of the revised Agreement and paras 68, 75–78 of the Explanatory Report.
[72] Art. 344 TFEU. See case C-459/03 *Commission v Ireland (MOX plant)* ECLI:EU:C:2006:345.
[73] Art. 4(3) and (4) of the revised Agreement and paras 80–85 of the Explanatory Report.
[74] Art. 6 of the revised Agreement and paras 87–88 of the Explanatory Report.

Convention sets a minimum level of protection of human rights and that a High Contracting Party is free to establish a higher level of protection. The new provision safeguards, in effect, the possibility for EU law to set a *uniform* standard of protection that is binding on EU Member States, provided that that standard does not fall short of the minimum level of protection guaranteed by the Convention.[75] This amendment also corresponds to Idea no. 2. Lastly, there is a new provision about the relationship between the mechanism established by Protocol no. 16 to the Convention and the preliminary ruling procedure provided for in art. 267 TFEU. Protocol no. 16 contains a procedure that allows the European Court of Human Rights to give advisory opinions to national courts on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto".[76] Only a "highest court or tribunal" of a High Contracting Party that has ratified Protocol no. 16 may refer requests to the European Court of Human Rights for an advisory opinion. However, when a question relates to EU law, the highest courts and tribunals of EU Member States are typically under an obligation to request a preliminary ruling from the Court of Justice, in accordance with art. 267 TFEU.[77] Indeed, in matters of EU law, the Court of Justice is the apex court in the EU's domestic legal system. The new provision accordingly clarifies that, in matters of EU law, national courts of EU Member States are not a "highest court or tribunal" within the meaning of Protocol no. 16.[78] This amendment corresponds to Idea no. 1.

A seventh and final set of amendments is unrelated to *Opinion 2/13*. It concerns voting in the Committee of Ministers of the Council of Europe. When the European Court of Human Rights rules that a High Contracting Party has violated the Convention, that Party must remedy the violation under the supervision of the Committee of Ministers. The Committee of Ministers exercises certain powers in that connection, for example the power to adopt requests for information, interim resolutions (where implementation of the Court's ruling is still insufficient), or final resolutions (finding that the breach has been remedied and closing the supervision). When such decisions are adopted by a vote, all High Contracting Parties, including the party concerned, have a right to vote. After accession, the Committee of Ministers will also supervise the implementation by the EU of a judgment of the European Court of Human Rights if the Court has found the EU to be in breach of the Convention. In those situations, the EU and its Member States will be obliged under the EU Treaties to vote in unison. The problem is that, under the Committee of Minister's normal voting rules, the EU and its Member States together hold enough

[75] Art. 1(9) of the revised Agreement and para. 38 of the Explanatory Report.

[76] Art. 1(1) of Protocol no. 16 to the Convention.

[77] See case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799 and case C-314/85 *Foto-Frost* ECLI:EU:C:1987:452.

[78] Art. 5 of the revised Agreement and para. 86 of the Explanatory Report. The 46+1 Group also amended art. 1(2) of the Draft Accession Agreement in order to permit the EU to accede to Protocol no. 16 if it would want to.

votes to adopt almost any decision, regardless of how the other High Contracting Parties would vote. The draft accession instruments of 2013 acknowledged this problem and introduced special voting arrangements to address it. However, during the 2020–2023 negotiations, non-EU Member States pointed to inadequacies in these voting arrangements. Those arrangements were therefore further adjusted to ensure that the EU and its Member States cannot, by voting in unison, determine how the Committee of Ministers decides in cases regarding the EU.[79]

One important and difficult matter remains: human rights protection in the CFSP. With respect to acts in the CFSP, the EU Treaties establish a limitation on Court of Justice's powers of judicial review.[80] The precise scope of this limitation has been a matter of ongoing debate and litigation. The Court of Justice plainly has jurisdiction to rule on actions for annulment and damages claims regarding individual "restrictive measures" (sanctions) imposed by the EU. But, until recently, it was unclear, for instance, to what extent the Court of Justice has jurisdiction to hear actions against measures adopted by the EU in the context of civil or military missions abroad that are under EU command.[81] This raised concerns at the time of Opinion 2/13, as the Court of Justice opposes a scenario where the European Court of Human Rights could rule on EU acts beyond the Court of Justice's own jurisdiction. At issue here is one of the basic tenets of *Opinion 2/13*: insofar as the European Court of Human Rights becomes the ultimate arbiter of whether an EU act complies with the Convention, it must be ensured that the Court of Justice is the penultimate arbiter of whether that act complies with fundamental rights (Idea no. 1). This issue does not lend itself very well to resolution by the 46+1 Group given that it would be undesirable to narrow the jurisdiction of the European Court of Human Rights. Interestingly, subsequent case-law from both European Courts since *Opinion 2/13* may have removed the need to amend the accession agreement on this point. On 10 September 2024, in its *KS and KD* ("Eulex Kosovo") ruling, the Court of Justice clarified the scope of its jurisdiction over CFSP matters, concluding that it has jurisdiction over "acts and omissions not directly related to political or strategic choices" – a conclusion rooted in its case-law after *Opinion 2/13*.[82] The judgment reflects the "act of state" doctrine within the CFSP and aligns with recent rulings from the European Court of Human Rights on foreign policy measures.[83] The Court of Justice expressly affirmed that the EU's system of judicial protection in the CFSP complies with the Convention, acknowledging that, in defining which CFSP cases fall within its jurisdiction, it must ensure that access to justice in these matters

[79] Art. 8 of the revised Agreement, Rule 18 (Appendix 3), and paras 96–107 of the Explanatory Report.

[80] Art. 24(1) TEU and art. 275 TFEU.

[81] For a more in-depth discussion, see P Van Elsuwege, 'Judicial review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice' (2021) CMLRev 1731.

[82] Joined cases C-92/22 P and C-44/22 P *KS and KD* ECLI:EU:C:2024:725 para. 116.

[83] ECtHR *H.F. and others v France* App. n. 24384/19 and 44234/20 [14 September 2022]; ECtHR *Tamazount and others v France* App. n. 17131/19 [4 April 2024].

meets the Convention's standards.[84] Accordingly, the ruling suggests that no further revisions to the accession agreement are needed and appears to pave the way for accession based on the revised Agreement.[85] A full and definitive assessment of the compatibility of the revised accession instruments with the EU Treaties will, of course, require new Opinion proceedings under art. 218(11) TFEU.

V. Conclusion

Those who have read the negotiating documents carefully may have noted that, for almost every issue under negotiation, the 46+1 Group ultimately found a solution that was different from what the EU originally had in mind. One possible explanation for that might be that my colleagues and I did a terrible job. Not surprisingly, I prefer a different explanation. In my experience, the negotiations were truly an exercise in collective problem solving in which the combined wisdom of the Group prevailed over the ideas of any one party. Clearly, it is much too soon to declare "mission accomplished". Yet, the 2020–2023 negotiations were a necessary and, I hope, decisive step forward on the road towards EU accession to the Convention.

[84] *KS and KD* cit. paras 66-68, 70, 77-80.

[85] D Sarmiento and S Iglesias Sánchez, 'KS and Neves 77: Paving the Way to the EU's Accession to the ECHR' (2024) eulawlive.com eulawlive.com.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

EU ACCESSION TO THE ECHR: THE NON-EU MEMBER STATE PERSPECTIVE

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ABSTRACT: The present *Article* addresses the perspective from a negotiator of a multilateral treaty that has not yet been finalised. The first part sets the frame of the former negotiation exercise and the preparatory work on which it is based. A particular focus lies on the non-EU Member States group, its main features, and the negotiating principles it has endeavoured to follow. The second part addresses the substance of the revised draft agreement, drawing on the structure in four baskets proposed by the EU Commission. The final part contains a general, provisional appraisal of the negotiation exercise, bearing in mind that the final position of the 46+1 negotiating parties is outstanding.

KEYWORDS: EU accession to the ECHR – negotiations – *Opinion 2/13* – Non-EU Member States – Negotiating principles – Committee of Ministers.

I. RESUMING NEGOTIATIONS: COMMON BASIS AND NEW REQUESTS

Following the adoption of *Opinion 2/13* of the Court of Justice of the European Union (CJEU) on 18 December 2014,[1] a period of analysis and reflection has been considered necessary by both sides, *i.e*. the European Union (EU) and the Council of Europe (CoE).[2]

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[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[2] For a short historic overview of the negotiation process, see the *Article* of T Meinich, 'From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective' (2024) European Papers 685 www.europeanpapers.eu.

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On 31 October 2019 the EU Commission informed the Secretary General of the CoE of the willingness of the EU to resume negotiations. On 15 January 2020 the Committee of Ministers of the CoE decided to relaunch the adoption of the legal instruments establishing the accession modalities of the EU to the ECHR. This was reflected in a Joint Statement on behalf of the CoE and the European Commission, which was issued on 29 September 2020.[3] These developments led to the resumption of the negotiation process in the so-called "47+1" Group format. A first, informal meeting of the 47+1 Group took place in June 2020 and was followed by 13 subsequent formal negotiations, which ended with the 18th meeting of the 46+1 Group on 14–17 March 2023.[4]

From the outset it was generally accepted that the renegotiation process should not start from scratch – quite the contrary: the 2013 draft accession instrument was considered by all delegations, including those from the non-EU Member States (NEUMs), as a common basis and the main point of reference.[5] In this context, the importance of the principles on the accession negotiations as outlined in para. 7 of the explanatory report to the 2013 Draft Accession Agreement (DAA) was recalled.[6]

The accession instruments of 2013 indeed represent a carefully elaborated package, and it was considered important not to draft an entirely new agreement. The EU, for its part, recalled that the renegotiation of a limited number of provisions of the Accession Agreement was required and that it would limit its request for amendments to what is strictly necessary to address these objections.[7] The EU Commission's position paper of 5 March 2020 was therefore meant to remedy only these objections, in the interest of the rule of law and legal certainty.[8]

While this approach was not *per se* challenged by the NEUMs,[9] it became quickly apparent that at least some of the NEUMs did not want to limit the renegotiation exercise

[3] Council of Europe and European Commission, *The EU's Accession to the European Convention on Human Rights* (29 September 2020) www.coe.int.

[4] The meetings were not renumbered, but continued from the numbering of the first round of negotiation. The change from "47+1" to "46+1" reflects the fact that Russia stopped participating in the negotiations following their exclusion from the Council of Europe in March 2022.

[5] The ad hoc terms of reference adopted by the Ministers' Deputies in January 2020 explicitly mentions that the negotiation shall resume "[...] on the basis of the work already conducted" (see 46+1 ad hoc Group, 'Interim Report to the Committee of Ministers', including the revised draft accession instruments in appendix CDDH(2023)R_Extra Addendum of 4 April 2023 para. 4).

[6] Council of Europe, *Interim Report to the Committee of Ministers, for Information, on the Negotiations on the Ascension of the European Union to the European Convention on Human Rights* (29 September 2020) search.coe.int.

[7] 47+1 ad hoc Group, 'Meeting Report of the 8th Meeting, 47+1(2021)R8' (June 2020) para. 8.

[8] 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' (22 October 2020).

[9] The non-EU Member States took the view that "the current negotiations should consider the challenges identified by the CJEU in Opinion 2/13, but at the same time take due consideration of the overall balance reached in the 2013 Accession Instruments" (see item 3 of the Common Statement, Appendix III of the 6th Meeting report: 47+1 ad hoc Group, in 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit.).

to those issues that had been considered problematic by the CJEU. Some delegations underlined the importance that the negotiations would look at the accession instruments as a whole and not be limited to those areas which the EU has identified in its position paper.[10] More specifically, two delegations announced during the 6th meeting of the 47+1 Group their intention to raise other issues which were not contained in the Paper by the Chair to structure the discussion at the 6th negotiation meeting.[11] These issues concerned arts 6, 7 and 8 of the Draft Accession Agreement and its appendices.[12]

In addition to those material issues not addressed in *Opinion 2/13* which some NEUMs wanted to include in the negotiation process, another important request was raised: one delegation inquired about the possibility for an opinion of the ECtHR on the DAA.[13] This was considered possible once the revised DAA has been officially submitted for adoption to the Committee of Ministers.[14]

A final, organisational aspect worth mentioning is the designation of the Chair and Vice-Chair of the 47+1 Group. As was the case in the first negotiations, the common understanding was that these positions should be held by delegates from NEUMs, not least to ensure a proper balance in the exercise and sufficient leeway to lead the discussions. While Tonje Meinich (Norway) accepted to continue to act as the Chairperson,[15] the author of this contribution (Switzerland) was elected as Vice-Chair during the 6th meeting of the 47+1 Group.

Upon resumption of the negotiations, the NEUMs tried to organise themselves and find ways and means to coordinate their position. The way in which they did so will be analysed in further detail in section II below. These efforts immediately resulted in an informal meeting of the NEUMs held on the margins of the 6th meeting of the 47+1 Group. This meeting led to the adoption of a Common Statement of 1 October 2020 setting out *inter alia* Key Negotiating Principles of particular importance to the NEUMs.[16] The NEUMs expressed their expectation that the EU would submit concrete drafting proposals in order to advance the negotiation process.[17] Indeed, they felt it was up to the EU to take the initiative in this respect since they were all able support the result of the 2013 DAA.

[10] 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. para. 3.

[11] 47+1 ad hoc Group, 'Paper by the Chair to Structure the Discussion at the Sixth Meeting of the CDDH *ad hoc* Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights' 47+1(2020)2 (31 August 2020).

[12] *Ibid*. para. 41.

[13] Opinion 2/13 cit.

[14] *Ibid*. para. 43.

[15] See T Meinich, 'From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective' cit.

[16] *Ibid*. para. 46 and Appendix III.

[17] See item 4 of the Common Statement, Appendix III of 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit.

II. Non-EU Member States: an actor of its own or a loose aggregate of diverging interests?

II.1. Context, changes and ongoing developments

The overall context of the negotiation process is well known: as a full member of the 47+1 Group, the EU is represented by the European Commission, which is entitled to negotiate also on behalf of the EU Member States. The position of the EU and its Member States must of course be aligned. This is done during EU-internal, separate meetings in which NEUMs do not participate. In the course of the negotiation within the 47+1 Group, the EU Member States cannot take a position which would contradict that of the EU. They can only intervene in support of the EU. This particular configuration is not unique: it exists whenever the EU negotiates its accession to a Council of Europe treaty pertaining to a subject matter for which there is an EU competence.

The NEUMs form the "counterparty" of the negotiation process. It is important to stress, however, that although the NEUMs may be seen as a group, they do not constitute a formal or institutional association of any sort. Admittedly, they have important interests in common, in particular their commitment to the preservation of the proper functioning of the Convention system and their willingness to avoid weakening the position of the applicants in the Convention procedures. The NEUMs also pursue the same main objectives, *i.e.*, to ensure a coherent development of human rights between Luxembourg and Strasbourg and to enhance human rights protection in Europe, including through the possibility of holding the EU directly and legally responsible for acts or omissions of its institutions.

It took a few meetings to establish good personal relations between the negotiators of the various delegations and to strengthen the level of confidence. This was not an easy task due to the large size of 46+1 Group and the complications brought by the Covid-19 pandemic. All meetings in 2020 and 2021 were held with a majority of delegates participating online, and it was not until 2022 that most of the delegates attended the negotiations in person. This state of affairs also complicated the work of the NEUMs, which almost exclusively resorted to online informal meetings to try and coordinate their positions ahead of the meetings of the 46+1 Group.

A final element needs to be mentioned regarding the overall context of the negotiations. From the point of the NEUMs, it was of paramount importance to have some sort of feedback from the ECtHR on the proposed amendments to the 2013 DAA. This has to do with the strong interest of the NEUMs to preserve the integrity and proper functioning of the Convention system. In that sense, the regular participation of a highly competent representative of the registry of the Court in all meetings of the 47+1 Group was highly appreciated. Even though the position expressed by this representative could not formally engage the ECtHR itself, it was nevertheless invaluable to help the NEUMs have a proper understanding of the implications of the amendments proposed. The NEUMs

would have welcomed a similar participation from a high-level representative from the CJEU during the negotiation process. This was, however, not accepted by the EU side. Hence the position of the CJEU, which was expressed in particular in *Opinion 2/13*, was always presented by the EU Commission. From a NEUMs standpoint, it was at times difficult to appreciate whether some of the hesitations expressed by the EU Commission to accept certain solutions or amendments would have been shared by the CJEU itself. This was notably the case as regards positive developments that occurred after *Opinion 2/13*, such as the jurisprudential evolution on the principle of mutual trust which probably rendered the objection raised by the CJEU in *Opinion 2/13* much less relevant in 2023.

II.2. Nature, aim and working methods of the NEUMs Group

As mentioned above, the NEUMs have organised themselves as an informal group.[18] This was also the case during the first round of negotiation in 2010–2013. The re-establishment of this forum was therefore considered useful by all parties concerned. As an informal group, the NEUMs have no legal or statutory basis, no terms of reference and no rules of procedures. The author of the present *Article* agreed to act as the coordinator of the NEUMs, mainly to organise the meetings, lead the discussions and encourage at least some coordination without, however, acting with the prerogatives of a President. The NEUMs have always worked with a consensus-based approach, *i.e*. with no formal votes taking place. As a rule, an informal meeting of the NEUMs was organised before every meeting of the 46+1 Group with a view to preparing the latter. Additional, informal meetings of the NEUMs occasionally took place when needed. No meeting reports were drafted and, with the exception of the Common Statement mentioned below (see section II.3), no written document was produced by the NEUMs. This has of course not precluded the submission of individual written proposals, which have often attracted wide support from the NEUMs during the discussions.

The aim of the NEUMs was to exchange views, in particular on proposals submitted by the EU, as well as to inform each other of national positions. The NEUMs have also been used by those delegations which intended to submit a proposal as a forum to test the level of support for their proposal before tabling it in the 46+1 Group. The NEUMs have certainly always examined whether a common position on certain issues was possible, but did not aim to reach unanimity. Indeed, the dynamic of the 46+1 Group has

[18] Although informal, the NEUMS has been at least indirectly recognised as an entity in the DAA, as reflected in the expression "High Contracting Parties other than the European Union and its member States" which is contained in Draft Rule 18 paras 1 and 5 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements (see Appendix 3 of the "Interim report to the Committee of Ministers, for Information, on the Negotiations on the Accession of the European Union to the European Convention on Human Rights, Including the revised Draft Accession Instruments in Appendix", CDDH(2023)R_EXTRA ADDENDUM of 4 April 2023, www.coe.int).

rather been to move collectively towards consensual solutions, and the NEUMs more or less acted in the same spirit.

As already mentioned, the NEUMs did not themselves take the initiative to propose amendments proposals to the 2013 DAA. It was therefore on the basis of mostly concrete proposals from the EU that the NEUMs sought to evaluate the potential consequences for the proper functioning of the Convention system and the overall balance of the DAA. Such analysis was instrumental for the NEUMs to decide whether or not a given proposal could be supported. This has, however, been a challenging exercise since a number of questions are legally complex and, for some, highly technical. A deep knowledge not only of ECHR case law but also of the working methods and practical functioning of the ECtHR is needed to be able to answer those questions. This has also been the case with regard to both applicable rules and evolving practice concerning the supervision of the execution of judgments by the Committee of Ministers. Against this background, the NEUMs have frequently relied on the assessment made by the Court's representative to take a stance on a number of proposals. To name a few, this has been in particular the case on amendment proposals regarding the operation of the co-respondent mechanism and those concerning inter-party applications, two topics where the need to respect the judicial independence of the ECtHR and the fact that it must remain master of its own proceedings have been considered essential. As concerns supervision of execution and voting modalities at the Committee of Ministers, the NEUMs requested a number of information documents from the Secretariat[19] and legal opinions from the DLAPIL.[20] This has proven extremely useful to enable the NEUMs to make their own sound analysis and, eventually, to be able to support the revised DAA.

The working methods of the NEUMs did not include separate consultation sessions with NGOs and other actors from civil society. A number of NEUMs, however, have called for regular consultation with non-governmental actors. This has been done in the context of the formal meetings of the 46+1 Group.[21] Although there has been no uniform position from the NEUMs on the numerous requests and suggestions voiced by NGOs, there has been a clear trend to support those proposals stressing the need to avoid weakening the position of the applicants in the procedures conducted before the ECtHR. In this context,

[19] See 47+1 ad hoc group, 'Meeting Report of the 12th Meeting, 47+1(2021)R12' (10 December 2021) on scenarios in the context of art. 7 of the Draft Accession Agreement.

[20] See Legal opinion DLAPIL21/2022_JP/IS, Directorate of Legal Advice and Public International Law, Council of Europe of 14 September 2022, prepared by DLAPIL, Laying Down Voting Rules in the Committee of Ministers' Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlement; and Background paper, 'Voting Rights of European Union in Council of Europe Treaties, DLAPIL16/2021 JP/IS/DG, Directorate of Legal Advice and Public International Law, Council of Europe' (17 November 2021).

[21] The 46+1 Group held three exchanges of views with representatives of civil society, at its 7th, 10th, and 13th meetings.

the NEUMs have been willing to limit the risk of unduly prolonging individual application procedures, including upon activation of the co-respondent mechanism.

II.3. Common Statement and Key Negotiating Principles

The main concerns and common objectives from the NEUMs have been expressed in the above-mentioned Common Statement, which was adopted in the 6th Meeting of the 47+1 Group. This Common Statement sets out the following six Key Negotiating Principles which are deemed particularly important to the NEUMs:[22]

- Equality of all High Contracting Parties;
- Preserve the proper functioning of the Convention system;
- Maintain the rights of applicants in the Convention procedures;
- No exclusion of jurisdiction of the European Court of Human Rights in specific areas
- Existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession;
- Taking into account the specific nature of the EU, which is not a State.

During the negotiation, these principles have often been referred to by NEUMs and therefore offered useful guidance to exclude certain ideas, support certain proposals or move towards more widely acceptable solutions. The EU Commission accepted these principles as a valid reference point and took particular care to show that due regard had been given to them in its proposals.

In addition to these Key Negotiating Principles, the Common Statement mentions a few other points which were certainly less operational for the discussions, but nevertheless expressed certain expectations from the NEUMs. Two of these points are worth mentioning:

First, the NEUMs expressed the hope that "the EU accession to the ECHR should not undermine the Convention system or the effectiveness of the Council of Europe as an organisation".[23] Admittedly, this is a very general statement. It should be understood as a reminder that it is of utmost importance to respect the independence of the ECtHR and the obligation from the High Contracting Parties to abide by the final judgments it delivers. The role of the Committee of Ministers is essential in this respect, and all High Contracting Parties bear a collective responsibility for this to happen. Behind this NEUMs statement one may easily detect some fears that together with its 27 Member States, the EU would in future be in a position to act as a numerical strong bloc. This might change the dynamic within the Committee of Ministers, which should continue to seek consensus to the extent possible and show sensitivity to national positions.

[22] 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. Appendix III, item 1.
[23] *Ibid*. Appendix III, item 3.

Second, the NEUMs clearly wanted that "adaptations to the DAA be made to the extent possible within the EU internal legal order".[24] This expectation has been voiced several times during the negotiation process, for example in relation to inter-party applications,[25] CFSP (section III.4)[26] or Protocol no. 16.[27] Indeed, it was at times difficult for the NEUMs to understand why legally binding obligations on EU Member States enshrined in the EU internal legal order would have to be matched with corresponding obligations in the DAA, the addressees of which are both EU and non-EU Member States. While this expectation from the NEUMs was only partly met regarding issues pertaining to sections III.1 and III.3, one may at least hope issues around CFSP (section III.4) will eventually be solved by the EU internally.

III. Issues of particular importance to the non-EU Member States

III.1. Basket 1

The Chair's paper to structure the discussion of the 47+1 Group dealt exclusively with problems that arise from *Opinion 2/13* of the CJEU.[28] It addresses four "baskets" in which the issues can be grouped. Basket 1 essentially deals with the functioning of the co-respondent mechanism (art. 3 DAA), including the prior involvement procedure (art. 3(7) DAA).

This mechanism had already been agreed upon during the first round of negotiations. Hence the overwhelming majority of the NEUMs did not question its pertinence nor the need to adapt it to address the problems identified by the CJEU. The main concerns expressed by certain NEUMs were rather aimed to ensure the possibility for the ECtHR to keep a say on whether the EU would be co-respondent or cease to be co-respondent in a given case,[29] it being accepted that the question whether the co-respondent mechanism is called for in a given case is purely a matter of EU law. The reason behind such fears from the NEUMs was that no gaps in accountability should be created at the expense of the applicants, including in the execution process.[30] The prior involvement procedure was widely

[24] 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. Appendix III, item 3 in fine.

[25] *Ibid*. para. 22.

[26] 46+1 ad hoc Group, 'Meeting Report of the 15th Meeting, 46+1(2022)R15' (7 October 2022) para. 24.

[27] 47+1 ad hoc Group, 'Meeting Report of the 8th Meeting, 47+1(2021)R8' (4 February 2021) para. 15.

[28] 47+1 ad hoc Group, 'Paper by the Chair to Structure the Discussion at the Sixth Meeting of the CDDH *ad hoc* Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights' cit.

[29] See for example 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. para. 13; 47+1 ad hoc Group, 'Meeting Report of the 7th Meeting, 47+1(2020)R7' (26 November 2020) para. 7; Meeting Report of the 8th Meeting, paras 12-13; 47 +1 ad hoc group, 'Meeting Report of the 11th Meeting, 47+1(2021)R11' (8 October 2021) paras 24 and 27.

[30] See 47+1 ad hoc Group, 'Meeting Report of the 8th Meeting, 47+1(2021)R8' (4 February 2021) cit. para. 11.

considered inherent and necessary to the co-respondent mechanism, although one delegation pointed to the risk that it could unduly delay the proceedings.[31] The introduction of an automatic, joint responsibility from the respondent and co-respondent parties (art. 3(8) DAA) was easily accepted by the NEUMs since it improves accountability in the execution process and thereby reinforces the position of the applicant.[32]

III.2. Basket 2

This basket encompasses issues relating to inter-party cases under art. 33 of the Convention and issues relating to requests for advisory opinions under Protocol no. 16 to the Convention.

Regarding inter-party applications, art. 5 of the 2013 DAA was considered insufficient by the CJEU since it allowed for the possibility that the EU or its Member States might submit an application to the ECtHR, under art. 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.[33] The CJEU therefore requested an express exclusion of the jurisdiction of the ECtHR over such cases.[34]

A first proposal by the EU to settle the problem was considered with concern by several NEUMs, mostly because they felt that it would limit the jurisdiction of the ECtHR and raise issues with regard to the equality of High Contracting Parties.[35] Even though some NEUMs suggested that this was rather a matter related to internal EU matters,[36] the discussions went on further on the basis a new proposal put forward by the Norwegian delegation and the Secretariat, which attracted wider support but proved too detailed procedurally speaking.[37] After lengthy discussions, the 46+1 Group agreed on key elements to solve the issue,[38] namely: reiteration of the legal obligation of EU Member States according to art. 344 TFEU; recognition of the possibility for the EU to assess whether and to what extent an inter-party dispute concerns the interpretation or application of EU law; and preservation of the ECtHR competence to remain master of the proceedings in deciding to strike out the inter-party application on the basis of art. 37 ECHR. The wording eventually found in art. 3(3) and (4) DAA remains rather general so as to leave flexibility in practice for both the ECtHR and the CJEU. Important precisions were also included in

[31] See 46+1 ad hoc Group, 'Meeting Report of the 13th Meeting, 46+1(2022)R13' (13 May 2022) para. 7.

[32] See *ibid*. para. 12; 46+1 ad hoc Group, 'Meeting Report of the 17th Meeting, 46+1(2023)R17' (2 February 2023) paras 12–13.

[33] See Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 207.

[34] *Ibid*. para. 213.

[35] See 47+1 ad hoc Group, 'Meeting Report of the 7th Meeting, 47+1(2020)R7' cit. para. 13.

[36] See art. 344 TFEU, which sets out a clear legal obligation for EU Member States.

[37] See 47 +1 ad hoc group, 'Meeting Report of the 11th Meeting, 47+1(2021)R11' cit. paras 8-9 and 4-10.

[38] See 46+1 ad hoc Group, 'Meeting Report of the 14th Meeting, 46+1(2022)R14' (7 July 2022) paras 8–14.

the explanatory report, especially on mixed applications and the scope of the interpretation or application of EU law.[39]

As regards Protocol no. 16, which was signed after the 47+1 Group had adopted its final report on the 2013 DAA, the objections raised by the CJEU in its by *Opinion 2/13* concern a possible circumvention of the preliminary reference-procedure under art. 267 TFEU due to the fact that no provision had been included in the 2013 DAA.[40] Although initially reluctant to do so, since the problem is essentially an internal matter of the EU which exists even without EU accession,[41] the NEUMs eventually accepted the inclusion of a provision in the DAA (art. 5).[42] The effect of this provision is to preclude recourse to the advisory opinion procedure before the ECtHR where EU law, as interpreted by the CJEU, requires a court or tribunal to instead submit a request to the CJEU under art. 267 TFEU.

III.3. Basket 3

This basket concerns the principle of mutual trust. By not including a provision in the Draft Accession Agreement which would recognise the obligation of mutual trust between EU Member States in certain circumstances, the CJEU considered that the underlying balance of the EU and the autonomy of EU was negatively affected.[43]

During the negotiation process, it became clear that the way in which the mutual trust principle was taken into account by the ECtHR and interpreted and applied by the CJEU was a matter of constant evolution. Some NEUMs considered that mutual trust would not necessarily have to be reflected in the DAA itself.[44] The EU, however, insisted that a specific provision be provided for. This was eventually accepted and resulted in a short, general provision – albeit without obvious normative effect – included in the DAA (art. 6) instead of a mere mentioning in the draft explanatory report. Since the issuing of *Opinion 2/13* in December 2014, there has been increased convergence in the case law of the CJEU and the ECtHR on mutual trust although the two systems remain autonomous.[45] The 46+1 Group was wise enough to avoid crystallising this state of affairs in the DAA. It preferred to highlight the most recent significant rulings with regard to the limits to the operation of mutual-

[39] See Draft Explanatory Report of the DAA, paras 82 and 84.

[40] See Opinion 2/13 cit. paras 196–200.

[41] See 47+1 ad hoc Group, 'Meeting Report of the 8th Meeting, 47+1(2021)R8' (4 February 2021) cit. para. 15.

[42] See 46+1 ad hoc Group, 'Meeting Report of the 14th Meeting, 46+1(2022)R14' cit. paras 8–14.

[43] See *Opinion 2/13* cit. paras 196–200.

[44] See 47 +1 ad hoc group, 'Meeting Report of the 11th Meeting, 47+1(2021)R11' cit. paras 11-18.

[45] See J Callewaert, 'The European Arrest Warrant under the ECHR: A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) ZesS-Sonderband 105–114; L Robert, 'La présomption Bosphorus à l'épreuve du mandat d'arrêt européen' (2021) Revue de l'Union européenne 519–525.

recognition mechanisms under EU law in light of the ECHR.[46] Furthermore, a specific mentioning of the fact that mutual trust can also be relevant to non-EU Member States in the context of bilateral agreements concluded with the EU was added.[47]

III.4. Basket 4

In *Opinion 2/13*, the CJEU objected that the 2013 DAA failed to have regard to the specific characteristics of EU law in terms of the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.[48]

The fact that the jurisdiction of the CJEU is limited in CFSP matters, coupled with the above-mentioned objection raised by the CJEU, represents perhaps the most difficult issue to solve to make EU accession possible. It is true that in comparison to the situation when *Opinion 2/13* was delivered, the CJEU has had the opportunity to interpret the scope of its jurisdiction in an extensive way, but this is by no means a guarantee that no gaps persist.[49]

Amending the European Treaties to extend the scope of the CJEU's jurisdiction would solve the issue, but this step does not seem likely to happen. An exclusion of the jurisdiction of the ECtHR in this matter would, theoretically, address the concerns expressed by the CJEU. This is, however, not an option since it would be in clear violation of the aforementioned Key Negotiating Principles – in particular the equality of all High Contracting Parties and the refusal to accept any exclusion of jurisdiction in specific areas. During the negotiation process, the EU Commission therefore proposed the introduction of a new attribution clause in the Draft Accession Agreement. Such a clause would have enabled the EU to allocate, for the purposes of the Convention, responsibility for an CFSP act of the EU to one or more EU Member State(s) if such act is excluded from the judicial review of the CJEU. A number of NEUMs expressed strong reservations and serious doubts about the envisaged clause due *inter alia* to its complex character and to the risk of putting the applicant at a disadvantage.[50] Given the scepticism and the many practical and operational difficulties pointed out by the NEUMs, the EU Commission decided to reconsider the feasibility of the reattribution mechanism.[51] It subsequently informed the 46+1 Group of its intention to resolve the basket 4 issue internally.[52]

[46] See Draft Explanatory Report of the DAA, para. 88.

[47] See *ibid*. para. 87 and, in particular, ECtHR *Tarakhel v Switzerland* App. n. 29217/12 [4 November 2014] para. 33.

[48] See Opinion 2/13 cit. para. 257.

[49] See PV Elsuwege, 'Judicial Review and Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) CLMR 1731-1760; S Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge 2020) paras 138–139.

[50] See 47+1 ad hoc Group, 'Meeting Report of the 9th Meeting, 47+1(2021)R9' (25 March 2021) paras 11–14; 47+1 ad hoc group, 'Meeting Report of the 12th Meeting, 47+1(2021)R12' cit. paras 12-13.

[51] See 46+1 ad hoc Group, 'Meeting Report of the 13th Meeting, 46+1(2022)R13' cit. paras 37-38.

[52] See Report of the "46+1" Group to the CDDH, CDDH(2023)R_EXTRA ADDENDUM cit. para. 8.

III.5. Decision-making by the Committee of Ministers

The most important topic not identified by the EU in its position paper, which the NEUMs insisted on including in the negotiation, was the voting modalities at the Committee of Ministers.[53] Although initially this request was essentially supported by two NEUMs, it became clear over time that the underlying concern was shared by the rest of the NEUMs. After several rounds of discussion, the 46+1 Group eventually affirmed the need to revisit the provisions of the 2013 instruments so as to ensure that the supervisory system remains effective in cases where the EU and its Member States are obliged by EU law to vote in a coordinated manner, which could determine the outcome of voting. It was also necessary to ensure the meaningful participation of non-EU Member States where the votes of the EU and its Member States alone are insufficient to determine the outcome. The overall solution should also take account of the fact that the interest of the EU in voting for or against a particular decision may vary.[54]

The 46+1 Group undertook to examine carefully the three main options presented in detail by the Secretariat: a revised version of Rule 18, a "0-vote", or a "1-vote" approach.[55] Although the three main options would in principle all achieve the desired results, different preferences were expressed, including among the NEUMs. At its last meeting, the 46+1 Group agreed to adapt the approach based on the 2013 DAA (revision of Rule 18), whose underlying logic remained valid. An additional threshold was therefore introduced concerning the adoption of final resolutions, namely that of "a simple majority of votes cast by representatives of High Contracting Parties other than the EU and its member States" (Rule 18 para. 1). This was considered to be necessary to ensure meaningful participation of non-EU Member States in addition to the EU and its Member States.[56] A specific rule was also added to govern the adoption of interim resolutions (Rule 18 para. 3). Finally, a review clause was added to oblige the High Contracting Parties to examine the application of the new rules in a given time frame (Rule 18 para. 6).

IV. An overall appraisal of the revised DAA from a non-EU Member State perspective

The 2023 DAA attempts to address the key issues raised by the CJEU in *Opinion 2/13* as well as a number of targeted requests put forward by the NEUMs. Eventually, a limited number of provisions of the 2013 DAA were renegotiated on certain specific points. As a

[53] 47+1 ad hoc Group, 'Paper by the Chair to Structure the Discussion at the Sixth Meeting of the CDDH *ad hoc* Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights' cit.

[54] See 46+1 ad hoc Group, 'Meeting Report of the 15th Meeting, 46+1(2022)R15' cit. para. 5.

[55] See 46+1 ad hoc Group, 'Meeting Report of the 16th Meeting, 46+1(2022)R16' (24 November 2022) paras 3–16.

[56] See 46+1 ad hoc Group, 'Meeting Report of the 18th Meeting, 46+1(2023)R18' (17 March 2023) para. 3.

result, the overall balance of the text was largely preserved, as pointed out in the Common Statement on Key Negotiating Principles of particular importance to the NEUMs.[57] This led several NEUMs to welcome explicitly the fact that the negotiations had respected these principles.[58]

As compared to 2013, the dynamic of the negotiation process had somewhat changed. This was due to the "limited" renegotiation exercise, as well as Brexit and the exclusion of the Russian Federation from the Council of Europe.

The initial expectation from the NEUMs that adaptations to the DAA should be made to the extent possible within the EU internal legal order[59] has perhaps not been fully met. This may be due to the sometimes overly prudent approach followed by the European Commission, coupled with the absence of a representative from the CJEU in the negotiation process. A notable exception concerns basket 4, but it remains to be seen whether the EU will be capable of adopting an internal, workable solution in the not-too-distant future. All in all, the 2023 DAA covers – sometimes at length – issues which are by nature internal to the EU, albeit without a negative impact on the Convention from a legal point of view. Similarly, the incorporation of certain amendments to the 2023 DAA itself is somewhat questionable: some issues could have been easily solved in the draft explanatory report without necessarily modifying the draft agreement itself. Again, this does not seem to entail any real legal problem.

During the whole negotiation process, the NEUMs have expressed a strong willingness to be associated as real partners as regards internal reflections and solutions developed by the EU. Against this background, the 46+1 Group noted that it would be necessary for all parties to the negotiations to be informed of and consider the manner in which the basket 4 issue had been resolved before they would be able to give their final agreement to the whole package of accession instruments.[60] It is in the same spirit that the NEUMs suggested that an informal Group of Friends of EU accession to the Convention could be created to function as a "sounding board" for discussion of the EU's proposed internal basket 4 solution.[61]

On the basis of the tremendous amount of work and energy which has been spent in this project during the last 12 years or so, it is to be hoped that the DAA will be finalised soon with the support from the 46+1 Delegations. Both the CJEU and the ECtHR will then have to examine the DAA and give their opinion on it, the latter being a clear expectation from the NEUMs. There are reasons to be optimistic about the outcome of these judicial

[57] See 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. Appendix III, item 3, second sentence.

[58] See 46+1 ad hoc Group, 'Meeting Report of the 18th Meeting, 46+1(2023)R18' cit. para. 10.

[59] See 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. Appendix III, item 3, third sentence.

[60] See 46+1 ad hoc Group, 'Meeting Report of the 18th Meeting, 46+1(2023)R18' cit. para. 8; CDDH, 'Interim Report to the Committee of Ministers' (4 April 2023) para. 3.

[61] See 46+1 ad hoc Group, 'Meeting Report of the 18th Meeting, 46+1(2023)R18' cit. para. 13.

procedures, but also on the subsequent ratification process provided the political will is there. It is after all in the interest of Europe as a whole that the EU accession to the ECHR eventually becomes reality.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

A COUNCIL OF EUROPE PERSPECTIVE ON THE EUROPEAN UNION'S ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

JÖRG POLAKIEWICZ* AND IRENE SUOMINEN-PICHT**

TABLE OF CONTENTS: I. Introduction. – II. Guiding principles. – III. Proceedings before the European Court of Human Rights. – III.1. The co-respondent mechanism. – III.2. The "prior involvement" of the Court of Justice. – III.3. Operation of inter-party applications and ECHR advisory opinions. – III.4. The principle of mutual trust between EU Member States and relationship between the two articles 53. – IV. Participation of the EU in the Committee of Ministers. – V. Election of judges. – VI. Conclusion.

ABSTRACT: The *Article* discusses the European Union's accession to the European Convention on Human Rights (ECHR) from the Council of Europe's perspective, focusing on the renegotiations between June 2020 and March 2023, which led to 10–20 formal amendments to the Draft Accession Agreement (DAA). It examines whether the guiding principles agreed upon in 2010 have been upheld and addresses the EU's accession in terms of the co-respondent mechanism, the principle of mutual trust, and the EU's participation in the Committee of Ministers, among other aspects. The document emphasises the balance between respecting the EU's constitutional requirements and maintaining the integrity of the Convention system, concluding that the revised DAA represents a collaborative effort to address the challenges posed by the Court of Justice of the European Union's (CJEU) Opinion 2/13 and to ensure coherent human rights protection in Europe.

KEYWORDS: EU accession to the ECHR – Opinion 2/13 – Council of Europe – Court of Justice of the European Union – autonomy of EU law – mutual trust.

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I. Introduction

On 20 April 2016, one of the present authors, Jörg Polakiewicz, represented the Council of Europe in the public hearing "Accession to the European Convention on Human Rights" organised by the European Parliament's Committee on Constitutional Affairs.[1] He argued that, if all objections formulated by the CJEU in Opinion 2/13[2] were met by formal amendments to the Draft Accession Agreement (DAA), there would be a real risk that, as a result, the European Court of Human Rights (ECtHR)'s jurisdiction over EU legal acts will be more restricted than it is today. Such a solution would not only undermine the whole purpose of accession but might also be unacceptable to non-EU Member States.

Altogether, the solutions found after almost three years of renegotiation, lasting from June 2020 to March 2023, consist in, depending on the counting, 10–20 formal amendments to the DAA. It is therefore interesting to examine whether the fears voiced in 2016 have materialised and whether the solutions found are still compatible with the guiding principles that all negotiating parties had agreed upon in 2010.

The following analysis will not be structured according to the baskets structure used in the second round of negotiations.[3] Instead, the focus will be on a Council of Europe institutional perspective. The authors represented the Council of Europe's legal service (DLAPIL) in these negotiations. The last remaining CJEU objection related to the exercise of jurisdiction in the area of the EU's common and foreign policy (CFSP) is omitted altogether since it is still under consideration.[4]

II. Guiding principles

At the outset of negotiations, in June 2010, the negotiating parties, including the EU, agreed on a series of principles to guide the negotiating process:[5]

[1] An extended version of the presentation was published as J Polakiewicz, 'Accession to the European Convention on Human Rights – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' (2016) HRLJ 10 ff.

[2] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[3] See T Meinich, 'From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective' (2024) European Papers 685 www.europeanpapers.eu.

[4] See P van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) CMLRev 1731; J Polakiewicz and L Panosch, 'Zwischen Hammer und Amboss. Das Spannungsverhältnis zwischen dem Europäischen Gerichtshof und dem Europäischen Gerichtshof für Menschenrechte beim Rechtsschutz gegen Maßnahmen im Bereich der Gemeinsamen Außen- und Sicherheitspolitik im Lichte der Beitrittsverhandlungen der Europäischen Union zur Europäischen Menschenrechtskonvention' in C Seitz, RM Straub. and R Weyeneth (eds) *Rechtsschutz in Theorie und Praxis*. *Festschrift für Prof. Breitenmoser* (Helbing Lichtenhahn 2022) 1031.

[5] See Steering Committee for Human Rights (CDDH), Report of the 70th Meeting, CDDH(2010)010, 15–18 June 2010, para. 31.

a) The existing system of the Convention should be preserved: amendments and adaptations should be limited to what is strictly necessary for the purpose of the accession of the EU as a non-state entity, respecting the principle of equal rights of all individuals under the Convention system, and the equality of all High Contracting Parties;
b) The EU should accede to the Convention, as far as possible, on an "equal footing" with the other Contracting Parties, with the same rights and the same obligations, and the existing obligations of the States Parties to the Convention should not be affected by the accession;
c) On the EU side, the accession treaty shall neither affect the existing obligations of EU Member States in relation to the Convention (principle of neutrality regarding Member States' obligations), nor the scope of the Union's competences and the distribution of competences between the EU and its Member States (principle of neutrality regarding Union powers).[6]

III. Proceedings before the European Court of Human Rights

III.1. The co-respondent mechanism

The Draft Accession Agreement foresees two distinct tests for triggering the co-respondent mechanism. In the case of applications against EU Member States, the EU may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility of a provision of EU law with the Convention.

During the negotiations, it was underlined that, had the mechanism already existed, the cases which would certainly have required its application would have been *Matthews*,[7] *Bosphorus*[8] and *Kokkelvisserij*.[9] These are cases where EU Member States as sole respondents would not be legally in a position to execute the judgment because it would require an amendment of EU legislation.[10] Indeed, a wider criterion, requiring merely that, "the alleged violation appears to have a substantive link with European Union law"[11] was abandoned during the negotiations. There are many cases where such a link exists without there being

[6] See art. 2 Protocol n. 8 relating to art. 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 [2007].

[7] ECtHR *Matthews v the United Kingdom* App n. 24833/94 [18 February 1999].

[8] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App n. 45036/98 [30 June 2005].

[9] ECtHR *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands*, App n. 13645/05 [20 January 2009], admissibility decision.

[10] See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* cit. para. 148, "For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, article 8 of Regulation (EEC) no. 990/93".

[11] CDDH, 4th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the ECHR with the European Commission, CDDH-UE (2010)16, at 5.

a necessity to join the EU to the proceedings. For example, in *Aristimuño Mendizabal*,[12] the failure to issue the applicant with a residence permit was a violation of EU law, which made the interference with her private and family life (art. 8 ECHR) unlawful. However, there was no question that EU law or actions of EU institutions had prompted the violation.

The question is whether cases such as *M.S.S. v Belgium and Greece* should qualify for the co-respondent procedure. Under the "sovereignty clause" contained in the then applicable Dublin II regulation,[13] Belgium could have examined the asylum-seeker's application instead of returning him to Greece.[14] EU Member States retain similar discretion to ensure compliance with their human rights obligations under other EU legislative acts, such as those regarding the European Arrest Warrant[15] or the non-consensual transfer of sentenced persons.[16] It can thus be argued that there are no compelling reasons to associate the EU as a co-respondent to the proceedings before the ECtHR regarding individual measures taken by a Member State. However, even if the co-respondent mechanism were not applied in such cases, amendments to the relevant EU legislation might still be called for to avoid similar human rights violations in the future. When supervising the execution of judgments, the Committee of Ministers (CM) regularly insists that legislative reforms are implemented not only where laws are found to be directly in contradiction with the Convention, but also where this is necessary to prevent human rights violations in the future.

Its complexity is another reason to restrict the use of the co-respondent mechanism. The ECtHR and the applicant may, in any given case, have to deal with up to 28 co-respondents. Several NGOs, in particular the Aire Centre and Amnesty International, have underlined the procedural and financial burdens attendant to the co-respondent mechanism on applicants, who may find themselves undertaking research into very complex EU law arguments when the EU law issues are not central to the resolution of the case.[17] In many cases it will be more appropriate to invite the EU to submit observations as a third-party intervener in accordance with art. 36(1) ECHR.

In the case of applications against the EU, the EU Member States become co-respondents if the EU could have avoided the act or omission underlying the alleged violation

[12] ECtHR *Aristimuño Mendizabal v France* App n. 51431/99 [17 January 2006].

[13] Regulation (EC) 343/2003 of the Council of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, art. 3(2).

[14] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] para. 358.

[15] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, art. 1(3).

[16] Framework Decision 2008/909/JHA of the Council of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, art. 3(4).

[17] Comments submitted in December 2010 and March 2011.

only by disregarding an obligation under the EU treaties or any other provision having the same legal value. This covers obligations deriving directly from the "primary law" of the EU, which can only be modified by agreement between the EU Member States.

During the second round of negotiations, the provisions governing the co-respondent mechanism were substantially amended. The Commission achieved its objective of ensuring that the decision to apply the co-respondent mechanism at the request of a High Contracting Party no longer depends on the interpretation of EU law by the ECtHR.[18] While art. 3(5) DAA still foresees that it is the ECtHR that admits a co-respondent, the question whether the relevant conditions are met is assessed by the EU. The ECtHR's decision-making power in this respect will be rather theoretical. The same applies for the termination of the co-respondent mechanism under the new art. 3(6) DAA.

This result does not contradict any of the 2010 guiding principles. On the contrary, it is rather reasonable to avoid situations where the ECtHR would have to pronounce itself on the division of competences between the Union and its Member States, a legally complex task for which it lacks particular expertise.

Where the finding of an ECHR violation involving EU secondary law is concerned, art. 3(8) DAA now foresees the principle of joint responsibility as a rule. This is only a minor change compared to the previous draft, which already provided for a reduced plausibility control test. In this way, the ECtHR will be dispensed from deciding on distribution of responsibility between the respondent and co-respondent. Such a decision would require a rather detailed analysis of EU law and its application as well as of the division of competences between the EU and its Member States, in particular when the breaches derive from omissions.

In the context of the co-respondent mechanism, the CJEU furthermore considered the interplay of art. 57 of the Convention on reservations with the concept of joint responsibility under the co-respondent mechanism. Finding that EU Member States are not precluded from being held responsible, together with the EU, for the violation of a provision of the Convention covered by a national reservation, the CJEU saw a contradiction with art. 2 Protocol no. 8, according to which accession should not affect the situation of Member States in relation to the Convention.

From the perspective of international law, the CJEU's reasoning is difficult to understand. It seems that the CJEU did not sufficiently take into account the specificity of the ECHR's reservations regime. Under the Vienna Convention on the Law of Treaties, States formulating reservations usually derogate generally from a treaty provision, while under the ECHR, they may do so only in respect of a specific piece of national legislation in force when the reservation is being made, and only to the extent that that national law is not

[18] European Commission, 'Position Paper for the Negotiations on the European Union's Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms' document 47+1(2020)01, 5 March 2020.

in conformity with a provision of the Convention.[19] Reservations of a general character are not permitted under art. 57 ECHR. Moreover, a reservation made by an individual Member State can only refer to a national law in force when that reservation was made, not to "a provision of (primary or secondary) EU law". Even in the exceptional case that the national legislation covered by the reservation subsequently falls within EU competence, it is difficult to imagine a situation where joint responsibility of the EU and its Member States would affect existing reservations by individual Member States.[20]

In the negotiations, however, the Commission's view prevailed and a new art. 2(3) DAA was inserted, providing that "[r]eservations made by High Contracting Parties in accordance with article 57 of the Convention shall retain their effects in respect of any such High Contracting Party which is a co-respondent to the proceedings". While this wording is questionable, it does not appear to be harmful. Reservations that are not relevant for the case cannot retain effect.

III.2. The "prior involvement" of the Court of Justice

During the negotiations, it was argued that the "prior involvement" procedure would unduly favour the CJEU compared to the supreme courts of the other Contracting Parties, which, depending on the applicable national procedures, may also not have had an opportunity to give their view prior to the Strasbourg Court's ruling. It must be stressed, however, that the procedure does not apply in direct actions against the EU, which are those that are comparable to procedures against other Contracting Parties, but only in the probably rare cases in which the EU will be a co-respondent. In these cases, the procedure appears to be justified by the considerations of subsidiarity and the "specific characteristics of Union law", which require the introduction of the co-respondent procedure in the first place.

The CJEU objections pertaining to the prior involvement procedure were largely addressed at the level of the Explanatory Report, which was rather exceptional in the second round of negotiations. The revised text now specifies that assessing the compatibility with the Convention shall mean to rule on the validity or the interpretation of a legal provision contained in EU secondary legislation.[21] The prior involvement procedure's scope is thus extended to questions of interpretation regarding both primary and secondary law, as required by the CJEU. This solution does not affect the ultimate jurisdiction of the ECtHR as to the existence of a Convention violation, and is fully compatible with the 2010 guiding principles.

[19] See J Polakiewicz, 'Collective Responsibility and Reservations in a Common European Human Rights Area' in I Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime* (Springer Dordrecht 2004) 95.

[20] J Polakiewicz, 'Accession to the European Convention on Human Rights – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' cit. 19.

[21] Draft Explanatory Report to the 2023 DAA, para. 77.

III.3. Operation of inter-party applications and ECHR advisory opinions

The revised DAA will eliminate the possibility of inter-party applications between the EU and its Member States altogether and, as between EU Member States, "insofar as a dispute between them concerns the interpretation or application of European Union law" (art. 4(3) DAA). In a similar vein, questions for ECHR advisory opinions will effectively be excluded whenever such questions "fall within the field of application of European Union law" (art. 5 DAA). The latter result is reached not by a straightforward prohibition, as in the case of inter-party applications, but by the postulate that in matters of EU law "highest courts or tribunals of a High Contracting Party" cannot be regarded as national courts, but only the CJEU. Advisory opinion requests by national courts, the subject matter of which falls within the field of application of EU law, would thus be inadmissible.

The solutions found in the second round of negotiations for inter-party applications and advisory opinions are in line with the CJEU's vision of the autonomy of EU law which is encapsulated in paragraph 193 of Opinion 2/13:

> 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.

The paragraph was intensely discussed during the negotiations because it formulates a premise that is difficult to accept from an international (ECHR) point of view.[22] The 2006 ILC report on the fragmentation of international law is crystal clear in this respect: "No rule, treaty, or custom, however special its subject-matter or limited the number of the States concerned by it, applies in a [legal] vacuum";[23] "no legal regime is isolated from general international law".[24] Even the Charter of Fundamental Rights of the European Union (CFR) itself is based on the premise that the ECHR continues to apply within the field of application of EU law.

[22] See the very useful overview by J Odermatt *International Law and the European Union* (CUP 2021) as well as HP Aust, 'Eine völkerrechtsfreundliche Union? Grund und Grenze der Öffnung des Europarechts zum Völkerrecht' (2017) Europarecht 106; T Molnar, 'The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States' (2015) Hungarian Yearbook of International and European Law 433; K Ziegler, 'International Law and EU Law: Between Asymmetrical Constitutionalisation and Fragmentation' (2013) Law of Ukraine: Legal Journal 5.

[23] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,13 April 2006, A/CN.4/L.682 and Add.1 (2006) para. 120.

[24] *Ibid*. para. 193.

The new provisions also raise questions as to their compatibility with the 2010 guiding principles, notably the equality of parties and the principle of neutrality regarding Member States' obligations. Moreover, would the effective application of these rules not require the ECtHR, when deciding on the admissibility of applications, to interpret EU law, a result that would be contrary to central arguments of Opinion 2/13? It can be argued that the latter concern is addressed, at least as far as inter-party applications are concerned, by the rule that the EU will assess whether and to what extent an inter-party dispute between EU Member States concerns the interpretation or application of EU law (art. 4(4) DAA). However, unlike in the case of the material conditions for applying the co-respondent mechanism,[25] the draft Explanatory Report does not specify that the EU's assessment "will be considered as determinative and authoritative". It is therefore not entirely clear whether – and if so, under which conditions – the ECtHR would be able to substitute its assessment to that of the EU. On the other hand, it has been argued that the solutions found are consistent with the idea of exhaustion of domestic remedies. They effectively avoid a proliferation of requests in areas where EU and ECHR law intersect, recognising that the CJEU is "at the summit" of the EU's judicial system.[26] Moreover, it must be emphasised that individuals always retain the option to eventually bring an application before the ECtHR. On balance, it can thus be concluded that the new provisions respect the integrity of the Convention system.

III.4. The principle of mutual trust between EU Member States and the relationship between the two articles 53

Although there had been voices arguing that EU accession to the ECHR would create problems for the implementation of EU legislation adopted within the framework of the former third pillar ("Justice and Home Affairs"),[27] this issue was not discussed during the first round of negotiations. In Opinion 2/13, the CJEU rather surprisingly formulated a fundamental objection that required an amendment to the DAA. It was therefore agreed to include the following provision in the DAA, as art. 6: "Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured".

[25] Draft Explanatory Report to the 2023 DAA cit. para. 61.

[26] See F Ronkes Agerbeek, 'EU Accession to the European Convention on Human Rights: A New Hope' (2024) European Papers 695 www.europeanpapers.eu.

[27] A Kornezov, 'The Forthcoming EU Accession to the ECHR: A Myriad of Problems, Few Solutions' (7 November 2012) CELS Seminar Series www.sms.cam.ac.uk.

This provision must be considered against the case law that has evolved considerably since Opinion 2/13.[28] While not being entirely identical, the jurisprudence of the Luxembourg and Strasbourg courts is certainly converging. Against this background, the new art. 6 DAA contains a minimalistic compromise formula. Neither the provision itself nor the draft Explanatory Report refer explicitly to "manifest deficiencies" or the so-called *Bosphorus* presumption.[29] During the negotiations, concerns were expressed that a codification of the *Bosphorus* presumption in the accession agreement would result in an unjustified unequal treatment among the contracting parties to the ECHR.[30] The CDDH had already raised concerns about the use of different standards of protection in 2019.[31] Such concerns are not unfounded. To name an example, the ECtHR has held that the *Bosphorus* presumption does not apply to the EEA Agreement.[32] This conclusion places the High Contracting Parties on an unequal footing in terms of the scrutiny exercised by the ECtHR vis-à-vis the fulfilment of their obligations under the ECHR and is thus likely to translate into unjustified differences in available remedies to individuals that find themselves in a substantially identical situation: whereas individuals operating within the EEA-EFTA States (Norway/Iceland/Liechtenstein) can potentially make a successful claim to the ECtHR concerning a norm of EU law, individuals facing the same situation within the EU Member States are precluded from doing so due to the application of the *Bosphorus* presumption.[33] Moreover, the jurisdiction of the ECtHR in the area of the EEA allows for an indirect review of EU law under the guise of EEA law,[34] an aspect that should not please the CJEU considering its views expressed in Opinion 2/13.

[28] See R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' (2024) European Papers 647 www.europeanpapers.eu.

[29] ECtHR *Avotiņš v Latvia* App n. 17502/07 [23 May 2016], paras 113–116; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* cit. paras 154–158. The ECtHR has only recently confirmed this approach in the case of *Bivolaru and Moldovan v. France* App n. 40324/16 and 12623/17 [25 March 2021].

[30] 47+1 ad hoc Group, Report of the 10th Meeting of the CDDH ad hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights of 2 July 2021, 47+1(2021)R10, para. 13.

[31] Steering Committee for Human Rights (CDDH), Report of the 92th Meeting, The Place of the European Convention on Human Rights in the European and International Legal Order, 26-29 November 2019, rm.coe.int, para. 413 ff.

[32] ECtHR *Konkurrenten.no AS v Norway* App n. 47341/15 [5 November 2019], admissibility decision, para. 42 ff; ECtHR *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway* App n. 45487/17 [10 May 2021], paras 106–108.

[33] U Lattanzi, 'The Inapplicability of the *Bosphorus* Presumption to the European Economic Area Agreement: A Risk for the Coherence of Legal Systems in Europe' (2023) EuConst 441. See also, HH Fredriksen, SO Johansen, 'The EEA Agreement as a Jack-in-the-Box in the Relationship Between the CJEU and the European Court of Human Rights?' (2020) European Papers www.europeanpapers.eu 707, arguing that the *Bosphorus* presumption should apply to the EEA Agreement.

[34] U Lattanzi, cit. 442. See also J Buckesfeld and RA Wessel, 'The Effect of Opinion 1/17 on the EU-ECHR Draft Accession Agreement: Lessons Learned?' (2024) European Papers 769 www.europeanpapers.eu.

Indeed, it seems difficult to justify continuing to apply the withdrawn standard of scrutiny, which dates back to a case decided well before the entry into force of the Lisbon treaty in the event of accession.[35] In particular the *Bivolaru and Moldovan* judgment, which is explicitly mentioned in the Explanatory Report,[36] shows that the distinction between the normal art. 3 ECHR test and a "manifest deficiency" test is not crystal clear.[37] In that case, the ECtHR applied both standards in parallel in two cases concerning conditions of detention in Romania, but only found a violation in the case of the applicant Moldovan, to whom the stricter standard of "manifest deficiencies" was applied.

In this context, it is interesting to note the case law of national courts which, with reference to art. 52(3) CFR, directly use ECHR standards to interpret the CFR, without differentiating according to whether or not the *Bosphorus* presumption applies. For example, in a decision of 1 December 2020, the German Federal Constitutional Court emphasised that both the case law of the CJEU and that of the ECtHR must be taken into account in the overall assessment of the conditions of detention to be carried out by a Member State court. According to the Constitutional Court, it follows from art. 4 CFR "that the specialised courts dealing with a request for transfer are obliged to examine in each individual case, and to clarify by means of additional information, whether the person to be transferred faces a real risk of being subjected to inhuman or degrading treatment".[38]

Given that the level of protection of the ECHR is guaranteed in any case, the new art. 6 DAA does not raise any concerns. It does not constitute a carve-out for EU law, but rather acknowledges that in the field of application of the principle of mutual trust, there are no insurmountable contradictions between Union and ECHR law. Anything else would be surprising. The jurisprudence of the ECtHR and the CJEU pursue the same objectives because they are based on the same principles and values. Respect for fundamental/human rights is a key component of the modern rule of law. Especially in the area of freedom, security and justice, respect for fundamental rights and freedoms is an absolute necessity. Understanding the principle of mutual trust as merely a concept of state-centred normative trust runs counter to the *ratio* of liberal fundamental rights.[39]

Finally, the rather futile objection regarding the relationship between the two articles[40] was addressed by a new paragraph 9 of art. 1 DAA, which states the obvious: art.

[35] G Ress, 'Relations between the European Union and the European Convention on Human Rights' in C De Angelis and A Scalone, *Πολιτεία Liber amicorum Agostino Carrino* (Mimesis 2020) 441, 458 ff; see however the more positive assessment of the continued application of the Bosphorus presumption by R Lawson, 'Atlas Shrugged. An Analysis of the ECtHR Case Law Involving Issues of EU Law since *Opinion 2/13*' cit.

[36] Draft Explanatory Report 2023, para. 88.

[37] G Ress, 'Presumption of Equivalent Protection of EU-law' (2021) EuZW 711, 711 ff.

[38] See Bundesverfassungsgericht (BVerfG) *European Arrest Warrant III* [1 December 2020], (2021) EuGRZ 69.

[39] KF Gärditz, 'Richtige Balance? – Zur Qualität des Grundrechtsschutzes im Recht des Europäischen Haftbefehls' (4 January 2021) Verfassungsblog verfassungsblog.de.

[40] See J Polakiewicz, 'Accession to the European Convention on Human Rights – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' cit. 12 ff.

53 ECHR shall not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the Convention and, as relevant, its protocols, "as interpreted by the European Court of Human Rights". Like the mutual trust provision, it does not raise any concerns, as it preserves the status of the ECHR as a common minimum standard which must always be observed.

IV. Participation of the EU in the Committee of Ministers

The EU's participation in the CM raises difficult questions from an institutional point of view. The CM is the decision-making body which shapes and determines Council of Europe policy. At the same time, it has been vested with a number of important functions under the Convention, thus acting *de facto* and *de jure* as a treaty body monitoring Member States' compliance with the ECHR. The CM supervises the execution of the Court's judgments (art. 46 ECHR) and of the terms of friendly settlements (art. 39 ECHR). It is also entitled to request advisory opinions from the Court (art. 47 ECHR) and to reduce the number of judges of the Chambers (art. 26(2) ECHR). Moreover, the CM deals with any question linked to the functioning of the Convention mechanism, even when it is explicitly addressed in the Convention itself.

There are no specific provisions regarding the adoption of amending and additional protocols or other legal instruments and texts, such as recommendations, resolutions and declarations, which are directly related to the functioning of the Convention. Such legal instruments and texts may be addressed, for example, to the Member States of the Council of Europe in their capacity as High Contracting Parties to the Convention, to the CM itself,[41] to the ECtHR[42] or, where appropriate, to other competent bodies.[43]

Despite this "*dédoublement fonctionnel*" as an organ of the Council of Europe and an ECHR treaty body, there is in reality only one CM whose composition and procedure are laid down in the Statute of the Council of Europe. According to art. 14 of the Statute of the Council of Europe, the Committee is made up of representatives of each Member State and each representative has one vote. It had therefore been argued that in order to give the EU a seat and right to vote in the CM, the Council's Statute would have to be amended, which is not only a relatively cumbersome procedure, requiring ratification by

[41] See, for instance, Resolution CM/Res(2010)26 of the Committee of Ministers of the Council of Europe of 10 November 2010 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, which entrusts the CM with the task of appointing the members of the Advisory Panel.

[42] See, for instance, Resolution CM/Res(2004)3 of the Committee of Ministers of the Council of Europe of 12 May 2004 on Judgments Revealing Underlying Systemic Problems.

[43] See, for instance, the replies by the CM to the recommendations made by the Parliamentary Assembly following its own survey of the implementation of the Court's judgments.

at least two-thirds of the Member States (see art. 41(c) Statute of the Council of Europe), but also politically unrealistic. This view eventually did not prevail. Instead, it was concluded that an amendment to the ECHR would, in terms of international treaty law, take precedence over the general rules of the Statute.[44] Like other Council of Europe treaties, the Convention is not an act of the Council itself but an independent international treaty which may contain special regulations going beyond the Statute's provisions.

An important question to be addressed during the first round of the negotiations was whether the Union should be given full voting rights as regards all functions that the CM exercises under the Convention or whether its voting rights should be somehow limited. According full voting rights to the Union as regards all "Convention-based" functions, irrespective of whether they are explicitly mentioned or not, would be in line with the guiding principle of "equal footing". Restrictions of the EU's right to vote had been advocated in view of its limited competences under the EU treaties and the fact that all its Member States are already represented in the CM.[45] Eventually, the EU was given full voting rights as regards the adoption of ECHR protocols.[46] Regarding the exercise of other Convention-related functions, the EU will only be consulted within the CM. The CM will be "required to take due account of the position that the EU may express, it being understood that it will not be bound by such position".[47] None of these provisions were subject to any CJEU objections, and remained unchanged during the second round of negotiations.

A distinct problem is the perceived threat to the Convention mechanism raised by block voting of the EU and its Member States. In particular non-EU Member States fear that the EU may dominate proceedings in the CM due to the sheer number of its Member States. In 1995, there were 15 EU members among the 38 Council of Europe Member States. Today, the ratio is 27 to 46. Adding candidate and other associated countries, the group of countries that regularly support EU common positions in the CM reaches the two-thirds majority that is required for the adoption of most CM decisions.[48]

[44] See art. 30(3) Vienna Convention on the Law of Treaties [1969]: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

[45] See Steering Committee for Human Rights (CDDH), Report of the 53rd Meeting, Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights, DG-II(2002)006, 28 June 2002, paras. 35–38.

[46] See art. 8(2) DAA, the new art. 54(1) ECHR, and para. 93 of the Draft Explanatory Report 2023, which specifies *in fine* that "these arrangements do not constitute a precedent for other Council of Europe conventions".

[47] Draft Explanatory Report 2023, para. 95. This principle is set out in art. 8(3) DAA.

[48] Art. 20(d) Statute of the Council of Europe [1949]: "All other resolutions of the Committee, including adoption of the budget, of rules of procedure and of financial and administrative regulations, recommendations for the amendment of articles of this Statute, other than those mentioned in paragraph *a*.v above, and deciding in case of doubt which paragraph of this article applies, require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee". In

This issue is particularly acute in relation to the supervision of the execution of ECHR judgments and friendly settlements, where the EU could, at least theoretically, use its majority in the CM to impose resolutions in cases against non-EU Member States or, as regards cases against the EU or against its Member States as co-respondents, to escape *de facto* from the control exercised by the Committee. It must be emphasised that in the latter cases there is an obligation of solidarity under EU law. As regards judgments against third countries or against EU Member States outside of a co-respondent context, the applicable rules of the EU treaties[49] would generally not impose a coordination of the position of the EU and its Member States. Such coordination is however possible under the EU's CFSP. As regards cases against EU Member States, the EU would generally be precluded from acting in a coordinated manner in the CM, either for lack of competence in the area to which the case relates or as a result of the prohibition to circumvent internal EU procedures.

When supervising the execution of ECHR judgments, the CM, by nature and composition a political organ, acts within the ECHR control mechanism with the task to ensure that respondent parties have discharged their legal obligations resulting from the Court's judgments.[50] The question whether the respondent State has taken all the individual and general measures which are required to give effect to a judgment by the Court is to be determined by legal analysis and must not be dictated by political expediency. From the Council of Europe's point of view, it was essential to ensure that EU accession will not affect the collective exercise by all High Contracting Parties of their joint responsibility for the supervision of the execution of judgments. The latter should as far as possible remain free of the political considerations which may otherwise influence decision-making in the CM.

Appendix III to the 2013 DAA already foresaw an additional Rule 18 to be included in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (CM Execution Rules) for decisions in relation to cases in which the EU is either respondent or co-respondent. Given that a legal obligation for EU coordination only exists in these cases, it was considered sufficient to limit the scope of application of this special voting rule to this context.

the absence of specific provisions on majorities in Rules of the Committee of the Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, as adopted by the Committee of Ministers of the Council of Europe on 10 May 2006 (CM/Del/Dec(2006)964/4.4), art. 20 (d) of the Statute applies also to CM decisions taken under arts 39 and 46 ECHR.

[49] These are in particular arts 28 and 29 TEU, as regards the EU's CFSP, art. 218(9) TFEU, as regards the adoption of "acts having legal effects" by bodies set up under international agreements, as well as the underpinning "principle of loyal cooperation" (art. 11(2) TEU).

[50] See, E Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability* (Council of Europe 2008) 32 ff; R Blackburn and J Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950–2000* (OUP 2001) 63 ff.

In the 2023 DAA the said balancing rule features as art. 8(4.a), in substance in the same form as in the 2023 DAA. A reference was merely added to clarify that the habitual majorities under the Council of Europe Statute or the ECHR would not apply in the cases to which the EU is a party. This was felt necessary from the point of view of hierarchy of norms given that the derogation from the habitual rules stipulated on the level of international treaties would only be anchored on the level of subordinate rules of procedure. Furthermore, a new paragraph 5 of art. 8 2023 DAA will add an additional paragraph 6 to art. 46 ECHR clarifying, for reasons of legal certainty, the inapplicability of the majorities laid down in the Convention for infringement proceedings in cases to which the EU is a party and that instead, the applicable majorities are to be drawn from the CM Execution Rules.[51]

The main modifications agreed to in the second round of negotiations were, consequently, made at the level of Rule 18 of the CM Execution Rules. First, account was taken of the fact that the 2013 version of the Rule did not sufficiently differentiate between the different categories of CM decisions. Some delegations found this problematic with a view to the growing number of votes taken in the CM in the recent past, e.g., on interim resolutions. The 2023 version of Rule 18 now includes a separate paragraph on interim resolutions to alleviate this concern.

The other issue of concern especially for the non-EU Member States was the possibility for the EU to block votes in its favour. This aspect was countered by introducing new safeguarding majorities of votes cast by representatives of non-EU Member States. Other options of reviewing Rule 18 were discussed in the course of the second round of negotiations, e.g., to give the EU and its Member States only one common vote or to deprive the respondent, in general, of its right to vote. Although simpler, these options were abandoned in the end – the 1-vote option for the necessity to preserve the equal participation of all High Contracting Parties, including the EU Member States, and the 0-vote option as inconsistent with the principle of collective supervision.[52]

The compromise reached on CM voting rules regarding execution decisions is of utmost importance for the credibility of the Convention system. Overall, the rather complex provisions of the revised DAA strike a fair balance between the requirements of legal certainty, efficiency and protection of the interests of non-EU Member States.

V. Election of judges

Judges to the ECtHR are elected by the Parliamentary Assembly of the Council of Europe ("PACE").[53] With the accession also the European Parliament should hence, in the name of the principle of equality of parties, be entitled to participate in these elections. The

[51] Draft Explanatory Report 2023, para. 105.

[52] 46+1 ad hoc Group, Meeting Report of the 16th Meeting of the CDDH ad hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights of 24 November 2022, 46+1(2022)R16, para. 7.

[53] Art. 22 ECHR.

principal role and tasks of the PACE are defined in the Statute of the Council of Europe. The DAA can only affect the Assembly's role under the Convention and cannot expand the participation rights of the European Parliament with regard to the general work of the PACE. This was clarified through an amendment of art. 7 2023 DAA, which now starts with the emphasis that a delegation of the European Parliament shall *only* be entitled to participate with a right to vote in the PACE when the latter exercises its functions pertaining to the election of judges under art. 22 ECHR.

As regards the list of candidates to be submitted to the PACE in respect of the judge for the EU, the 2013 Explanatory Report already stated that the modalities for the selection were to be defined in internal EU rules.[54] The 2023 version of the Explanatory Report now underlines, furthermore, the condition that such internal rules shall be consistent with the modalities defined by the relevant Council of Europe instruments.[55] While this is a welcome addition given that CM resolutions addressed to High Contracting Parties are not directly applicable to the EU as a non-member of the Council of Europe, respect for the principle of equality of parties could have been fostered even more by introducing a clause directly in the DAA providing generally that such instruments will be binding upon the EU.

VI. Conclusion

Confronted with CJEU Opinion 2/13, the negotiators faced a formidable challenge. It required the collective wisdom and sense of compromise of all negotiating parties to square the circle[56] and to find creative and practical solutions to the various objections raised by the CJEU. The revised Draft Accession Agreement is the result of a joint intellectual effort striking a fair balance between the constitutional requirements of the EU and the integrity of the Convention system.

Despite a relatively high number of formal amendments to the 2013 DAA, the solutions found are consistent with the guiding principles that all negotiating parties had agreed upon in 2010. The new provisions on inter-party applications and Protocol no. 16 largely accommodate the CJEU's position on the autonomy of EU law, without however sacrificing essential Convention principles. The ECtHR remains the final arbiter as regards the application of the Convention's rights and freedoms. Apart from addressing CJEU objections, the new round of negotiations also provided an opportunity to reconsider voting rights in the CM. On this vital issue for the credibility of the Convention system, the EU accepted to reinforce safeguards for non-EU Member States.

[54] Draft Explanatory Report 2013, para. 76.

[55] The Draft Explanatory Report 2023 refers, in para. 90, to Resolution CM/Res(2010)26 cit. and the Guidelines CM(2012)40 final of the Committee of Ministers of the Council of Europe of 29 March 2012 on the Selection of Candidates for the Post of Judge at the European Court of Human Rights.

[56] J Polakiewicz, 'EU Accession to the ECHR: How to Square the Circle?' (9 March 2020) Directorate of Legal Advice and Public International Law www.coe.int.

Only time will tell whether and when the revised Draft Accession Agreement will enter into force. It is in any case a sound basis to bring this "never-ending story"[57] to a happy end. For the cause of coherent human rights protection for the European continent, this will be of crucial importance. There will not be another chance. It is now or never.

[57] S Leutheusser-Schnarrenberger, 'Der Beitritt der EU zur EMRK: Eine schier unendliche Geschichte' in C Hohmann-Dennhardt/P Masuch/M Villiger (eds) *Grundrechte und Solidarität. Festschrift für Renate Jaeger* (Engel 2010) 135.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

THE 2023 DRAFT AGREEMENT ON THE EU ACCESSION TO THE ECHR: POSSIBLE "GAPS" AND "CRACKS" IN THE CO-RESPONDENT MECHANISM AND THE IMPLICATIONS FOR THE *BOSPHORUS* DOCTRINE

DEMI-LEE FRANKLIN* AND VASSILIS P TZEVELEKOS**

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ABSTRACT: Negotiations concerning the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) have resumed following the Court of Justice of the European Union's delivery of Opinion 2/13, resulting in a new Draft Accession Agreement in 2023. This *Article*

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focuses on the co-respondent mechanism provided for in the 2023 draft accession instruments. The application of the co-respondent mechanism shall result in the EU and its Member State(s) being held jointly responsible for ECHR violations owing to EU law, a key aim of the mechanism being to prevent the European Court of Human Rights (ECtHR) from allocating responsibility between the EU and its Member States. This *Article* briefly explores whether the co-respondent mechanism is solid enough to achieve its goals. The *Article* identifies three types of possible "loopholes" in the co-respondent mechanism and examines whether they could prompt the ECtHR to consider alternative avenues for holding the involved actors responsible or even refrain from exercising (full) scrutiny either through the so-called *Bosphorus* doctrine of equivalent protection or by devising a new test for this purpose. Thus, the *Article* also delves into the future application of the *Bosphorus* doctrine post-accession. The three types of possible "loopholes" in the co-respondent mechanism pertain to: a) the confines of and the criteria for the applicability of the co-respondent mechanism, and how widely this mechanism will be applied; b) how the involved actors will apply the co-respondent mechanism; and c) reservations to the ECHR.

KEYWORDS: EU accession to the ECHR – co-respondent mechanism – *Bosphorus* doctrine – equivalent protection – joint responsibility – autonomy of EU law.

I. INTRODUCTION

Following the Court of Justice of the European Union's (CJEU) delivery of Opinion 2/13,[1] which concluded that the 2013 draft agreement[2] on the European Union's (EU) accession to the European Convention on Human Rights (ECHR or Convention) is incompatible with EU law, negotiations on the same topic resumed in 2019.[3] These (re)negotiations led to

[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454. For an analysis of Opinion 2/13, see, amongst others, S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) German Law Journal 213; A Lazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) German Law Journal 179; E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union After Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 35; D Halberstam, '"It's Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) German Law Journal 105; B de Witte and Š Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' (2015) ELR 683; J Polakiewicz, 'Accession to the European Convention on Human Rights (ECHR) – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' (2016) HRLJ 10; S Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (18 December 2014) EU Law Analysis eulawanalysis.blogspot.com; T Lock, 'Oops! We Did it Again – The CJEU's Opinion on EU Accession to the ECHR' (18 December 2014) Verfassungsblog verfassungsblog.de; S Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice' (24 December 2014) Verfassungsblog verfassungsblog.de.

[2] 47+1 ad hoc group, Meeting report of the 5th Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights of 5 April 2013, 47+1(2013)008rev2. See also P Gragl, 'Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights' (2013) CMLRev 13.

[3] The accession of the EU to the ECHR has been a long-running saga, which has generated considerable scholarship. See, footnote 1. See also, amongst others, P Gragl, *The Accession of the European Union to the*

the 2023 final consolidated version of the draft accession instruments.[4] In this *Article* we focus on the co-respondent mechanism provided for in these instruments.[5] The application of this mechanism shall result in the EU and its Member State(s) being held jointly responsible for Convention violations owing to EU law,[6] a key aim of the mechanism being to prevent the European Court of Human Rights (ECtHR or Court) from allocating responsibility between the EU and its Member States, and thereby also avoid interferences with the EU's autonomy and "domestic" division of competences while allowing the ECtHR to rule on compliance with the Convention.[7]

The main question we explore in this *Article* is whether the co-respondent mechanism is solid enough to achieve its goals. To the best of our knowledge, we are the first to explore this question. We consider the answer to this question to be of fundamental importance: first, because it impacts accountability for human rights violations related to EU law and, second, because it may be decisive for the involved actors (e.g., the CJEU) to determine whether the terms of the accession instruments are compatible with EU and/or ECHR law, and meet their expectations and standards so that they can favour (or even authorise) the conclusion of the accession agreement. Our analysis identifies three different types of possible "loopholes" in the co-respondent mechanism and explores whether they could open the way for the ECtHR to consider alternative avenues for holding the involved actors (i.e., the EU and its Member States) accountable or even to refrain from exercising (full) scrutiny.

Abstaining from exercising scrutiny can conditionally be achieved through the so-called *Bosphorus* doctrine of equivalent protection, a test developed by the ECtHR to determine if/when it will review the conduct of EU Member States implementing EU law.[8] In

European Convention on Human Rights (Hart 2013); F Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015); C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaption' (2013) ModLRev 254; LFM Besselink, 'Acceding to the ECHR Notwithstanding the Court of Justice Opinion 2/13' (23 December 2014) Verfassungsblog verfassungsblog.de; V Kosta, N Skoutaris, and VP Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014).

[4] 46+1 ad hoc group, Final consolidated version of the draft accession instruments of 17 March 2023, 46+1(2023)36, which, *inter alia,* contains the text of the revised Draft Accession Agreement (2023 DAA) and, in appendix 5, the Draft Explanatory Report.

[5] See 2023 DAA, art. 3. For an examination of the co-respondent mechanism provided for in the 2013 draft accession agreement (Final Report 47+1(2013)008rev2 cit.), see T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) CMLRev 1025, 1038 ff. See also F Korenica and D Doli, 'The CJEU Likes to Blame Loudly and Applaud Quietly: The Co-Respondent Mechanism in the Light of Opinion 2/13' (2017) Maastricht Journal of European and Comparative Law 86.

[6] See 2023 DAA art. 3 para. 8.

[7] For a definition and discussion of the term "autonomy" as employed by the CJEU in *Opinion 2/13*, see, amongst others, P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) FordhamIntLJ 955; D Halberstam, "'It's Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' cit.

[8] The function of the *Bosphorus* doctrine is outlined in Section II, below.

such cases, judicial review also entails indirect scrutiny of EU law. Alternatively, the Court could replace or amend its *Bosphorus* test by devising a new set of criteria that conditionally enable it to self-restrain its powers and abstain from (indirectly) reviewing EU law.

If, after the EU's accession to the ECHR, the ECtHR decides to exercise scrutiny in a case involving EU law where the co-respondent mechanism does not apply, a number of options are available. Depending, of course, on the specifics of each case and on who the respondents are (e.g., if both the EU and its Member State(s) are respondents), the Court may, for instance, establish the shared responsibility of the EU and its Member States,[9] or even, if the EU Member States are the sole respondents, indirectly review EU law by scrutinising the conduct of the Member States in implementation of EU law.

Among the alternative avenues that may be available to the Court after the EU's accession to the ECHR if the co-respondent mechanism cannot be applied (possibly due to one of the "loopholes" identified in this article), this *Article* primarily focuses on the *Bosphorus* doctrine. We concentrate on the *Bosphorus* doctrine because it is the "standard" test that the Court has used in cases involving EU law. Moreover, as mentioned earlier and as we further explain in the main part of this *Article*, the *Bosphorus* test can either lead to judicial self-restraint, resulting in no scrutiny by the ECtHR – which we find problematic for human rights protection, accountability, and access to justice – or result in an indirect review of EU law and an implied allocation of responsibility,[10] thus interfering with the autonomy of the EU order. This is exactly what the co-respondent mechanism aims to prevent through the joint responsibility of the EU and its members. Thus, a secondary question that we explore

[9] Shared responsibility may exist when two or more actors contribute to a common harm/injury. Among other scenarios of shared responsibility, the ECtHR may establish the derived responsibility of one of these actors in connection with the (at least *prima facie* wrongful) conduct of the other. In doing so, the ECtHR will be expected to apply the relevant provisions of the UN, International Law Commission of the United Nations, Draft Articles on the Responsibility of International Organisations of 2011, UN Doc A66/10, arts 14–17 and arts 58–62, notably arts 17(1) and 61 legal.un.org. Should an internationally wrongful act of the actor from whom responsibility is derived be established, the relevant actors (i.e., the EU and its Member State(s)) will share responsibility. Moreover, provided an application is directed against the EU and its Member State(s) and the co-respondent mechanism is not applicable, shared responsibility could also be achieved through dual attribution of the same conduct to both of these actors. However, this is something that the ECtHR has refrained from doing in the past. See ECtHR *Behrami and Behrami v France and Saramati v France, Germany and Norway* App n. 71412/01 and 78166/01 [2 May 2007]. For a discussion of dual attribution and the variants of responsibility under general international law, see SØ Johansen, 'Dual Attribution of Conduct to Both an International Organisation and a Member State' (2019) Oslo Law Review 178; T Dannenbaum, 'Dual Attribution in the Context of Military Operations' (2015) International Organizations Law Review 401, 405 ff; C Ryngaert, 'The Responsibility of Member States of International Organizations' (2015) International Organizations Law Review 502, 507 ff. See also A Nollkaemper, J d'Aspremont, C Ahlborn and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15.

[10] By determining that a State's implementation of EU law breaches the ECHR, the ECtHR may indirectly assess the compatibility of the relevant EU law with ECHR standards. In doing so, the Court can indirectly allocate responsibility between the EU (e.g., because its law is incompatible with the ECHR) and the State (because its conduct in implementing EU law is incompatible with the ECHR).

in this *Article* is when the Court may, and if the Court should, continue to apply the *Bosphorus* doctrine once the EU has become a party to the ECHR.[11]

The *Article* proceeds as follows. Section II briefly examines the origins and function(s) of the *Bosphorus* doctrine. Section III turns to the co-respondent mechanism, critically outlining the mechanism's *modus operandi* and key goal, namely the joint responsibility of the EU and its Member State(s) in cases wherein violations of the Convention stem from EU law. This also means that, following the accession of the EU to the ECHR, *prima facie*, no space shall remain for the continued application of the *Bosphorus* doctrine. Section IV assesses the co-respondent mechanism's confines and function, seeking to identify and briefly evaluate certain possible "cracks" or "gaps" (i.e., "loopholes") in this mechanism and whether these may and should prompt the Court to continue employing its *Bosphorus* doctrine after the EU has acceded to the ECHR. Section V concludes.

II. The equivalent protection doctrine

Although the seeds of the ECtHR's equivalent protection doctrine had been sown in earlier case law,[12] the doctrine reached maturity in the *Bosphorus* judgment.[13] In that case, the applicant complained in relation to the impoundment of an aircraft by the Irish authorities in implementation of EU law. Having acknowledged that the impoundment was "not the result of an exercise of discretion by Irish authorities [...] but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93",[14] the ECtHR proceeded to assess whether the Irish authorities had struck "a fair balance [...] between the demands of the general interest

[11] The question of the future of the *Bosphorus* doctrine has been the subject of existing literature. Yet, this mostly concerns the 2013 Draft Accession Agreement that the CJEU found in Opinion 2/13 to be incompatible with EU law. See, for instance, T Lock, 'The ECJ and the ECtHR: The Future Relationship Between the Two European Courts' (2009) LPICT 375; P Gragl, 'Strasbourg's External Review After the EU's Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?' (2012) Tilburg Law Review 32; P de Hert and F Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) German Law Journal 874; O De Schutter, 'Bosphorus Post-Accession: Redefining the Relationship Between the European our of Human Rights and the Parties to the Convention' in V Kosta, N Skoutaris and VP Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 177; D Engel, 'The Future of the Bosphorus-Presumption After the EU's Accession to the European Convention on Human Rights' in S Lorenzmeier and V Sancin (eds), *Contemporary Issues of Human Rights Protection in International and National Settings* (Bloomsbury 2018) 133, 140. For a more recent discussion, see Š Imamović, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine' (2024) Utrecht Journal of International and European Law 17.

[12] For instance, European Commission of Human Rights (EComHR) *X v Federal Republic of Germany* App n. 235/56 [10 June 1985]; EComHR *M & Co v Federal Republic of Germany* App n. 13258/87 [9 January 1990].

[13] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App n. 45036/98 [30 June 2005] (*Bosphorus*).

[14] *Bosphorus* cit. para. 148.

[...] and the interest of the individual company concerned".[15] In doing so, the Court noted the need to establish "the extent to which a State's action can be justified by compliance with its obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty".[16] It was the ECtHR's consideration of this question that led to its formulation of the equivalent protection doctrine.

In accordance with the equivalent protection doctrine, a rebuttable presumption of compliance with the Convention will arise when a State "does no more than implement legal obligations flowing from its membership of"[17] an international organisation, provided the international organisation affords (at least) equivalent protection to fundamental rights as offered by the ECHR. When alleged violations of the Convention owe to States' compliance with obligations stemming from an international organisation of which they are a member, the ECtHR will therefore presume that the conduct at issue does not constitute a violation of the Convention (thereby abstaining from exercising scrutiny) if – and only if – the respondent State(s) exercised no discretion as to its/their means of compliance with the obligation(s) stemming from the international organisation (that is, the EU) *and* the international organisation at issue offers equivalent protection of fundamental rights as provided under the Convention.[18] By "equivalent protection", it is meant that the international organisation offers "comparable"[19] protection as afforded under the Convention, with respect to "both substantive guarantees offered and the mechanisms controlling their observance".[20] Any finding of equivalent protection may, however, be rebutted in the event that, "in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient".[21] The establishment of the exercise of discretion by a respondent State *or* a finding that the international organisation in question does (in general) or did (in the particular case) not offer equivalent protection of fundamental rights therefore leads to the inapplicability of the equivalent protection doctrine. However, if a presumption of equivalent protection arises and is maintained, the ECtHR will abstain from exercising full scrutiny and, consequently, not establish any violation(s) of the Convention.

Provided the necessary criteria are fulfilled, *Bosphorus*' equivalent protection doctrine therefore functions to adjust the depth of scrutiny exercised by the ECtHR when alleged

[15] *Ibid*. cit. para. 149.

[16] *Ibid*. cit. para. 154.

[17] *Ibid*. cit. para. 156.

[18] Note that in subsequent cases, the ECtHR has necessitated the fulfilment of additional criteria, such as the requirement that the mechanisms of protection of the international organisation in question have been deployed to their full potential. See, for instance, ECtHR *Michaud v France* App n. 12323/11 [6 December 2012] paras 112–116.

[19] *Bosphorus* cit. para. 155.

[20] *Ibid*. cit. para. 155.

[21] *Ibid*. cit. para. 156. See, for instance, ECtHR *Bivolaru and Moldovan v France* App n. 49324/16 and 12623/17 [25 March 2021] paras 117–126.

violations of the Convention are the result of State conduct in compliance with obligations stemming from an international organisation that affords equivalent protection to fundamental rights. Since the crystallisation of the doctrine in *Bosphorus*, the Court has – more or less –[22] consistently applied the doctrine in cases concerning alleged ECHR violations arising from States' compliance with EU obligations. Moreover, the ECtHR has recently reaffirmed the applicability of the equivalent protection doctrine to cases concerning the implementation of EU law by States,[23] thereby indicating that the *Bosphorus* doctrine still firmly has a place in the case law of the ECtHR concerning allegations of violations owing to EU law pre-accession.

III. An alternative to *Bosphorus*: The joint responsibility of the EU and its Member States on the basis of the co-respondent mechanism

Although the *Bosphorus* doctrine continues to play a prominent role in the case law of the ECtHR concerning state conduct in implementation of EU law pre-accession, the future (if any) of the doctrine post-accession is less clear. This is particularly so given that the future of the *Bosphorus* doctrine will significantly depend upon the terms of the Draft Accession Agreement, as these will be interpreted and applied by the involved actors. In this respect, the key point to make is that, through the co-respondent mechanism that it establishes, the Draft Accession Agreement shifts to a "model" of joint responsibility in terms of which the ECtHR shall abstain from allocating responsibility between the EU and its Member States. The application of this model shall render unnecessary (i.e., shall replace) the *Bosphorus* doctrine. Yet, the latter may still be employed if and to the extent that the co-respondent mechanism does not apply such as to bring the EU and its Member States under the same "veil". Before further unpacking this point, we briefly explain how the co-respondent mechanism results in the EU and its Member States being held jointly responsible. We then outline the co-respondent mechanism's structure, highlighting certain aspects in its design that may raise concerns.

[22] For a discussion of ECtHR's case law involving EU law following Opinion 2/13, see R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' (2024) European Papers 647 www.europeanpapers.eu. See also J Callewaert, 'Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights' (2023) European Papers www.europeanpapers.eu 331, 333 ff; D Franklin and VP Tzevelekos, 'The ECtHR Bosphorus Doctrine in Cases Calling for Indirect Scrutiny of EU Law: Judicial Smoke Signals?' in V Pergantis (ed), *EU Responsibility in the International Legal Order* (Sakkoulas 2023) 35. There are some inconsistencies in the ECtHR's approach. For instance, the ECtHR has occasionally refrained from applying the doctrine in cases in which it appears to be applicable. E.g., ECtHR *Robert Stapleton v Ireland* App n. 56588/07 [4 May 2010]. Moreover, the ECtHR has refined the equivalent protection doctrine through its case law. See, for instance, *Michaud v France* cit. paras 112–116; ECtHR *MSS v Belgium and Greece* App n. 30696/09 [21 January 2011] paras 338–340.

[23] For instance, ECtHR *Avotiņš v Latvia* App n. 17502/07 [23 May 2016]; *Bivolaru and Moldovan v France* cit. See also SØ Johansen, 'EU Law and the ECHR: The Bosphorus Presumption is Still Alive and Kicking – The Case of Avotiņš v. Latvia' (24 May 2016) EU Law Analysis eulawanalysis.blogspot.com.

III.1. The co-respondent mechanism and joint responsibility

Following its accession to the Convention, the EU will be under an obligation to safeguard the rights enshrined in the ECHR, with allegations of violations of these rights being subject to the full and direct scrutiny of the ECtHR. Although the EU's accession to the Convention will make it a party on par with the 46 Member States, it has been recognised that, given the nature of the EU as a (unique type of) international organisation, "its accession requires certain adjustments to the Convention to be made".[24] Amongst other adjustments, in recognition of the "special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties established by its member States may be implemented by institutions, bodies, offices or agencies of the EU",[25] art. 3 of the Draft Accession Agreement provides for the establishment of a co-respondent mechanism under art. 36 ECHR.[26]

The co-respondent mechanism could metaphorically be described as a "veil" between, on the one hand, the ECtHR that assesses the compatibility of certain conduct with the ECHR and, on the other, the EU and its Member States. The whole idea of the co-respondent mechanism is that the ECtHR shall not pierce this fictional "veil", whose aim is to "hold" the EU and its Member States "together" and keep their inter-relationship, distribution of competences, and common "domestic" legal order under EU law intact. The autonomy of EU law will thereby be preserved, and the ECtHR will not interfere with the EU's *interna corporis*.[27] The means (but, possibly, also the "cost") to achieve these goals is joint responsibility. To abstain from piercing the EU's "veil", the ECtHR will stop short of the allocation of responsibility between the EU and its members.[28] Through the application of the co-respondent mechanism, these two actors, namely the organisation and its Member States,

[24] See 2023 DAA preamble.

[25] See Draft Explanatory Report, para. 46.

[26] See 2023 DAA art. 3.

[27] An interesting question is, however, whether this will also be equally the case when the Council of Europe's Committee of Ministers will be monitoring the execution of judgments under the co-respondent mechanism and the measures that the EU and/or its Member State(s) will be taking to comply with such a judgment.

[28] It is unclear whether this may also require, or perhaps simply cause, the Court to also abstain from attributing conduct to the EU and/or its Member States. As in cases before its pre-accession, the Court may be required to examine questions surrounding the attribution of conduct as part of its admissibility assessment. Should the Court proceed with an examination of the attribution of conduct in cases wherein alleged violations stem from Member States' conduct in compliance with EU law, it may opt to follow the approach set out in *Bosphorus* cit. and its subsequent case law, in accordance with which the conduct of Member States undertaken in (strict) compliance with their obligations under EU law is attributable to the State. Indeed, such an approach appears likely given that the accession agreement provides as follows: "For the purposes of the Convention, of the Protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union" (Final consolidated version of the draft accession instruments 46+1(2023)36 cit. art. 1(4)).

will essentially be treated as one single, (co-)respondent actor. As a result, when the co-respondent mechanism is applied, the EU and its Member States will be held jointly responsible for any violations established. Under art. 3(8) of the Draft Accession Agreement, when the co-respondent mechanism applies and a violation is established, the ECtHR cannot but hold the co-respondents jointly responsible.[29] Therefore, with the co-respondent mechanism, the ECHR system shifts from a model of allocating responsibility individually, in accordance with which the ECHR contracting parties may separately incur responsibility for ECHR violations owing to (the implementation of) EU law,[30] to a model of joint responsibility, wherein the EU and its Member States shall jointly incur responsibility for their combined contributions to the occurrence of violations of the Convention.

III.2. The "mechanics" of the co-respondent mechanism: a critical overview

As to the "mechanics" of the co-respondent mechanism, in accordance with the draft accession instruments, both the EU and its Member States may become a co-respondent (i.e., co-party)[31] to proceedings directed against one or more of the EU Member States or the EU itself, respectively. As outlined in the paragraphs that follow, three "paths" to the co-respondent mechanism's application exist.

First, the EU may become a co-respondent to proceedings directed against one or more of its Member States if it appears that an alleged violation "calls into question the compatibility with the rights at issue defined in the Convention or in the Protocols to which the European Union has acceded of a provision of European Union law [...], notably where that violation could have been avoided only by disregarding an obligation under European Union law".[32] In other words, the EU may join proceedings as a co-respondent when an alleged violation of the ECHR appears to owe to an EU Member State's compliance with an obligation stemming from (primary or secondary)[33] EU law, "notably" where that State exercises no discretion as to how it shall comply with EU law.[34]

[29] See 2023 DAA art. 3 para. 8.

[30] The aim of the *Bosphorus* doctrine has been to mitigate this model by conditionally enabling the ECtHR to exercise self-restraint in scrutinising the conduct of States parties to the ECHR in implementation of EU law.

[31] As set out in 2023 DAA art. 3, "[a] co-respondent is a party to the case". In this sense, the status of co-respondents differs to the status of third-party interveners. See Draft Explanatory Report, paras 53–54.

[32] See 2023 DAA art. 3, para. 2.

[33] See Draft Explanatory Report, para. 56.

[34] It is interesting to note that 'discretion' appears to be a criterion that the *Bosphorus* doctrine and the co-respondent mechanism have in common. Yet, the absence of discretion under *Bosphorus* can lead to self-restraint by the ECtHR and no exercise of scrutiny, whereas under the co-respondent mechanism, the same criterion, namely the absence of discretion, leads to joint responsibility. Alternatively, the existence of discretion can lead to the exercise of full scrutiny, individual responsibility, and indirect review of EU law under *Bosphorus*, whilst the existence of discretion *may* preclude joint responsibility through the co-re-

A number of questions arise with respect to this first "path" of the co-respondent mechanism and the requirements for its employment. First, what is meant by the word "notably" in this context? [35] Does "notably" imply that the precondition for the applicability of the co-respondent mechanism, namely that the alleged violation could have been avoided *only* by disregarding an obligation under EU law, is not the only precondition or is not a "strict" precondition? Should it be read as meaning that the co-respondent mechanism applies first and foremost, but not exclusively, when EU Member States enjoy no discretion in the way they implement EU law? Could it then be that the co-respondent mechanism may be applied other than when the "no discretion" criterion is fulfilled? If so, could the EU become a co-respondent when a Member State exercises discretion as to its implementation of EU law, which could enable it to harmonise its obligations under the EU order and the ECHR? If so, what are the criteria for the co-respondent mechanism's application, other than the absence of discretion? Who shall establish these criteria or decide on their fulfilment? How low could the "bar" be set for the co-respondent mechanism to apply? Ultimately, the key questions to ask are what triggers the applicability of the co-respondent mechanism, and how high or low should the threshold for the mechanism's application be? What should determine this threshold? Could the co-respondent mechanism be "all encompassing" and apply at any time EU law is involved? This set of questions raises important issues pertaining to legal certainty, foreseeability, and consistency in the application of the co-respondent mechanism.

Similar to the first "path", under the second "path" a Member State of the EU may become a co-respondent to proceedings directed against the EU if it appears that an alleged violation of the ECHR

> "calls into question the compatibility with the rights at issue defined in the Convention or in the Protocols to which the European Union has acceded of a provision of the Treaty on

spondent mechanism. Moreover, one may question whether determining if Member States exercise discretion in implementing EU law requires or amounts to interpreting EU law, which could potentially interfere with the autonomy of EU law.

[35] The explanatory report provides that in cases directed against the EU, the criteria for the application of the co-respondent mechanism would be fulfilled, "for instance, if an alleged violation could only have been avoided by a member State disregarding an obligation under EU law (for example, when an EU law provision *leaves no discretion* to a member State as to its implementation at the national level)" (emphasis added) (See Draft Explanatory Report, para. 56). Admittedly, the phrases "for instance" and "for example" leave space for circumstances other than the absence of discretion in which an alleged violation "calls into question the compatibility with the rights at issue defined in the Convention or in the Protocols to which the European Union has acceded of a provision of European Union law" to exist. Moreover, the term "notably" in 2023 DAA art. 3, para. 2 may be interpreted to suggest that this is also only one example of a circumstance in which the co-respondent mechanism's criteria would be fulfilled. "Notably" may be read as discretion will especially, but not only, be the criterion rendering the co-respondent mechanism applicable. It remains to be seen in future practice if scenarios/criteria other than discretion will ever determine the applicability of the co-respondent mechanism and what these scenarios/criteria will be.

> European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments".[36]

In other words, EU Member States may join proceedings directed against the EU as a co-respondent when an alleged violation appears to stem from an obligation on the EU under EU primary law. The same questions as with respect to the first "path" can be raised here regarding the term "notably" and the criteria and threshold for the applicability of the co-respondent mechanism as a means for the ECtHR to abstain from allocating responsibility between the EU and its members.

The third "path" is a combination of the other two "paths" and stems as a logical consequence of their combination. Should complaints be directed against both the EU and its Member State(s), either party may have its status changed to co-respondent if the criteria under the two paths outlined above are fulfilled.[37] "Path three" "inherits" the ambiguity caused by the term "notably" in "paths" one and two.

As to who can take the initiative to apply the co-respondent mechanism, if the criteria for the mechanism's application – vague as these criteria may be, due, *inter alia*, to the word "notably" – appear to be fulfilled, the mechanism may be initiated by the EU or its Member States. Alternatively, these actors can be invited by the ECtHR to join proceedings as a co-respondent.[38] Although it is for the Court to admit a co-respondent to proceedings, it shall only do so "if a reasoned assessment by the European Union sets out that the conditions" for the co-respondent mechanism's application "are met".[39] If applied, the co-respondent mechanism may also only be terminated if the EU provides a renewed assessment that determines that these conditions are no longer met.[40] While the applicant will be afforded an opportunity to state their views on the matter,[41] the explanatory report provides that the EU's assessment will be "considered as determinative and authoritative".[42]

Although, formally, it is the ECtHR which can (i.e., has the power to) admit a co-respondent, in essence, it is therefore ultimately for the EU to determine whether the co-respondent mechanism can/shall be applied in any particular case. This raises another set of important questions. Is a *carte blanche* for establishing the criteria for the application of the co-respondent mechanism and determining whether these criteria have been fulfilled therefore afforded to the EU? If so, given the vague nature of the criteria triggering the co-respondent mechanism, could granting such unconditional authority to the EU

[36] See 2023 DAA art. 3, para. 3.
[37] *Ibid*. para. 4.
[38] *Ibid*. para. 5.
[39] *Ibid*. para. 5.
[40] See Draft Explanatory Report, para. 66.
[41] See 2023 DAA art. 3, para. 5.
[42] See Draft Explanatory Report, para. 61.

prompt it to abstain from acting in a principled manner? We recognise that the EU is highly motivated, mainly by the desire to protect its autonomy, to use the co-respondent mechanism, but we also believe that possible "cherry picking" by the EU – which cannot be expected to always maintain neutrality or dispassionateness where its own interests are involved – in the cases where the co-respondent mechanism shall (or shall not) apply may undermine legal certainty or lead to inconsistencies in the case law of the ECtHR concerning alleged violations owing to EU law. For instance, is it possible that through its reasoned assessment the EU may not find the criteria for the co-respondent mechanism's application to be fulfilled in one case, and yet find the same criteria to be fulfilled in another similar case? This possible inconsistent and/or unprincipled application of the co-respondent mechanism could result in uncertainty not only for victims of human rights violations, but also for all other involved actors. However, here yet further questions arise: are there any limits on the "determinative and authoritative" nature of the EU's reasoned assessment? Is this assessment by the EU *legibus solutus* from the perspective of the ECHR legal order? Who can (judicially) review the EU's reasoned assessment to ensure, *inter alia*, compliance with the right to access to justice? Then, what shall happen if the ECtHR fails (possibly by establishing certain criteria or a test) to "comply" with the EU's "determinative and authoritative" reasoned assessment, because it disagrees with this assessment or because it finds the reasoning to be lacking or incompatible with ECHR standards, for instance? We return to some of these questions in Section IV, below. First, a few clarifications on the inter-relationship between the co-respondent mechanism and the *Bosphorus* doctrine are necessary.

III.3. The co-respondent mechanism and the *Bosphorus* doctrine

If a violation of the Convention is established in proceedings in which the EU or its Member State(s) are a co-respondent, the Draft Accession Agreement provides that the ECtHR "shall hold the respondent and the co-respondent jointly responsible for that violation".[43] What does this mean for the *Bosphorus* doctrine? Following the accession of the EU to the ECHR, the door will be opened to the exercise of full and direct scrutiny by the ECtHR over the conduct of the EU and its Member States. Although the ECtHR may continue to be faced with allegations of violations owing to EU Member States' implementation of EU law with respect to which they exercise no discretion as to how they shall comply (in which case, the Court currently applies the *Bosphorus* doctrine as the EU is not a party to the ECHR), the Draft Accession Agreement and the co-respondent mechanism established therein offer the possibility for the EU to join such proceedings directed against its Member States as a co-respondent and *vice versa*. Post-accession, there therefore seems

[43] See 2023 DAA art. 3, para. 8.

little reason for the ECtHR to self-restrain the exercise of its scrutiny through the continued application of the *Bosphorus* doctrine when a complaint is directed against an EU Member State implementing EU law.

Indeed, any finding of a presumption of equivalent protection for the purposes of judicial self-restraint in such circumstances would seemingly afford a privilege to the EU[44] and undermine the very objective of the accession, namely to "enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the Convention system".[45] Moreover, the application of the *Bosphorus* doctrine post-accession in proceedings in which the EU is (co-)respondent appears contrary to the requirement outlined in the explanatory report that "[t]he current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties".[46] The draft accession instruments and the co-respondent mechanism established therein therefore *prima facie* leave little space for *Bosphorus* post-accession. Indeed, perhaps the rendering of the *Bosphorus* doctrine redundant in order to enable the ECtHR to find violations of the ECHR that ultimately owe to the EU order may be considered an important rationale of the Draft Accession Agreement and a key aim of the EU accession to the ECHR. The co-respondent mechanism and the joint responsibility that it establishes are the means to that end. However, among other options that we identified in the introduction of this article, the *Bosphorus* doctrine or a new test replacing it may still be applied if and to the extent that the co-respondent mechanism fails to apply. But how well can the co-respondent mechanism achieve its goals? Are there any "gaps", "cracks" or, more generally, "loopholes" in its design?

IV. "Gaps" or "cracks" in the co-respondent mechanism?

Although the co-respondent mechanism has been designed to leave, in principle at least, no space for the *Bosphorus* doctrine post-accession, our discussion turns here to highlighting potential "loopholes" in the co-respondent mechanism that can undermine its applicability. These "loopholes" could open the way for the ECtHR to consider avenues other than the co-respondent mechanism to either self-restrain its judicial scrutiny or hold the involved actors (i.e., the EU and its Member State(s)) accountable. As explained in the introduction, judicial scrutiny could result in the Court establishing the shared responsibility[47] of the EU and its members, or even indirectly reviewing EU law by scrutinis-

[44] Gragl and Lock contend that the privilege afforded by the *Bosphorus* doctrine ought not to be granted to the EU post-accession. See, P Gragl, 'Strasbourg's External Review After the EU's Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?' cit. 54; T Lock, 'The ECJ and the ECtHR: The Future Relationship Between the Two European Courts' cit. 395.

[45] See Draft Explanatory Report, para. 1.

[46] *Ibid*. para. 7.

[47] See footnote 9.

ing the conduct of EU Member States. But the Court may also decide to refrain from exercising full scrutiny, either through the *Bosphorus* doctrine or by devising a new test for this purpose. Therefore, the "loopholes" can offer space for the *Bosphorus* doctrine to continue to apply in the case law of the ECtHR post-accession. Consequently, the *Bosphorus* test may result in the ECtHR indirectly allocating responsibility between the EU and its Member States, rather than holding the EU and its members jointly responsible as the co-respondent mechanism prescribes. This also depends on the potential "gaps" or "cracks" in the co-respondent mechanism and the extent to which they allow the Court to apply alternatives. Of course, whether such possible "loopholes" will be utilised by the ECtHR to maintain the *Bosphorus* doctrine, replace it with a new, equally ECtHR-made, doctrine, apportion responsibility between the EU and its members, or hold them jointly responsible through means other than the co-respondent mechanism remains to be seen. In the lines that follow, we briefly identify and discuss three possible types of "loopholes" in the design of the co-respondent mechanism.

IV.1. Possible "loophole" type one: The co-respondent mechanism's confines

The co-respondent mechanism comes with certain prerequisites and conditions that render it applicable. These are the mechanism's confines. We have already raised the question of the absence of the requisite/desirable clarity as to the precise criteria triggering the co-respondent mechanism's application, focusing in particular on the meaning and function of the term "notably" as to the criterion of the absence of discretion in the implementation of EU law. The relevant questions that we raised in Section III.2 of the *Article* result in uncertainty as to how wide the co-respondent mechanism's cast will be. Arguably, wide applicability of the co-respondent mechanism would increase the likelihood of treating the EU and its Member States as "one" entity behind one common "veil" with a view to possibly holding them jointly responsible. *Vice versa*, narrow applicability of the mechanism would result in more chances for the ECtHR to apply its *Bosphorus* doctrine or proceed with one of the other avenues that we identified earlier.

To provide a clearer understanding of how the criteria for the applicability of the co-respondent mechanism can influence scrutiny by the ECtHR, let us consider the following scenarios. Imagine that the word "notably" was absent from the text of the relevant provisions, such that the sole precondition triggering the co-respondent mechanism was, without doubt, the absence of discretion in the implementation of EU law. Alternatively, imagine that the provisions at issue are interpreted narrowly, such that the existence of discretion excludes the co-respondent mechanism. What shall happen under these scenarios if a particular case involving EU law entails the exercise of discretion?

If the co-respondent mechanism is read as only applying when States have no discretion in the implementation of EU law and, in a particular case, discretion in the implementation of EU law by Member States exists, the co-respondent mechanism will be in-

applicable. Thus, the Court will be unable to hold the EU and its members jointly responsible through the co-respondent mechanism. Accordingly, the ECtHR could be prompted to apply its *Bosphorus* doctrine. In accordance with this doctrine, the exercise of discretion in the application of EU law by the respondent state enables the Court to exercise full scrutiny. That is, under this scenario, the *Bosphorus* test would not lead to judicial self-restraint. Accordingly, if the Court applied the *Bosphorus* doctrine in this scenario, it would proceed with scrutinising the conduct of the sole respondent before it, i.e., the EU Member State giving effect to EU law. If a violation were found, the EU Member State would be found individually responsible for its own conduct in implementation of EU law. But, in a case like this, the Court could also be indirectly reviewing the EU law in question. In this way, it could find that the relevant EU law, its interpretation (by the CJEU), or its implementation do not satisfy the exigencies of the ECHR. This is exactly what the co-respondent mechanism and joint responsibility as a means to abstain from interfering with the EU order sought to avoid. Alternatively, if the ECtHR wishes to abstain from interfering with EU law when the co-respondent mechanism is inapplicable and the *Bosphorus* doctrine leads to scrutiny, it might have to devise a new test/set of criteria enabling it to self-restrain its scrutiny –which is clearly problematic from the perspective of human rights, access to justice, and accountability. To prevent all of this, the co-respondent mechanism should apply as widely as possible, including when Member States exercise discretion in implementing EU law.

IV.2. Possible "loophole" type two: Good faith by the involved actors, their willingness to engage with the co-respondent mechanism, and the question of trust

Moving to another type of possible "crack" in the co-respondent mechanism, these "cracks" may be seen as stemming from the willingness, or lack thereof, of the involved actors to apply the co-respondent mechanism and duly engage with it. The three key involved actors are the ECtHR and the two possible co-respondents, namely, on the one hand, the EU and, on the other, its Member States. In accordance with art. 3(5) of the accession agreement, "[t]he European Union or its member States may become a co-respondent, either by accepting an invitation from the Court or upon their initiative. The Court shall admit a co-respondent by decision if a reasoned assessment by the European Union sets out that the conditions in paragraph 2 or 3 of this article are met."[48] This is the framework provided by the Draft Accession Agreement. However, for this framework to function as intended, it requires that the parties involved co-operate in good faith and place trust in one another.

[48] See 2023 DAA art. 3, para. 5.

a) The ECtHR

Starting then with the ECtHR, the explanatory report clarifies that the EU's reasoned assessment will be "determinative and authoritative",[49] thus binding for the ECtHR. The accession agreement and its co-respondent mechanism emanate an "understanding" that the ECtHR shall have no say on the applicability of the co-respondent mechanism. A "green light" by the EU may well establish a duty for the ECtHR to apply the co-respondent mechanism and *vice versa*, but then, in practice, it will be up to the ECtHR to apply the mechanism. Could the ECtHR therefore ever discard the reasoned assessment of the EU and/or set conditions that ought to be met for that assessment to be valid and/or generate effects resulting in the application of the co-respondent mechanism? Once the EU has acceded to the ECHR, the ultimate, last-word interpreter of the accession agreement will be the ECtHR itself. Is there something – other than an expectation that the ECtHR acts in good faith and in a spirit of self-restraint – that guarantees that the ECtHR will not interpret the rules on the co-respondent mechanism in a manner that erodes the power of the EU and its position as the sole competent to decide in a "determinative and authoritative" manner whether the co-respondent mechanism shall apply? Are there any guarantees that the ECtHR will never deny the EU's wish for the co-respondent mechanism to apply or that it will not treat the EU or its Member States as co-respondents in a case where the EU has declared the mechanism to be inapplicable? In similar terms, are there any guarantees that the ECtHR will not proceed with applying – as per the EU's reasoned assessment – the co-respondent mechanism, but include elements within its reasoning that allocate responsibility between the EU and its Member States in a particular case, thereby compromising EU autonomy?

Moreover, it is important to highlight that there may be genuine practical reasons pertaining to the ECHR's systemic design that require the ECtHR to depart from the logic of the co-respondent mechanism's "impenetrable" veil that unites the EU and its Member States. The argument we are making here can serve as evidence that the co-respondent mechanism may not be as watertight as its drafters and the EU order, including the CJEU, might desire. Indeed, there may be good reasons why the co-respondent mechanism's fictional "veil" should be "translucent". For instance, a factor that may very legitimately prompt the ECtHR to include elements of responsibility allocation between the EU and its members in a judgment where they are co-respondents is the need to clearly guide the Council of Europe's Committee of Ministers on what each co-respondent must do in order to comply with the ECtHR judgment. Besides, the ECtHR may be explicitly asked to do so by the Committee of Ministers if the latter, acting on the basis of Rule 10 of the "Rules of the Committee

[49] See Draft Explanatory Report, para. 61.

of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements", refers a judgment to the Court for a ruling on its interpretation.[50]

b) The EU

Similar questions pertaining to good faith and good will can also be asked regarding the EU. The co-respondent mechanism has been designed to afford discretion to the EU as to the application of the co-respondent mechanism and, essentially, the power to decide when it can apply. It appears that the co-respondent mechanism is thus somewhat "voluntary" and contingent upon the EU's discretion. As we argued in Section iii.2, this could turn out to be problematic. For instance, what if, for its own reasons, the EU fails to act in good faith?[51] What if the EU decides the applicability of the co-respondent mechanism on the basis of motivations and criteria that are foreign to the reasons for which the co-respondent mechanism has been created? What if the EU abuses its power to block the application of the co-respondent mechanism? What if, for any reason, such as the promotion of self-interests, the EU decides through its reasoned assessment to prevent the co-respondent mechanism from applying in a particular case where this should apply? The questions then arise of who is entitled to control the EU and its practice pertaining to the co-respondent mechanism, and how can they do so? Can and should the ECtHR play a role in this respect?

We acknowledge that the EU has strong motivations – primarily, the protection of its autonomy – to apply the co-respondent mechanism. In principle, through the co-respondent mechanism, the EU safeguards its self-interests. However, there is no assurance that there will not be instances in which the EU, driven by stronger interests or motivations, might choose to "block" the application of the co-respondent mechanism. Ultimately, the EU can deprive the ECtHR of the opportunity of having it (the EU) and its member(s) as co-respondent(s) and, if a violation of the ECHR exists, from finding them jointly responsible. This can be problematic from several perspectives. "Forcing" the EU and its Member States to stand as co-respondents could be entirely justified for a number of reasons, including the avoidance of double standards or abusive exercise by the EU of the power to prevent the co-respondent mechanism from applying, ensuring consistency in the application of the co-respondent mechanism, and upholding the right to access to justice. Yet, "forcing" the EU to act as a co-respondent when it does not wish to do so might create tension in the relationship between the ECHR regime and the EU.

In the end, depending on the circumstances of a given case questioning the compatibility of EU law with the ECHR and who the respondents are, if the ECtHR accepts that

[50] Committee of Ministers of the Council of Europe, Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, adopted 10 May 2006, amended 18 January 2017.

[51] See also V Pergantis, 'Shades of Trust: The ECtHR, the ECJ and Their Evolving Relationship in Light of the 2023 Revised Draft Accession Agreement' (2024) European Papers 801 www.europeanpapers.eu, who makes a similar argument about the EU possibly acting in bad faith.

the co-respondent mechanism does not apply, it may establish the individual responsibility of the EU Member State acting as the sole respondent before it, either directly or through the *Bosphorus* doctrine. Thereby, the Court can indirectly/implicitly allocate responsibility between the EU and its members. Or, if the EU "vetoes" the application of the co-respondent mechanism in a case that the mechanism should apply and this case concerns the strict implementation of EU law by an EU Member State that exercises no discretion in the way it gives effect to EU law, the application of the *Bosphorus* doctrine can result in the ECtHR self-restraining its scrutiny powers. Although the criteria for the application of the *Bosphorus* doctrine would be met, we would rather caution against the application of the doctrine in these circumstances given that this would almost certainly defeat the aim of "strengthening participation, accountability and enforceability in the Convention system".[52] Moreover, the ECtHR's restraint of its scrutiny in these instances could signal undesirable messages to the EU and serve as an incentive for it (the EU) to (continue) refrain(ing) from participating in the co-respondent mechanism.

c) The Member States

Moving then to another possible "crack" in the co-respondent mechanism – albeit this time, as we explain below, a rather "inoffensive" one – this may appear in the event that a complaint of an alleged violation of the ECHR calling into question the compatibility of EU law is directed against either the EU *or* one or more of its Member States (i.e., when a complaint is, at least initially, not directed against both the EU and its member(s)). In this respect, the explanatory report is not as clear as one may have wished. On the one hand, it explains that "no High Contracting Party can be forced to become a party to a case where it was not named in the original application."[53] This creates the impression that the ECtHR cannot oblige a party to become a co-respondent, such that the co-respondent mechanism is not binding when a complaint was not initially addressed to a would-be co-respondent. Yet, the explanatory report continues, "[t]he EU or its member State(s), as the case may be, will however accept to become co-respondent if the reasoned assessment by the EU concludes that the material conditions for applying the co-respondent mechanism are met."[54] One way to read this is that, ultimately, a reasoned assessment by the EU that the co-respondent mechanism's criteria are fulfilled makes it binding for the involved parties to participate in the proceedings before the ECtHR as co-respondents, even if the complaint of an alleged violation was not directed against them at the outset. If this reading is correct, then the Court will proceed with employing the co-respondent mechanism's "veil" to hold the EU and its members jointly accountable. If, however, participating in the co-respondent mechanism is not binding for the involved parties when a complaint has not initially been addressed to them and/or the EU or its Member

[52] See Draft Explanatory Report, para. 1.
[53] *Ibid*. para. 62.
[54] *Ibid*. para. 62.

State(s) refuse an invitation to join proceedings as co-respondent(s), this can create some challenges for the Court.[55]

We would not expect this scenario to appear in the form of the EU failing to appear before the Court in a case where it is a co-respondent. After all, the EU will have determined that the criteria for the co-respondent mechanism's application are fulfilled. Thus, it would make no sense to then fail to co-operate as a co-respondent. However, this reasoning does not apply with respect to Member States acting as co-respondents. Again, this is a question of good faith in a spirit of co-operation. Yet, in practice, the scenario in which a Member State refuses to participate as co-respondent in proceedings before the ECtHR may not raise major concerns from the perspective of the applicability of the co-respondent mechanism, as perhaps the Court may proceed, treating the State as a co-respondent and trying the case "*in absentia*".[56] This is far from ideal and raises a number of hurdles, yet, as such, it does not necessarily obstruct the application of the co-respondent mechanism. Therefore, this may not necessarily constitute a "loophole" in the design of the co-respondent mechanism in practice.

IV.3. Possible "loophole" type three: An intended "crack"?

There is a further – this time, arguably, very much intended – type of "crack" in the co-respondent mechanism. Art. 2 of the Draft Accession Agreement provides for an amendment to art. 57 ECHR on reservations to the effect that, on "an equal footing with the other High Contracting Parties",[57] the EU may when acceding to the Convention "make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision".[58] In Opinion 2/13,[59] the CJEU raised the issue of the ECtHR holding the EU and its members jointly responsible for the breach of an ECHR provision in respect of which a state has

[55] Although not explored here, it is possible that the EU order may provide avenues on the basis of EU law to address any such challenges arising from the EU or its Member States' refusal to join proceedings as co-respondent in bad faith. Ultimately, this is a matter of sincere (loyal) co-operation, as well as of any EU-internal arrangements that may be made to co-ordinate the participation of the EU and its Member States in proceedings before the ECtHR, but also before the Committee of Ministers at the execution stage. However, we do not get into EU law in this *Article*. We limit ourselves to observing that the potential involvement of EU institutions, particularly the CJEU, will introduce further delays to implementing the co-respondent mechanism, noting that its application already raises concerns from the perspective of the reasonable length of judicial proceedings before the ECtHR.

[56] With respect to the approach of the ECtHR in cases where states fail to participate in the proceedings against them before the Court, see, for instance, ECtHR *Svetova and Others v Russia* App n. 54714/17 [24 January 2023], paras 29–30 and ECtHR *Ukraine and the Netherlands v Russia* App n. 8019/16 and others [30 November 2022], para. 438.

[57] See Draft Explanatory Report, para. 40.

[58] See 2023 DAA art. 2(2).

[59] Opinion 2/13 cit. paras 226–228.

made a valid reservation. Obviously, this would result in ECtHR case law affecting the situation of an EU Member State in relation to the ECHR and essentially establishing obligations for ECHR parties to which they never consented. To address this concern of the CJEU, art. 2(3) of the Draft Accession Agreement further provides that "[r]eservations made by High Contracting Parties in accordance with art. 57 of the Convention shall retain their effect in respect of any such High Contracting Party which is a co-respondent to the proceedings".[60] Accordingly, should the EU make or its Member States have made a reservation deemed valid by the ECtHR, their joint responsibility as a co-respondent will be precluded to the extent that the issue in question falls within the scope of the relevant reservation.[61] Notably, the explanatory report provides that "the responsibility of the respondent Party which has not made a reservation remains",[62] whereas "applications concerning a provision of the Convention in respect of which a High Contracting Party has made a reservation are declared incompatible *ratione materiae* with the Convention with regard to that Party [...], provided that the issue falls within the scope of the reservation [...] and that the reservation is deemed valid by the Court [...]."[63]

In the event that the subject of a valid reservation made by the EU, or its Member State(s) is at issue in a case before the ECtHR,[64] it will therefore not be possible for the EU or its Member State(s) to be held jointly responsible through the co-respondent mechanism, even if the criteria for the application of that mechanism are fulfilled. Admittedly, the chances are higher that the EU will be the sole respondent, as it is states that have issued reservations over ECHR provisions.[65] But if the EU also makes reservations and this results in an application being declared incompatible with the ECHR *ratione materiae* in respect of the EU, the sole respondent will be an EU Member State. In this case, the ECtHR may be faced with proceedings resembling those before it pre-accession, wherein

[60] See 2023 DAA art. 2(3).

[61] See Draft Explanatory Report, para. 44.

[62] *Ibid*. para. 44.

[63] *Ibid*. para. 44.

[64] Pursuant to art. 19(c) of the Vienna Convention on the Law of Treaties [1969] entered into force 27 January 1980 ('VCLT') 1115 UNTS 331, a reservation is invalid if it "is incompatible with the object and purpose of the treaty" to which the reservation is made. A reservation contrary to the object and purpose of the ECHR may therefore be deemed invalid. However, the question remains as to the effects of an invalid reservation. As to the status of the author of an invalid reservation in relation to the treaty, see International Law Commission of the United Nations, Guide to Practice on Reservations to Treaties of 2011, UN Doc A/66/10, art. 4.5.3. For the ECtHR's early approach to (invalid) reservations, see ECtHR *Loizidou v Turkey* App n. 15318/89 [23 March 1995] paras 65–98; ECtHR *Belilos v Switzerland* App n. 10328/83 [29 April 1988] paras 38–60.

[65] In this respect, see Polakiewicz and Suominen-Picht's insightful analysis, explaining that '[e]ven in the exceptional case that the national legislation covered by the reservation subsequently falls within EU competence, it is difficult to imagine a situation where joint responsibility of the EU and its Member States would affect existing reservations by individual Member States'. J Polakiewicz and I Suominen-Picht, 'A Council of Europe Perspective on the EU's Accession to the ECHR' (2024) European Papers 729 www.europeanpapers.eu.

an alleged violation stems from a respondent State's compliance with EU law, but the ECtHR does not possess jurisdiction to (fully and directly) scrutinise the EU. If the criteria for the *Bosphorus* doctrine's application are fulfilled, would it then be possible that the ECtHR resorts to it? While we would favour the Court scrutinising the conduct of the respondent state, we also acknowledge that, should the ECtHR wish to retain the *Bosphorus* doctrine post-accession, this would seemingly be the most appropriate place for it to do so. This is because, in the event of a reservation being made, the EU will have expressed through its reservation the desire not to be bound by the ECHR provision at issue and not to be subject to the jurisdiction and scrutiny of the ECtHR, such that the Court's possible self-restraint of its (indirect) scrutiny of EU law through the application of the *Bosphorus* doctrine appears reasonable. Indeed, this particular "crack" in the design of the co-respondent mechanism is more sensible than the other two types of possible "loopholes" that we discussed earlier in this Section. Therefore, it may be more acceptable for the ECtHR to "fill" this "crack" with its *Bosphorus* doctrine, provided of course one is comfortable with the "trade-off" and cost of the *Bosphorus* doctrine to the extent that it entails lack of accountability for alleged human rights violations.

V. Conclusion

The purpose of this *Article* has been twofold. The first aim has been to assess the design of the co-respondent mechanism and consider (or even speculate) about possible "loopholes" in this design that may render the mechanism inapplicable. The second aim has been to explore the inter-relationship between the *Bosphorus* doctrine and the co-respondent mechanism, examining when the Court may, and if the Court should, continue to apply the *Bosphorus* doctrine once the EU has become a party to the ECHR.

Under the co-respondent mechanism, the Court is expected to refrain from allocating responsibility between the EU and its Member States as a means of avoiding interference with the autonomy of EU law. To that end, the Court is expected to hold the EU and its Member States jointly responsible. In principle, the co-respondent mechanism shall leave no room for the *Bosphorus* doctrine after accession. Therefore, the wider the cast of the co-respondent mechanism is, the lower the chances are for the *Bosphorus* doctrine to continue applying post-accession. If the co-respondent mechanism fails to apply, the ECtHR will be prompted to explore alternative avenues, including *Bosphorus*. Such alternatives range from judicial self-restraint to the exercise of judicial scrutiny, which may result in different scenarios of responsibility allocation between the EU and its Member States or to no allocation at all.

Our analysis has identified three different types of possible "loopholes" in the co-respondent mechanism. The first type arises from the confines of the co-respondent mechanism, i.e., the criteria that determine the mechanism's applicability. In this respect, we posed questions regarding the absence of discretion in the implementation of EU law as a/the criterion for triggering the application of the co-respondent mechanism. We noted

that, if this is the sole criterion, there will be cases where the co-respondent mechanism will not be applicable. This will create a gap/space that the Court will need to cover through other approaches, possibly including the *Bosphorus* doctrine.

The second set of potential "loopholes" that we identified relates to whether the involved parties will be willing to utilise and duly engage with the co-respondent mechanism. This hinges on a spirit of trust, good faith, and sincere co-operation. In this respect, the *Article* discussed the possible stance of each of the three involved actors: the ECtHR, the EU, and its Member States. Starting with the Court, the *Article* raised the question of whether it should or will unconditionally endorse the reasoned and, theoretically at least, "determinative and authoritative" assessment of the EU regarding the application of the co-respondent mechanism in a given case. Furthermore, our analysis highlighted the possibility that certain reasons, such as providing clear guidance to the Council of Europe's Committee of Ministers, which monitors the execution of ECtHR judgments, may require the ECtHR to outline the basic contours of the respective wrongful conduct of the EU and its Member States, that is, essentially allocate responsibility even while holding them jointly responsible for breaching the ECHR. Moving to the EU, our discussion pondered whether the EU might exercise the discretion it possesses regarding the applicability of the co-respondent mechanism, potentially hindering its application in cases where it should indeed apply. While we recognise that the EU has compelling motivations, such as preserving the autonomy of its legal order, to desire the application of the co-respondent mechanism, there may be occasions where stronger motivations and interests lead to the abuse of its privilege to determine when the mechanism applies. Finally, regarding EU Member States, the explanatory report is not entirely clear on whether the co-respondent mechanism is binding for potential co-respondents when complaints are not initially directed against them. Therefore, should a complaint of an alleged violation involving EU law be directed against either the EU or its Member State(s), it appears possible for a "would-be co-respondent" to refuse to engage with such proceedings. Given that the EU decides when the co-respondent mechanism applies, it would be very surprising if the EU refused to appear as a co-respondent in a case where it has "authorised" the use of the mechanism. However, this does not extend to EU Member States. Yet, should they ever contemplate refusing to participate in proceedings as co-respondents, the Court retains the authority to adjudicate the case "*in absentia*" to hold the Member States jointly responsible with the EU. Depending on the Court's approach, this may, therefore, not necessarily constitute a "loophole".

The third and final possible "loophole" that we identified concerns reservations. We view this as an intentional "crack" aimed at addressing an issue raised by the CJEU in Opinion 2/13. Pursuant to art. 2 of the Draft Accession Agreement, should the subject of a valid reservation made by the EU or its Member State(s) be at issue in a case involving EU law before the ECtHR, it will not be possible for the EU or its Member State(s), respec-

tively, to be held jointly responsible through the co-respondent mechanism. The application against the ECHR party that has made the reservation will be declared incompatible *ratione materiae* with the Convention concerning the party in question. While the likelihood of this scenario occurring is low, we argued that this could be the only instance where, if the sole respondent before the ECtHR is an EU Member State, we would consider it conceivable/acceptable for the Court to resort to the *Bosphorus* doctrine. However, we are presenting this argument very reluctantly, as we are generally quite sceptical of the potential lack of judicial scrutiny and accountability that the *Bosphorus* doctrine may entail. We find this problematic, particularly with respect to access to justice and effectiveness in the protection of human rights.

Overall, while the co-respondent mechanism aims to prevent the ECtHR from allocating responsibility between the EU and its Member States, this *Article* has identified certain potential "loopholes" in the mechanism. Such "gaps" or "cracks" in the co-respondent mechanism will prompt the ECtHR to consider alternatives, which may or may not interfere with the autonomy of EU law. Which "path(s)" the Court will decide to follow and when it will decide to do so remain to be seen. The entire accession process relies on good faith and the trust that the EU and ECHR systems place in each other. The same "ingredients", namely trust and good faith, will also be crucial post-accession. The ECtHR, acting as the final adjudicator directly scrutinising EU law, will be expected to do so in a balanced manner. To that end, it will be required to duly consider the preferences or views of the EU as a (co-)respondent, show respect for the autonomy and specificities of the EU order, and balance these with the *effet utile* of human rights, the effectiveness of the ECHR system, and the safeguarding of its own (i.e., the Court's) reputation.

We close this *Article* with one final set of points. While our discussion has identified certain potential "gaps" or "cracks" in the draft accession documents, it is important to emphasise that our analysis aims at highlighting what is required for the involved actors – primarily the CJEU and the ECtHR – to interpret and apply the terms of the accession agreement, and in particular the co-respondent mechanism, in a way that allows for holding the EU directly accountable for possible human rights violations, while respecting the special traits of the EU order. Enabling the EU accession to the ECHR is long overdue. To that end, we are of the view that the involved actors shall endorse the draft accession documents and appreciate the sincere efforts made by the negotiators in this endeavour. Their dedication to meeting the requirements outlined by the CJEU in Opinion 2/13 should be acknowledged. Furthermore, it is crucial to recognise that no agreement can be as airtight as the CJEU might desire without significantly compromising the very essence of accountability for possible human rights violations through a human rights court external to the EU. Further inflating the concept of the autonomy of EU law could indeed set the threshold for EU accession to the ECHR so high that no accession agreement, no matter how well-designed – and the 2023 agreement is, overall, well-designed – can meet it. As autonomy, thus defined, would effectively prevent any form of external scrutiny. By

providing the necessary leeway for the EU to accede to the ECHR on the basis of the 2023 draft accession documents, the CJEU will not only enable the EU to benefit from the ECHR system but also uphold its own reputation as a Court that respects the commitment of EU Member States to accede to the ECHR. To that end, the CJEU should decide in a principled manner, avoiding creating the impression that it is abusing its position and power as a "veto player" to evade ECtHR authority. Moreover, such an approach would better serve the EU's self-interests, both reputationally and practically. If this new attempt to enable the EU to accede to the ECHR fails, the ECtHR would have little reason to continue self-restraining its judicial authority and maintain its *Bosphorus* doctrine of equivalent protection as a means to conditionally abstain from scrutinising EU law. The exercise of indirect review by the ECtHR of EU law can seriously undermine the autonomy of EU law and place ECHR parties that are also EU members in a difficult position where they must choose between EU law and their commitments under the ECHR. For, when "elephants" (meaning, the CJEU and the ECtHR) fight, it is the "grass" (representing the Member States) that suffers.[66]

[66] VP Tzevelekos, 'When Elephants Fight it is the Grass that Suffers: "Hegemonic Struggle" in Europe and its Side-Effects for International Law: Dynamic Systemic Integration, Ad Hoc Normative Hierarchy and Responsibility of Member States Linked to the Conduct of International Organisations' in K Dzehtsiarou, T Konstantinides, T Lock and N O'Meara (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014) 9.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

THE EFFECT OF *OPINION 1/17* ON THE EU-ECHR DRAFT ACCESSION AGREEMENT: LESSONS LEARNED?

JENNIFER BUCKESFELD* AND RAMSES A. WESSEL**

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ABSTRACT: *Opinion 2/13*, in which the Court infamously declared the first draft agreement on the accession of the EU to the ECHR not to be compatible with the Treaties, is one of the clearest examples of the CJEU's protectiveness in its external relations case law. Now, ten years later, this very draft agreement has been revised and might again be subjected to the scrutiny of the Court. However, what has changed in the meantime is what scholars consider a softening in the Court's otherwise rather rigid approach to autonomy. *Opinion 1/17* on the Comprehensive Economic and Trade Agreement (CETA) with Canada did indeed come as a surprise to some, as the Investor state dispute settlement (ISDS) system that it establishes was considered to be in line with the notion of autonomy. Naturally, the question arises of whether the CJEU, if asked to rule again on the legality of the DAA concerning the EU's accession to the ECHR, would follow its conciliatory approach vis-à-vis the international legal order, which it embarked on in *Opinion 1/17*. Therefore, the present contribution will seek to answer two related questions: Which lessons can be derived from *Opinion 1/17*, and did the negotiators take these lessons into account in the revised DAA?

KEYWORDS: EU accession to the ECHR – autonomy of the EU – EU external relations – *Opinion 2/13* – *Opinion 1/17* – legal protection.

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I. Introduction

The revised 2023 Draft Accession Agreement (DAA)[1] and the prospect of the EU acceding to the European Convention on Human Rights (ECHR) appear in light of a long line of case law of the Court of Justice of the European Union (CJEU, or the Court) on the relation between the EU's autonomy and external dispute mechanisms. Despite the current obligation for the Union to become a party to the ECHR (art. 6 TEU), the Court's focus on the 'autonomy' of the European Union in *Opinion 2/13* did not make discussions easy. While the principle of autonomy was first introduced to regulate the relationship between EU and national law in the early years of the European integration process, it has now become key in its external-relations case law in order to protect the EU legal system (and perhaps even more so, the Court itself) against the "influence of foreign courts".[2] In particular, the Court considered the principle to be violated where foreign courts got to interpret EU law or rule upon the allocation of responsibility between EU institutions and Member States,[3] where the principle of mutual trust was endangered,[4] where fundamental rights were at stake,[5] or where foreign courts would be accorded jurisdiction in legal fields in which the CJEU itself lacks such jurisdiction.[6] The Court seems to fear that the EU's or Member States' action on the international plane – for instance, the conclusion of treaties or the submission to external courts – threatens the integrity and uniformity of EU law. *Opinion 2/13*, in which the Court infamously declared the first draft agreement on the accession of the EU to the ECHR not to be compatible with the Treaties, is one of the clearest examples of the CJEU's protectiveness in its external relations case law.[7]

[1] See M Lecerf 'Completion of EU Accession to the European Convention on Human Rights', Legislative Train Schedule www.europarl.europa.eu.

[2] The notion of "autonomy" has been analysed abundantly in the literature. See, for some recent analyses: J Lindeboom and R A. Wessel (eds.), 'Introduction: The Autonomy of EU Law, Legal Theory and European Integration' (2023) European Papers www.europeanpapers.eu 1247; K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) HJIL 47; C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1; E Kassoti and J Odermatt, 'The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17' (2020) QuestIntL 5.

[3] Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* ECLI:EU:C:1991:490 para. 35. See E Paasivirta, 'The Union's Participation in Legally Binding International Third-Party Dispute Settlement: *Opinion 1/91 (EEA I) and Opinion 1/92 (EEA II)*' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022) 215.

[4] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 191–94. See also K Ziegler, 'The Second Attempt at EU Accession to the ECHR: *Opinion 2/13*', in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* cit. 755.

[5] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461 paras 282–85.

[6] Opinion 2/13 cit. paras 255–57.

[7] See K Ziegler, 'The Second Attempt at EU Accession to the ECHR: *Opinion 2/13*' cit.

Now, ten years later, this very draft agreement has been revised and might again be subjected to scrutiny by the Court. However, what has changed in the meantime is what scholars consider a softening in the Court's otherwise rather rigid approach to autonomy.[8] *Opinion 1/17* on the Comprehensive Economic and Trade Agreement (CETA) with Canada[9] did indeed come as a surprise to some, as the Investor state dispute settlement (ISDS) system that it establishes was considered to be in line with the notion of autonomy.[10] Naturally, the question arises of whether the CJEU, if asked to rule again on the legality of the DAA concerning the EU's accession to the ECHR, would follow its conciliatory approach vis-à-vis the international legal order, which it embarked on in *Opinion 1/17*. Therefore, the present contribution will seek to answer two related questions: Which lessons can be derived from *Opinion 1/17*, and were these lessons taken into account in the revised DAA?

This contribution is structured in the following way. The next section will briefly revisit the historical background against which the revised DAA, and the question of balancing the EU's external action versus the principle of autonomy, appear. Section III will then seek to explain why a comparison with *Opinion 1/17* and thus with the CETA is even relevant for the purposes of assessing the new draft agreement. Subsequently, the autonomy test employed by the Court in *Opinion 1/17* shall be introduced and tested against the revised DAA (Section IV). The different steps of this test will be elaborated on in different subsections, each of which will first consider the lessons to be learned from the Court's CETA Opinion before analysing whether any of these lessons returns in the text of the revised DAA. Finally, a conclusion will be drawn in which the main questions of the paper shall be answered.

[8] GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' (2020) LIEI 43; P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle' (2019) City Research Online 90, 99; W Weiß, 'CETA Investment Court and EU External Autonomy: Did Opinion 1/17 Strengthen the EU's Room for Manoeuvre in External Relations?' (2020) Hungarian Yearbook of International and European Law 15, 22 ff; A Melikyan, 'The Legacy of Opinion 1/17: To What Extent is The Autonomous EU Legal Order Open to New Generation ISDS?' (2021) European Papers www.europeanpapers.eu 645, 658 ff; S Gáspár-Szilágyi, 'Between Fiction and Reality, The External Autonomy of EU Law as a "Shapeshifter" After Opinion 1/17" (2021) European Papers www.europeanpapers.eu 675; K Bradley, 'Investor–State Dispute Tribunals Established under EU International Agreements: *Opinion 1/17 (EU–Canada CETA)*' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* cit. 959.

[9] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017].

[10] Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)* ECLI:EU:C:2019:341 paras 106–161.

II. Historical background

Irrespective of the fact that *Opinion 2/13* came as a surprise to most EU law experts,[11] the CJEU's aversion towards external dispute settlement mechanisms and fear of interference with the EU legal order by foreign courts seems to be a common thread throughout the CJEU's jurisprudence. In order to understand the reasoning behind and the development of the Court's arguments, it is useful to briefly revisit the starting points.

Six times the Court has already been given the opportunity to issue an opinion on draft agreements that also established a judicial system to check whether the proposed system was in conformity with the notions underlying the concept of EU autonomy. The earliest one was *Opinion 1/91*,[12] in which the Agreement on the European Economic Area (EEA Agreement) – a mixed agreement in which the EU sought to reproduce some notions of Community law on the international plane – was declared incompatible with the Treaties. The reason for the Court's decision was the potential of the EEA Court being able to interpret provisions of EU law and to rule on the allocation of responsibility between the EU and its Member States, which was considered by the CJEU as contradicting the concept of the autonomy of the EU legal order.[13] Subsequently, the EEA Agreement was revised to accommodate the CJEU's position and on the basis of *Opinion 1/92*,[14] it was finally accepted.[15] The following decades saw a refinement and broadening of the concept of the external autonomy of EU law, resulting in *Opinion 1/00*[16] and *Opinion 1/09*.[17] In the former, the Court introduced a two-pronged autonomy test in accordance with which agreements entered into by the Union are only in conformity with the autonomy concept if they (1) preserve the "essential character of the powers of the Community and its institutions"[18] and (2) refrain from establishing judicial systems capable of imposing binding interpretations of EU law on the EU and its institutions.[19] In *Opinion 1/09* it was added

[11] See, for instance, the contributions to the entire Special Section 'Opinion 2/13: The E.U. and the European Convention on Human Rights' (2015) German Law Journal 105.

[12] Opinion 1/91 cit.

[13] JW van Rossem, 'Pushing Limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice' in M Andenas and L Pantaleo, M Happold and C Contartese (eds), *EU External Action in International Economic Law* (Asser Press 2020) 35, 38-39.

[14] Opinion 1/91 cit. See E Paasivirta, 'The Union's Participation in Legally Binding International Third-Party Dispute Settlement: *Opinion 1/91 (EEA I) and Opinion 1/92 (EEA II)*' cit.

[15] JW van Rossem 'Pushing Limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice' cit. 39.

[16] Opinion 1/00 *European Common Aviation Area* ECLI:EU:C:2002:231. See C Rapoport, 'Autonomy of the EU Legal Order and International Agreements Extending the Acquis: *Opinion 1/00 (European Common Aviation Area)*', in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* cit. 421.

[17] Opinion 1/09 *Creation of a unified patent litigation system* ECLI:EU:C:2011:123.

[18] Opinion 1/00 cit. para. 12.

[19] *Ibid*. para. 13; JW van Rossem 'Pushing Limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice' cit. 40.

that not only the CJEU's but also the national courts' powers and competences must remain unaltered.[20] Perhaps the clearest case of the CJEU invoking the idea of autonomy to prevent the EU from subjecting itself to the jurisdiction of a foreign court is *Opinion 2/13*, in which the first draft agreement on the accession of the EU to the ECHR was found to be incompatible with the Treaties. This opinion was heavily criticised as many scholars considered the Court's argumentation to be too rigid and incoherent with previous case law.[21] The very idea of external scrutiny that comes with accession to the ECHR seemed to have been ignored by the Court; after all, the whole idea of joining the ECHR system is to allow for an external check of one's domestic human rights judgments.

EU legal scholars like to think that the extensive academic debate that followed *Opinion 2/13* also helped the Court reassess its starting points. In 2019, five years after issuing *Opinion 2/13*, the Court of Justice handed down another opinion; this time on the legality under EU law of the CETA, concluded between the EU, its Member States, and Canada, and the ISDS system that it establishes. *Opinion 1/17* found the CETA dispute settlement mechanism to be compatible with the Treaties and the autonomy of the EU legal order, a decision which – in light of the Court's prior rigidity and protectiveness – indeed came as somewhat of a surprise. Hence, *Opinion 1/17* is one of very few cases in which an external dispute settlement mechanism was declared to be in line with EU law.

The divergence between the Court's reasoning in *Opinion 2/13* and in *Opinion 1/17* sheds a special light on the progress that was recently made in the negotiation process concerning the EU's accession to the ECHR. Nine years after the Luxembourg Court issued *Opinion 2/13*, the CDDH ad hoc negotiation group ("47+1 Group") concluded its ongoing negotiations, thereby producing a draft for a new accession agreement.[22] As it is likely that the CJEU will be requested to give its opinion on the draft's compatibility with EU law, it seems sensible to assess to what extent lessons drawn from, in particular, *Opinion 1/17* have been taken into account in the drafting process to ensure that the Court delivers a positive verdict.

[20] Opinion 1/09 cit. para. 89; JW van Rossem 'Pushing Limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice' cit. 43–44.

[21] J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI Working Papers 07-2016) 15–19; JW van Rossem 'Pushing Limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice' cit. 43–46; S Gáspár-Szilágyi, 'Between Fiction and Reality, The External Autonomy of EU Law as a "Shapeshifter" After Opinion 1/17' cit. 678-679; A Łazowski and RA Wessel, 'When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) German Law Journal 179.

[22] See note 1.

III. Relevance of a comparison with *Opinion 1/17*

So, against the backdrop of this brief summary of the CJEU's applicable case law, why is an analysis of and comparison with *Opinion 1/17* relevant for the purpose of assessing the revised DAA?

Opinion 1/17 deals with the participation of the EU in the CETA, a mixed agreement concluded by the EU and its Member States, on the one hand, with non-Member State Canada on the other. CETA establishes an ISDS system which comprises the CETA Tribunal,[23] competent to hear disputes between investors and states, as well as an Appellate Tribunal.[24] At first glance the nature of such agreement differs from that of the DAA. While the former constitutes a bilateral trade agreement, the latter envisages the Union's accession to the ECHR,[25] an international agreement to which both EU Member States and a large number of other states are a party. Yet, there are important similarities between the two agreements that render an analysis of *Opinion 1/17* worth making.

Both the CETA and the DAA constitute agreements entered into by the EU, submitting the latter to the jurisdiction of a judicial body responsible for the agreements' interpretation and being able to issue decisions binding upon the Union.[26] In both instances, the respective judicial mechanism stands outside the EU judicial system, which – in light of the idea of external autonomy – has important implications for the Court's powers and competences, as will be elaborated upon below. While *Opinion 2/13* dates back to 2014, *Opinion 1/17* was issued more recently in 2019, so that an analysis of the latter may allow for conclusions as to the question of whether there has been any development in the Court's case law concerning the notion of external autonomy of the EU legal order.

Furthermore, the CJEU's reasoning in *Opinion 1/17* may be used to illustrate how the Court employs different conceptions of autonomy depending on the context of the EU's external action. In that regard, recent scholarly work identified a narrow and a broad conception of autonomy in the Court's jurisprudence.[27] It has been argued that the CJEU adopts a broad, far-reaching conception of autonomy in the context of agreements concluded between EU Member States *inter se*[28] and a rather narrow, more lenient conception

[23] CETA cit.

[24] CETA cit. arts. 8.28(1).

[25] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [1953].

[26] *Ibid*. art. 19; CETA cit. arts. 8.27(1) and 8.28(1).

[27] E Kassoti and J Odermatt, 'The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17' cit. 8; J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 9; T Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights After Opinion 2/13: Is it Still Possible and Is it Still Desirable?' (2015) EuConst 239, 243.

[28] A famous case in point is ase C-284/16 *Achmea* ECLI:EU:C:2018:158, on a bilateral investment treaty that was applicable between the Kingdom of the Netherlands and the Slovak Republic. See X Groussot and ML Öberg, 'The Web of Autonomy of the EU Legal Order: Achmea' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* cit. 927. Cf also case C-741/19 *République de Moldavie*

when it comes to agreements between the EU or its Member States, on the one hand, and non-Member States on the other.[29] The narrow conception is focused on preserving the CJEU's exclusive powers in the interpretation of EU law[30] and thus it is rather indulgent in that it merely requires for there to be "sufficient 'safeguards' [...] in place to protect the EU and its autonomy".[31] When employing a broader conception of autonomy, however, the CJEU is not only concerned with the preservation of its own powers but also with the safeguarding of more fundamental "essential characteristics of the European Union legal order".[32] In such cases, the Court considers how an envisaged agreement between Member States will be implemented in practice and requires it to exclude *any* theoretical and hypothetical possibility of any court other than the CJEU interpreting and applying EU law.[33]

This distinction is important to keep in mind throughout the following analysis, and it cautions us not to jump to any conclusions from the analysis of CETA and *Opinion 1/17* to the DAA's compatibility with the autonomy of EU law. That is because there is an important difference between the two agreements: while the CETA's subject matter relates to the EU's economic relations with Canada (a non-EU Member State), the ECHR, and thus ultimately the DAA, are concerned not only with the relationship of the EU with non-Member States but also with the relationship between EU Member States *inter se.*

In *Opinion 1/17*, the Court, in adopting a narrow conception of autonomy, confined itself to a strict textual and grammatical interpretation, thereby adhering to the literal reading of the CETA text instead of examining the impact that the agreement is liable to have in practice.[34] In respect of the revised DAA, however, the fact that the ECHR is also binding between Member States *inter se* suggests that the Court will likely take a broader and more extensive approach to the notion of autonomy. Hence, it should not be taken for granted that the CJEU will follow the rather lenient approach it has adopted in *Opinion 1/17* when ruling upon the new draft agreement.

ECLI:EU:C:2021:655 on the (in)compatibility of the intra-EU application of the Energy Charter Treaty's investor-state dispute settlement mechanisms with EU law. See for instance: J. Odermatt, 'Is EU Law International? Case C-741/19 *Republic of Moldova v Komstroy LLC* and the Autonomy of the EU Legal Order' (2021) European Papers www.europeanpapers.eu 1255.

[29] E Kassoti and J Odermatt, 'The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17' cit. 6.

[30] *Ibid*. 8; B de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) Zeitschrift für öffentliches Recht 141, 150.

[31] E Kassoti and J Odermatt, 'The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17' cit. 8.

[32] Opinion 1/91 cit. para. 21; Opinion 1/09 cit. para. 65; J Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' cit. 10.

[33] E Kassoti and J Odermatt, 'The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17' cit. 8.

[34] GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' cit. 48-49, 53.

IV. The DAA: Lessons learned from Opinion 1/17?

In *Opinion 1/17*, the CJEU declared CETA and the ISDS system established by it to be compatible with EU law and with the idea of external autonomy of the EU legal order. The Court's assessment was conditioned on an affirmative answer to the initial question of whether the external dispute settlement mechanism stood outside the EU judicial system.[35] From the Court's subsequent analysis, one can discern a two-pronged autonomy test, which, in its essence, resembles the one it initially introduced in its *Opinion 1/00*. Accordingly, an international agreement and the judicial system that it establishes are in conformity with the autonomy of the EU legal order where two criteria are satisfied: First, it shall be established that the foreign tribunal does not interpret and apply EU law; and second, there shall be safeguards in place preventing this tribunal from issuing decisions capable of "preventing the EU institutions from operating in accordance with the EU constitutional framework".[36] In the following subsections, these conditions will be examined and applied to the DAA: *(1)* the existence of the treaty's dispute settlement mechanism outside the EU judicial system; *(2)* the absence of any competence for foreign courts to interpret and apply EU law; and *(3)* the existence of safeguards ensuring that the tribunals' decisions do not prevent the EU institutions from operating in accordance with the EU constitutional framework.

IV.1 The existence of the treaty's dispute settlement mechanism outside the EU judicial system

From the outset of its substantive analysis in *Opinion 1/17*, the Court establishes that the ISDS mechanism set up in CETA stands outside the EU judicial system.[37] Consequently, it was found to be consistent and logical that there is no preliminary reference procedure in place which would allow or necessitate the CETA Tribunal to request preliminary rulings from the CJEU.[38] Neither does the CJEU or any Member State's national court have the competence to review decisions of the CETA Tribunals.[39]

How does this requirement stand out in relation to the revised DAA: Does the established court system stand outside the EU judicial system? The text of the draft treaty contains certain safeguards to that effect. One such safeguard is art. 5, which regulates the relationship between the preliminary reference procedure, which is characteristic for the EU legal order, and the procedure for requesting advisory opinions from the ECtHR under

[35] Opinion 1/17 cit. paras 113–14.
[36] *Ibid*. para. 119.
[37] *Ibid*. paras 113–14.
[38] *Ibid*. para. 134.
[39] *Ibid*. para. 135.

Protocol No. 16 to the ECHR.[40] The provision is meant to ensure that the highest national courts cannot circumvent their duty to request preliminary rulings from the CJEU by making use of the advisory opinion procedure before the ECtHR, and thus it keeps the two procedures separate from one another. Similarly, it is provided that the prior involvement procedure, which allows the CJEU to interpret provisions of EU law before they are taken into account by the ECtHR, is strictly confined to the mere assessment of EU legal bases.[41] Thus, the CJEU will not be able to assess the act or omission complained of by the applicant before the ECtHR. Similarly to CETA, the DAA does not allow the CJEU to re-examine final decisions by the ECtHR, either. Therefore, it is possible to conclude that the system established by the DAA does indeed stand outside the EU judicial system. This implies that for the DAA to be approved by the CJEU, the autonomy test – the two steps of which will be assessed in the following to subsections – must be passed.

IV.2 The absence of any competence for foreign courts to interpret and apply EU law

A large part of the Court's assessment in *Opinion 1/17* was devoted to the question of whether the condition of absence of any competence for the tribunals of interpreting or applying EU law was fulfilled.[42] The condition that any foreign court – in this case, the ECtHR – must lack any competence to interpret or apply EU law was the main reason for the 2013 DAA to fail the autonomy test in *Opinion 2/13*; the Court had found that the agreement would allow and even require the ECtHR to interpret and apply EU law in various ways.[43] Therefore, many of the revisions of the DAA's original text may be considered direct responses to *Opinion 2/13*. They are meant to ensure that the interpretation and application of EU law remain the exclusive competence of the CJEU.

The overarching idea of exclusive jurisdiction for the CJEU to interpret and apply EU law covers various aspects. First and foremost, in *Opinion 1/17* it was considered crucial that the CETA Tribunal's power of interpretation and application be confined to the provisions of the CETA itself, which it is to interpret "in accordance with the rules and principles of international law applicable between the Parties".[44] Hence, for the revised 2023 DAA to be approved, it should be a given that in its judgments the ECtHR confines itself to the interpretation and application of the provisions of the ECHR. One of the 2013 DAA's provisions criticised in that respect in *Opinion 2/13* stipulated that the procedure for prior involvement of the CJEU was to take place where the latter "[had] not yet assessed the

[40] 46+1 ad hoc group Report to the CDDH, 46+1(2023)35FINAL of 30 March 2023 (hereinafter "Report to the CDDH"), art. 5.

[41] *Ibid*. Appendix 5, paras 77–78.

[42] Opinion 1/17 cit. paras 120–36.

[43] Opinion 2/13 cit. paras 186–90, 221–25,230–31, 238–41, 245–46.

[44] Opinion 1/17 cit. para. 122.

compatibility with the rights at issue [...] of the provision of European Union law".[45] The CJEU found that such a provision would allow for the ECtHR to interpret the case law of the Luxembourg Court and therefore to go beyond the interpretation of the ECHR's provisions. That is why in the course of revising the accession agreement's text the negotiation group clarified that for the purposes of the prior involvement procedure, it will be up to the EU rather than the Strasbourg Court to determine 2whether the CJEU has already undertaken the assessment".[46] It seems as if the negotiating group thereby sought to persuade the Court that the ECtHR's interpretating powers would not exceed the realm of the ECHR.

A second important consideration under the first step of the autonomy test is the idea that it should be exclusively up to the CJEU to rule on the allocation of responsibility between the EU and its Member States. In *Opinion 1/17* the Court ruled that art. 8.21(3) CETA would indeed reserve the power of allocating responsibility between the EU and its Member States to the EU.[47] Similarly, the 47+1 Group sought to acknowledge this notion when revising arts. 3(5) and 3(6) on the co-respondent mechanism, one of the DAA's most characteristic features. The new text subjects the triggering and terminating of the co-respondent mechanism to a prior 'reasoned assessment' by the EU, thereby allowing the latter to rule upon the division of powers in a 'determinative and authoritative' statement.[48] Unlike the 2013 DAA,[49] the revised draft agreement no longer allows the ECtHR to decide that only one of the parties – namely either the respondent or the co-respondent – shall be liable. Instead, once the co-respondent mechanism has been triggered, both the respondent and the co-respondent are to be held jointly liable.[50]

Third, *Opinion 1/17* is well known for the CJEU's distinction between considering EU law *as a matter of fact* versus considering it *as a matter of law*.[51] It found that whenever the CETA Tribunal does assess the compatibility of a measure of EU law with the CETA text, it considers EU law merely *as a matter of fact* rather than interpreting it; the CETA Tribunal will always have to follow the prevailing interpretation of the EU law in question by the CJEU. The CJEU, on the other hand, can never be bound by the meaning given to EU law by the CETA Tribunal.[52] The passage on consideration of EU law *as a matter of fact* was heavily criticised by scholars who argue that the idea of distinguishing between application of law *as a matter of fact* and *a matter of law* was a mere theoretical fiction employed by the Court to justify its more lenient approach. In practice, any foreign court will

[45] Report to the CDDH cit. art. 3(7).
[46] Report to the CDDH cit. Appendix 5, para. 76.
[47] Opinion 1/17 cit. para. 132.
[48] Report to the CDDH cit. Appendix 5, para. 61.
[49] *Ibid*. art. 3(7).
[50] *Ibid*. art. 3(8).
[51] Opinion 1/17 cit. paras 130–31.
[52] *Ibid*.

not be able to avoid interpreting EU law when ruling upon the legality of an EU measure.[53] In the revised DAA, the idea of applying EU law *as a matter of fact* is not explicitly mentioned. Yet, some of the agreement's provisions may be seen as implicitly using the concept, by allowing the CJEU to rule on the interpretation of EU law before the latter is being applied by the ECtHR. For example, the tests for triggering the co-respondent mechanism require the taking into account of EU law provisions "as interpreted by the competent court",[54] the competent court being the CJEU. Moreover, the prior involvement procedure is meant to ensure that before a case is brought before the ECtHR, the CJEU is given the opportunity to rule on the "validity or the interpretation of a provision of secondary law or the interpretation of a provision of primary law".[55] However, such assessment by the CJEU will not bind the Strasbourg Court,[56] which raises doubts as to whether the CJEU will consider the text of the DAA sufficient to obliterate any worries as to the interpretation of EU law by a foreign court – in particular in light of the fact that the Court will most likely scrutinise the revised DAA more critically and strictly than the CETA (due to the adoption of a broader notion of autonomy).

Lastly, as part of its autonomy test, the CJEU checks whether any given agreement preserves the principle of mutual trust, meaning the idea that any Member State court must trust that any other domestic court within the EU applies at least the EU's fundamental rights standard in its judgments.[57] The first time the principle of mutual trust came into play in the context of autonomy was in *Opinion 2/13*, in which the Court considered it to be one of the 'essential characteristics' of EU law which must remain unaffected by the EU's accession to the ECHR.[58] The CETA is an agreement concluded with Canada, a non-EU Member State. Since the idea of mutual trust does not play a role in the EU's external relations with non-Member States, the principle did not have to be accommodated for in the text of the CETA. The situation is different with respect to the ECHR, which binds not only the EU and third parties but also the EU Member States *inter se*, which entails the requirement for the DAA to guarantee protection of the principle of mutual trust.[59] A respective safeguard can

[53] S Gáspár-Szilágyi, 'Between Fiction and Reality, The External Autonomy of EU Law as a "Shapeshifter" After Opinion 1/17' cit. 684-686.

[54] Report to the CDDH cit. Appendix 5, para. 55.

[55] *Ibid*. Appendix 5, paras 74–79; the notion of "*interpretation* of a provision of secondary law" was added by the 47+1 Group to the draft explanatory report after the CJEU had found in Opinion 2/13 (paras 242–47) that the absence of such mentioning would preclude a definitive interpretation by the Court of secondary law.

[56] *Ibid*. Appendix 5, para. 78.

[57] *Ibid*. Appendix 5, paras 87–88; see, for instance, L Boháček, 'Mutual Trust in EU Law: Trust "in What" and "Between Whom"?' (2022) European Journal of Legal Studies 103, 109-112.

[58] Opinion 2/13 cit. para. 191–95; JW van Rossem 'Pushing Limits: The Principle of Autonomy in the External Relations Case Law of the European Court of Justice' cit. 51.

[59] Opinion 2/13 cit. para. 194.

be found in art. 6 of the revised DAA, which lays down that the principle of mutual trust must remain unaffected by the EU's accession to the ECHR.

IV.3 The existence of safeguards against interference with the EU institutions' proper functioning

The second major question asked in *Opinion 1/17* was whether it was guaranteed that any of the external tribunals' decisions will be without effect as to the EU institutions' operation "in accordance with the EU constitutional framework".[60] For this second step of the autonomy test to be passed, the Court considered that it had to be proven that an international agreement entered into by the Union would not have the effect of requiring "the Union – or a Member State in the course of implementing EU law – [...] to amend or withdraw legislation because of an assessment made by a tribunal standing outside the EU judicial system of the level of protection of a public interest established [...] by the EU institutions".[61]

Again, the CJEU confined itself to a strict grammatical interpretation of the CETA's text,[62] pursuant to which it found that the CETA Tribunals would lack any jurisdiction to "call into question the level of protection of public interest determined by the Union following a democratic process",[63] *inter alia* with respect to the level of fundamental rights protection.[64] This analysis is another testament to the Court's leniency when adopting a narrow notion of autonomy. Had it assessed strictly the agreement's implications in practice, it might have also come to the conclusion that decisions by the CETA Tribunal may indeed have the effect of necessitating the Union to amend secondary legislation in order to avoid "several additional investment arbitrations – copycat cases"[65] across the EU, as well as a patchwork implementation of EU law due to the Member States facing conflicting obligations under EU law and under investment law as interpreted by the CETA Tribunal.[66]

What does this mean for the revised DAA and its prospects of being approved by the Court? Will the ECtHR be able to appraise the EU's level of fundamental rights protection and pursuantly effectively require EU institutions to amend or withdraw legislation? In the Draft Explanatory Report to the revised DAA it is explicitly stated that a decision by the ECtHR, by which it finds that a measure of EU law is incompatible with the Convention rights, will be binding upon the Union.[67] In fact, it is the very purpose of accession by the

[60] Opinion 1/17 cit. paras 112,118.

[61] *Ibid*. para. 150.

[62] GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' cit. 62.

[63] CETA cit. para. 156.

[64] *Ibid*. para. 160.

[65] S Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in Achmea Put in Perspective' (2019) ELR 383, 390; GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' cit. 61.

[66] GC Leonelli, 'CETA and the External Autonomy of the EU Legal Order: Risk Regulation as a Test' cit. 61-62.

[67] Report to the CDDH cit. Appendix 5, para. 30.

EU to the ECHR to allow the Strasbourg Court to check the compliance of EU acts with its human rights standards in a mandatory manner; this was also recognised by the CJEU in *Opinion 2/13*.[68] Nonetheless, the Court ruled that there was a need for some form of co-ordination between art. 53 ECHR, which allows states party to the Convention to raise their level of human rights protection beyond the one set by the ECHR, and art. 53 of the Charter to guarantee that the level of protection afforded under the Charter will not be jeopardised.[69] A provision to that effect was missing in the 2013 DAA,[70] but has been added in art. 1(9) of the revised 2023 DAA. Accordingly, post-accession, EU law may set its own standard of protection of human rights, as long as such standard meets, or exceeds, the level of protection guaranteed by the ECHR itself.[71]

Such a rule resembles the one laid down in the CETA granting state parties the right to "regulate within their territories to achieve legitimate policy objectives",[72] including with respect to fundamental rights protection. The Court considered the latter to be a sufficient safeguard to the effect that none of the tribunals' decisions would impede the EU institutions' operation in accordance with the EU constitutional framework.[73] The foregoing suggests that the Court should reach a similar conclusion when assessing the revised DAA; this at least would be consequential if it was to adopt a conception of autonomy similar to the one it used in *Opinion 1/17*.

V. Conclusion

In answering the initial question of what lessons can be drawn from *Opinion 1/17*, one may point out the different particularities of the CETA's text, which the CJEU considered to guarantee conformity with the principle of external autonomy. For an international agreement to be approved it must be demonstrated that the judicial system that it establishes stands outside the EU judicial system, that foreign courts do not have the power to interpret and apply EU law, and that there are safeguards in place against interference with the EU institutions' proper operation within the EU constitutional framework. Particularly favourable to the Court was the idea of EU law being taken into account *as a matter of fact* rather than *as a matter of law*.

The analysis above shows that many of the considerations made by the CJEU in *Opinion 1/17* indeed show up in the revised DAA. Some are addressed explicitly, such as the principle of mutual trust or the idea of exclusive competence for the EU to rule upon the allocation of responsibilities. Others are implicitly alluded to, for instance the idea of absence of interpretation of EU law through a foreign court.

[68] Opinion 2/13 cit. para. 185.
[69] *Ibid*. para. 189.
[70] *Ibid*. para. 190.
[71] Report to the CDDH cit. art. 1(9) and Appendix 5, para. 38.
[72] CETA cit. art. 8.9.1.
[73] Opinion 1/17 cit. para. 154.

However, recalling the above-mentioned distinction between the broad and narrow conception of autonomy, those lessons should be considered with caution. In *Opinion 1/17*, the CJEU adopted a relatively narrow conception of autonomy, whereby it confined itself in its analysis to a strictly literal interpretation of the CETA's text. In particular the idea of considering EU law as a matter of fact may be considered an example of the Court's rather lenient approach to the autonomy of EU law. If the CJEU was to issue an opinion on the revised DAA, the fact that the ECHR binds not only the EU and a non-Member State but also EU Member States *inter se* suggests that the Court will interpret the notion of autonomy more broadly. Especially in light of *Opinion 2/13*, it is probable that the Court will subject the revised DAA to a stricter, more substantive scrutiny than has been the case for the CETA.

To conclude, the analysis of *Opinion 1/17* alone does not allow for a clear prediction as to whether the new text of the DAA will be considered acceptable from the CJEU's perspective. It remains to be seen whether *Opinion 1/17* did indeed mark a shift in the Court's jurisprudence to more openness and trust towards the international legal order, or whether the Court will fall back to the rather sceptical stance it previously adopted in *Opinion 2/13*.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

THE (IM)POSSIBILITY OF A CFSP "INTERNAL SOLUTION"

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ABSTRACT: There is one obstacle to the EU's accession to the ECHR that the negotiators were unable to overcome in the revised DAA: the CJEU's limited jurisdiction over the Union's Common Foreign and Security Policy (CFSP). Carving out CFSP cases from the ECtHR's jurisdiction was taken off the table already during the first round of DAA negotiations back in 2010–2013. During the renegotiations the parties made several attempts at drafting a DAA provision that would otherwise solve the issue. Ultimately, the EU side conceded and promised to resolve it internally. After abandoning the idea of an interpretative declaration that would "clarify" that the CJEU has jurisdiction over human rights violations in the CFSP area, the EU side were hoping that the *KS and KD* case would magically solve the issue for them. However, while *KS and KD* does provide some answers, serious questions remain. This could force the EU side to find a proper solution to the CFSP issue.

KEYWORDS: EU accession to the ECHR – Common Foreign and Security Policy (CFSP) – Court of Justice of the European Union (CJEU) – *Opinion 2/13* – judicial protection – political questions doctrine.

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I. Introduction

One of the CJEU's key objections to the 2013 Draft Accession Agreement (DAA) was its failure to "have regard to the specific characteristics of EU law with regard to the judicial review" of the Union's own conduct under the Common Foreign and Security Policy (CFSP).[1] These specific characteristics are set out in art.24(1) TEU and art.275(1) TFEU, according to which the CJEU "shall have no jurisdiction" over the treaty provisions relating to the CFSP and acts adopted on the basis of them. This jurisdictional carve-out is subject to two exceptions (claw-backs).[2] Firstly, the CJEU has jurisdiction to prevent the encroachment of purported CFSP acts on other policy areas.[3] Secondly, the CJEU has jurisdiction to review the legality of "restrictive measures" adopted under TFEU art. 275.

Upon accession to the European Convention on Human Rights (ECHR), as envisaged in the 2013 DAA, it would be possible for litigants to file applications against the Union itself before the European Court of Human Rights (ECtHR). In *Opinion 2/13* the CJEU held that, post-accession, the ECtHR would have jurisdiction to rule on the ECHR compatibility of the Union's conduct under the CFSP – "notably [conduct] whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights".[4]

During the (re-)negotiations of the DAA between 2020 and 2023, the issue of how to properly take into account the specific characteristics of the CFSP when it comes to judicial review proved difficult to resolve – not due to negotiations bogging down, but because the proposed solutions proved to be unworkable.

Ultimately, the negotiators gave up on resolving the CFSP issue in the accession agreement, with the EU side promising to resolve it internally.[5] However, no consensus emerged among the EU Member States and Union institutions on such an internal solution.[6] The EU side for a long time appeared to be in "wait-and-see" mode, hoping that the CJEU would cut this Gordian knot with its judgment in *KS and KD*.[7]

In this article, I analyse and assess the different ways of solving this CFSP issue. Which solutions are legally possible and workable in practice?

In section II, I outline and discuss the two options considered in some depth during and after the DAA (re-)negotiations: a "reattribution mechanism" (II.2) and an "interpretative declaration" to extend the CJEU's jurisdiction over the CFSP (II.3). In doing so, I will demonstrate that both options are legally impossible and/or practically unworkable.

[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 257.

[2] The scope of the carve-out and the claw-backs have been the subject of significant academic debate and a long line of CJEU case law. See section III below for an overview.

[3] See the reference to art. 40 TEU in both art. 24(1) TEU and art. 275(1) TFEU.

[4] Opinion 2/13 cit. para. 254.

[5] 46+1 ad hoc group, Report of the 18th Meeting, 46+1(2023)R18 of 17 March 2023 on the Accession of the European Union to the European Convention on Human Rights.

[6] Steering Committee for Human Rights (CDDH), Report of the 99th Meeting CDDH(2023)R99 of 11 December 2023, para. 7.

[7] *Ibid*. para. 7.

Then, in section III, I consider the extent to which the CJEU itself can and will resolve the issue by interpreting the scope of its jurisdiction over the CFSP so widely that it encompasses all potential ECHR violations. Finally, in section IV I conclude by defending the only option that is both guaranteed to work and technically simple: extending the jurisdiction of the CJEU by amending the EU treaties.

II. The main options considered by the negotiators

II.1 Introduction

From a high-level perspective, there are essentially three possible ways to approach the CFSP issue: *(a)* carving out the CFSP from the jurisdiction of the ECtHR, *(b)* extending the CJEU's jurisdiction over the CFSP, or *(c)* ensuring that only EU Member States, and not the Union, are held responsible in CFSP cases before the ECtHR.

Option *(a)* was taken off the table more than a decade ago, during the first round of accession negotiations.[8] Option *(b)* was deemed unattractive at the outset of the re-negotiations, since there is little appetite among EU Member States for amending the EU treaties.[9]

Thus, unsurprisingly, the negotiators focused their initial effort towards option *(c)*. Many ideas were mooted and discarded.[10] Only one of them was discussed at length, namely the establishment of a mechanism that would "reattribute" CFSP conduct from the Union to (one or more) EU Member States.

[8] 47+1 ad hoc group, Chairperson's proposal on outstanding issues, 47+1(2013)004, 14 January 2013, 3; 47+1 ad hoc group, Fourteen non-EU parties to the ECHR, 'Common Paper on Major Concerns Regarding the Draft Revised Agreement on the Accession of the EU to the ECHR', 47+1(2013)003, 21 January 2013, para. 9; 47+1 ad hoc group, Report of the Fourth Negotiation Meeting 47+1(2013)R04 of 23 January 2013 between the CDDH and the European Commission on the Accession of the European Union to the European Convention on Human Rights, para. 9.

[9] See e.g. 47+1 ad hoc group, Report of the Eighth Negotiation Meeting 47+1(2021)R8 of 4 February 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 7.

[10] Including, rumours suggest the creation of an administrative CFSP complaints procedure within the framework of the EU Council. The idea apparently was that the decisions of such an administrative review mechanism/board could be brought before the EU courts (likely as an action for annulment before the General Court). The only trace of this in publicly available documents is an oblique reference to a "third option" in Steering Committee for Human Rights (CDDH), Report from the 98th Meeting CDDH(2023)R98 of 20 July 2023 para. 10.

II.2 A "reattribution mechanism" to ensure that EU Member States are exclusively responsible for CFSP conduct outside the scope of CJEU jurisdiction

The so-called "reattribution mechanism", proposed by the EU side during the DAA re-negotiations, constituted the most developed attempt at solving the CFSP issue in the accession agreement. Yet, it was not the object of much real discussion. The EU side tabled a text, received a bucketload of critical and clarifying questions they were not able to answer, and ultimately withdrew the proposal. It is still worth briefly outlining it, in order to explain why such a mechanism is unworkable in practice. In particular because the impossibility of this option led the EU side to decide to resolve the CFSP issue internally.

The mechanism evolved gradually. After some exploratory discussions during the first few (re-)negotiation meetings in 2020,[11] the EU side presented some "building blocks" towards a solution of the CFSP issue at the ninth meeting of the 47+1 *ad hoc* group in March 2021.[12] What the EU side suggested was a mechanism that would reattribute any Union act under the CFSP that falls outside the scope of CJEU jurisdiction to (one or more) EU Member State(s). It argued that such a mechanism would essentially circumvent the issue by ensuring that no CFSP conduct would ever be attributable to the Union itself in cases that reached the ECtHR.

The EU side was then invited to submit concrete proposals for how such a mechanism could be worded.[13] Taking up this challenge, it submitted a non-paper in November 2021 containing the following proposal for a new DAA art. 1(4a):

> "Where an application has been brought against the European Union in relation to an act, measure or omission of a European Union institution, body, office or agency or of persons acting on their behalf which falls in the scope of the Common Foreign and Security Policy according to the assessment by the European Union, that act, measure or omission shall be attributed to one or more member States of the European Union, for the purposes of the Convention, of the protocols thereto and of this Agreement, if the European Union has designated that member State or those member States of the European Union as responsible for that act, measure or omission by means of a reasoned declaration.
>
> To that end, in case the Court of Justice of the European Union has not yet had the opportunity to assess its jurisdiction in relation to the compatibility with the rights at issue contained in the Convention and/or of the protocols thereto of the EU act, measure or omission, upon a reasoned request by the European Union to the Court, sufficient time shall be afforded to the Court of Justice of the European Union to make such an assessment on the basis of which the Union or the Member State(s) shall be the respondent.

[11] See e.g. 47+1 ad hoc group, Report of the Sixth Negotiation Meeting 47+1(2020)R6 of 22 October 2020 on the Accession of the European Union to the European Convention on Human Rights, para. 38.

[12] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 of 25 March 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 11.

[13] *Ibid*. para. 116.

> In the latter case, the Member State(s) designated will become respondent(s) and the action shall be deemed to be directed against the designated member State(s).
>
> Where remedies have not been exhausted in at least one Member State jurisdiction, the proceedings before the Court are to be stayed in order to allow the applicant to pursue domestic remedies in the designated Member State(s), if those remedies are still available".[14]

During the 12th negotiation meeting, in December 2021, negotiators considered the EU proposal. Non-EU delegations asked an array of pertinent questions, such as the criteria for reattribution, how the exhaustion of domestic remedies would be handled in practice, and how judgments could be enforced in the absence of the EU as a respondent.[15]

The EU side was asked to provide "more elaborate answers" to the many questions asked.[16] However, during the next negotiation meeting, in May 2022, the EU side found itself unable to provide proper answers, and explained that the difficulty in answering the questions had led them to reconsider the reattribution mechanism altogether.[17]

Between those two negotiation meetings, scepticism of the mechanism had materialised within the EU Council working party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP). Discussions there had revealed worries that "such a decentralized mechanism of control of EU legal acts by national courts would pose legal difficulties of principle in terms of the judicial architecture of the Union".[18] Indeed, this would mean accepting the review by domestic courts of Union conduct without the key mechanisms ensuring uniformity in interpretation and determination of the validity of EU acts – notably the preliminary ruling procedure and the *Foto-Frost* doctrine.[19] This is possibly the situation even today, since art. 274 TFEU strips the Union of its jurisdictional immunity *vis-à-vis* the domestic courts of its Member States in cases where the CJEU lacks jurisdiction.[20] Yet, openly admitting that fact was probably uncomfortable.[21] Moreover,

[14] 47+1 ad hoc group, Negotiation Document of the 12th Meeting on the Accession of the European Union to the European Convention on Human Rights, Proposals in the Area of Basket 4 ("Common Foreign and Security Policy") rm.coe.int.

[15] 47+1 ad hoc group, Report of the 12th Negotiation Meeting 47+1(2021)R12 of 10 December 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 12.

[16] *Ibid*. para. 13.

[17] 46+1 ad hoc group, Report of the 13th Negotiation Meeting 46+1(2022)R13 of 13 May 2022 on the Accession of the European Union to the European Convention on Human Rights, para. 37.

[18] Council Legal Service Opinion 10360/22 of 16 June 2022, Interpretative Declaration Concerning the Last Sentence of the Second Subparagraph of Article 24(1) TEU and the First Paragraph of Article 275 TFEU (Competence of the Court of Justice in CFSP Matters) – Compatibility with the Treaties, para. 11.

[19] C Timmermans, 'EU Common Foreign and Security Policy and Protection of Fundamental Rights', in J Czuczai and F Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice* (Brill Nijhoff 2017) 291, 304.

[20] RA Wessel, 'Immunities of the European Union' (2014) International Organizations Law Review 395, 401 ff.

[21] As it probably also was for the CJEU in Opinion 2/13 cit., see C Timmermans, 'EU Common Foreign and Security Policy and Protection of Fundamental Rights' cit. 304.

delegations from several EU Member States pointed out practical and legal difficulties that such a solution would pose for their national law.[22]

A reattribution mechanism could also have faced legal difficulties under Union law. The EU treaties establish the CFSP as a Union competence, which is to be exercised by its organs (notably the Council and its subsidiary bodies).[23] At least at first glance there appears to be a tension between this distribution of competences and a reattribution mechanism *post facto* recharacterising Union acts under the CFPS as acts of the Member States. That said, attribution of conduct is conceptually distinct from the issue of competences. Attribution is concerned with conduct: acts and omissions. It is irrelevant for attribution purposes whether, for example, an international organisation's act is *ultra vires*.[24] What matters is whether an organ or agent of the international organisation performed the act in question. Attribution is thus conceptually distinct from competence distribution. A reattribution mechanism would therefore perhaps not threaten the autonomy of Union law after all.

The proposed reattribution mechanism continued to appear in consolidated drafts of the DAA until February 2023.[25] However, the EU side had in reality moved on.

II.3 An "interpretative declaration" to extend the CJEU's jurisdiction over the CFSP

As it became clear that the "reattribution mechanism" would be unworkable, discussions of possible EU-internal solutions deepened within the FREMP working party. During the spring of 2022, the idea of an interpretative declaration on the scope of the CJEU's jurisdiction emerged as a promising alternative.[26] In mid-May 2022, the Commission submitted a non-paper containing a draft text of such a declaration, which had been drafted in consultation with the Council Presidency.[27]

[22] Council Legal Service Opinion 10360/22, cit. para. 11.

[23] See e.g. arts 26 and 28–29 TEU, which set out a range of competences that "shall" be exercised by the Council. For civilian and military missions under the Common Foreign and Defence Policy, arts 42–44 TEU provide that the Union "may" entrust such missions to a group of Member States. However, such missions are typically carried out under Union command, with Member States seconding assets to the mission.

[24] See International Law Commission, Draft Articles on the Responsibility of International Organisations of 2011, UN Doc A66/10 legal.un.org art. 7.

[25] 46+1 ad hoc group, Consolidated Version of the Draft Accession Instruments (as of 16 December 2021) of the 12th Negotiation Meeting 47+1(2021)17of 16 December 2021 on the Accession of the European Union to the European Convention on Human Rights; 46+1 ad hoc group, Consolidated Version of the Draft Accession Instruments (as of 2 February 2023) of the 18th Negotiation Meeting 46+1(2023)31 of 16 February 2023 on the Accession of the European Union to the European Convention on Human Rights.

[26] Council Legal Service Opinion 10360/22 cit. para. 2.

[27] *Ibid*.

Sadly, this draft text is not available to the public.[28] However, the substantive content of the draft interpretative declaration can be deduced from a legal opinion of the Council Legal Service, which assesses the declaration's compatibility with the EU treaties.[29]

The first part of the draft interpretative declaration consists of three paragraphs recalling three key points:[30] *(a)* that the EU is under an obligation to accede;[31] *(b)* that accession is only possible if jurisdiction to carry out judicial review over Union conduct is not conferred exclusively on the ECtHR;[32] *(c)* that the EU has a complete system of legal remedies to ensure judicial review of Union conduct based on the EU treaties and the Charter of Fundamental Rights.[33]

The second part of the draft declaration recalls that the CFSP is subject to specific rules and procedures, notably that the jurisdiction of the CJEU is "very limited".[34] However, this jurisdictional carve-out must be interpreted narrowly due to its character as an exception to the general jurisdiction of the CJEU laid down in art. 19 TEU.[35]

The crux of the draft interpretative declaration is its third and final part, which constitutes an attempt to resolve the tension between the points recalled in the two first parts. It does so by first establishing the need to ensure the consistency between provisions in the EU treaties that provide for accession and access to justice[36] and the CFSP jurisdictional carve-out[37]. Then it expresses the interpretation of the EU Member States of those provisions, the purpose of which is to ensure both consistency between, and the effectiveness (*effet utile*) of, all those provisions:

> "the Treaties must be interpreted as granting the Court of Justice jurisdiction related to, and strictly within the limits of, actions introduced by applicants who claim they are victims of violations of fundamental rights caused by acts, actions or omissions by the European Union that, following the Union's accession to the European Convention on Human Rights, would be amenable to judicial review by the European Court of Human Rights (strict parallelism between the jurisdiction of the two courts)".[38]

[28] It should be contained in EU Council Working Document WK 7238/2022, which I have been refused access to.

[29] Council Legal Service Opinion 10360/22 cit. particularly at paras 22–28.

[30] *Ibid*. para. 23.

[31] Art. 6(2) TEU.

[32] Opinion 2/13 cit. para. 256.

[33] See e.g. case C-72/15 *Rosneft* ECLI:EU:C:2017:236 para. 66, with further references.

[34] Council Legal Service Opinion 10360/22 cit. para. 26.

[35] *Ibid*. paras 25–26. In making this point, the draft declaration allegedly cites case C-658/11 *Parliament v Council* ECLI:EU:C:2014:2025 para. 70.

[36] Arts 6(2) and 19 TEU, as well as art. 47 of the Charter of Fundamental Rights of the European Union [2012].

[37] Art. 24(1) TEU and art. 275 TFEU.

[38] Council Legal Service Opinion 10360/22 cit. para. 27 (underline in original). This is probably not the exact wording of the declaration, but a paraphrasing by the Council Legal Service.

The legal effect of such an interpretative declaration is not evident. In the opinion of the Council Legal Service, such an interpretative declaration would limit itself to "reflect an agreed interpretation rendered necessary by the introduction of art. 6(2) TEU by the Treaty of Lisbon, [which] would not contradict the Treaties nor amend them".[39] This, however, seems to mask the purpose of making such a declaration in the first place. Its actual purposes seems to be to rebut the CJEU's finding in *Opinion 2/13* that, post-accession, there would indeed be CFSP cases over which the ECtHR would have jurisdiction, but not the CJEU.[40] The declaration seems premised on a reading of this part of *Opinion 2/13* as a mere assumption, rather than a final determination – probably because the CJEU's finding is prefixed by the statement that "the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters".[41]

There may, in other words, be a straw to grasp here. There is, moreover, some precedence for such interpretative declarations. In *Rottmann*, the CJEU held that similar interpretative declarations were relevant for the interpretation of the EU treaties.[42] However, it remains unclear whether such declarations carry much weight. Perhaps for that reason the Council Legal Service admits that "it cannot be excluded that the Court of Justice would make a literal reading of Article 24(1) TEU and Article 275 TFEU, and may decide that such a declaration is insufficient".[43]

Moreover, the interpretative declaration is problematic for other reasons, which are not discussed in the Council Legal Service's opinion.

One particularly problematic aspect is that the proposed interpretation defines the scope of the CJEU's jurisdiction in a manner that threatens the autonomy of Union law. The proposed declaration seeks to ensure "strict parallelism between the jurisdiction of the two courts" by delimiting the scope of the CJEU's jurisdiction over CFSP cases to those cases which are amenable to judicial review by the ECtHR. Thus, the scope of the CJEU's jurisdiction over the CFSP would not be finally determined by the CJEU itself, but by the ECtHR. Given how dearly the CJEU guarded the autonomy of Union law in *Opinion 2/13*, it seems highly unlikely that such a parallelism would be deemed acceptable.

Another problematic aspect is that the content of the declaration is very difficult to square with the language used in art. 24(1) TEU and art. 275 TFEU. The critique that such a declaration would not entail a (re)interpretation, but rather a rewriting of those treaty provisions, has already been voiced by the French Senate, which in March 2023 declared the proposed interpretative declaration unacceptable: "such a declaration would be contrary to the Treaties which have been ratified by the Member States in accordance with their respective constitutional rules and would in fact amount to a revision of the Treaties,

[39] Council Legal Service Opinion 10360/22 cit. para. 28.
[40] Opinion 2/13 cit. para. 254.
[41] Opinion 2/13 cit. para. 251 in fine.
[42] Notably in case C-135/08 *Rottmann* ECLI:EU:C:2010:104 para. 40.
[43] Council Legal Service Opinion 10360/22 cit. para. 30.

exempt from the control of national parliaments, according to methods which are not provided for in Article 48 of the Treaty on European Union".[44]

The rejection of the interpretative declaration by the French Senate may explain why the FREMP working party of the EU Council seemed to turn their attention elsewhere during 2023.

III. Extension by interpretation – without a declaration – as the way forward?

After years of going down blind alleys, a case before the CJEU offered an opportunity for a dramatic conclusion to the (re-)negotiation process. The case in question was *KS and KD*, an action for damages against the Council, the Commission, and the European External Action Service.

The applicants – KS and KD – are relatives of persons who disappeared or were killed in Kosovo in 1999. They claim that EULEX Kosovo failed to carry out an effective investigation into those deaths, thus violating their procedural rights under arts 2 and 3 ECHR, as well as art. 13 ECHR (and corresponding provisions of the Charter of Fundamental Rights).

Previously, the applicants had successfully argued their cases before the EULEX Kosovo Human Rights Review Panel (HRRP).[45] However, as an inspection and review panel, the HRRP merely had jurisdiction to make recommendations to the EULEX head of mission.[46] Those recommendations were only partially implemented.[47]

Dissatisfied with the outcome of the HRRP proceedings, KS and KD decided to pursue their cases before the courts. KS brought an action before the General Court in 2017, but it was dismissed for manifest lack of jurisdiction.[48] Rather than file an appeal, KS joined KD (and others) in a lawsuit before the High Court of Justice (England & Wales). They argued that UK Courts should assert jurisdiction, pointing to art. 274 TFEU and the General Court's dismissal of the action brought by KS. However, also the High Court dismissed their case due to lack of jurisdiction, and refused permission to appeal.[49]

[44] French Senate, *Résolution Européenne sur le volet relatif à la politique étrangère et de sécurité commune des négotiations d'adhésion de l'Union européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales* www.senat.fr (my translation).

[45] HRRP, *L.O. v EULEX* (Decision and findings, 11 November 2015) Case 2014-32; HRRP, *Veselinović and Others v EULEX* (Decision and findings, 19 October 2016) joined cases 2014-11 to 2014-17.

[46] SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (CUP 2020) 170 ff.

[47] Joined Cases C-29/22 P and C-44/22 P *KS and KD v Council and Others* ECLI:EU:C:2023:901, opinion of AG Ćapeta para. 19, with further references.

[48] General court, order of 14 December 2017, case T-840/16, *KS v Council and Others* ECLI:EU:T:2017:938.

[49] UK High Court of Justice of England and Wales judgement of 5 December *Tomanović and Others v the European Union and Others* [2019 EWHC 263 (QB)]. For an analysis of the rather complex reasoning of

KS and KD then turned their attention back to the EU courts, filing an action for damages. In the first instance, the General Court dismissed the case due to manifest lack of jurisdiction in November 2021.[50] This time around, the applicants appealed, and the Grand Chamber of the CJEU heard the case in June 2023.

KS and KD is a litmus test for whether the CJEU's jurisdiction covers all potential human rights violating conduct under the CFSP, because the alleged violations are a result of the operational conduct of personnel in the field. This is far removed from actions for annulment against "restrictive measures", which is the terms used in the key claw-back provision in art. 275 TFEU.[51]

In November 2023, unfazed by such linguistic considerations, Advocate General Tamara Ćapeta in her opinion in *KS and KD* concluded that the CJEU nevertheless *has* jurisdiction over *all* fundamental rights violations resulting from CFSP conduct.[52] Her conclusion rested on rather lofty premises. Echoing *Les Verts* and *Kadi*,[53] she postulated that "[i]n a Union based on the rule of law, it could not have been the intention of the authors of the Treaties to allow for breaches of fundamental rights in the CFSP".[54] According to AG Ćapeta, it follows from this that the CJEU's jurisdiction to review the fundamental rights compatibility of CFSP conduct "cannot be excluded by" art. 24(1) TEU and art. 275 TFEU.[55] To her, then, the reference to restrictive measures in art. 275 TFEU is merely an example of potential fundamental rights violating CFSP conduct, rather than a narrow jurisdictional claw-back.[56]

As a supporting argument, she pointed to the unworkability of leaving CFSP cases to domestic courts, as art. 274 TFEU provides for where the CJEU lacks jurisdiction.[57] She also emphasised that her interpretation would smoothen the EU accession to the ECHR, by overcoming the CFSP obstacle.[58]

At the same time, she recognized that the CFSP jurisdictional carve-out may serve a (legitimate) purpose, namely to shield sensitive political choices in the foreign policy field

the High Court, see SØ Johansen, 'Suing the European Union in the UK: *Tomanović et. al. v. the European Union et. al.*' (2019) European Papers www.europeanpapers.eu 345.

[50] Case T-771/20 *KS and KD v Council and Others* ECLI:EU:T:2021:798.

[51] SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* cit. 142 ff.

[52] *KS and KD v Council and Others*, opinion of AG Ćapeta, particularly at cit. paras 116 and 154.

[53] Case 294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166, particularly at para. 23; joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* ECLI:EU:C:2008:461, particularly at paras 278–284.

[54] *KS and KD v Council and Others*, opinion of AG Ćapeta, cit. para. 115.

[55] *Ibid*. para. 116.

[56] *Ibid*. paras 127–133.

[57] *Ibid*. paras 134–144.

[58] *KS and KD v Council and Others*, opinion of AG Ćapeta, cit. paras 145–151.

from the jurisdiction of the CJEU.[59] Still, she stood by her conclusion, asserting that "the breach of fundamental rights cannot be a political choice in the European Union".[60]

AG Ćapeta's conclusion may be normatively laudable. It also avoids threatening the autonomy of EU law, since it does not tie the scope of CJEU jurisdiction to the material scope of the ECtHR, like the proposed interpretative declaration would.[61] However, the legal reasoning supporting it is rather weak.

First, her line of reasoning represents a paradigm shift compared with the CJEU's existing CFSP-related case law. While the CJEU has not yet declined to exercise jurisdiction in a CFSP case, all such cases so far decided have either concerned restrictive measures, or have had some connection with non-CFSP areas of Union law.[62] In *Elitaliana*, the contested act was alleged to be in violation of EU public procurement law and had implications for the EU budget and Financial Regulation.[63] In *H v Council* and *SatCen v KF*, the contested acts were of a staff management nature.[64]

While one can question the degree to which the connections so far identified by the CJEU are solid,[65] it remains that the CJEU consistently requires a connection to non-CFSP areas of Union law. An action for damages against operational conduct, like *KS and KD*, lacks any plausible non-CFSP connection. By asserting that the CJEU would nevertheless have jurisdiction, AG Ćapeta is thus proposing a paradigmatic shift, which would require entirely novel reasoning and justification from the CJEU.

Second, AG Ćapeta's interpretation would override the rather clear wording of TEU art. 24(1) TEU and art. 275 TFEU. While it is true that the CJEU in *Les Verts* did use lofty rule of law arguments to override the clear wording of the EU treaties at the time, it did so to correct what appeared to be a drafting oversight.[66] The situation here is different. Art. 24(1) TEU and art. 275 TFEU expressly carve out much of the CFSP from the jurisdiction of the CJEU. This is not an oversight, but the explicit purpose of those provisions.[67]

[59] *Ibid*. paras 117–119.

[60] *Ibid*. para. 155 in fine.

[61] See section II.3 above.

[62] P Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) CMLRev 1731, 1753.

[63] Case C-439/13 P-DEP *EULEX Kosovo v Elitaliana* ECLI:EU:C:2020:14.

[64] Case C-455/14 P *H v Council and Commission* ECLI:EU:C:2016:569; case C-14/19 P *CSUE v KF* ECLI:EU:C:2020:492.

[65] Particularly the use of "staff management" as a linking criterion has been criticised. P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 1, 12 describes the CJEU's approach in *H v Council and Commission* as "interpretative acrobatics", while J Heliskoski, 'Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy' (2018) Europe and the World: A Law Review 1, 10 considers the CJEU's characterization of the contested act in *H v Council and Commission* to be "highly artificial".

[66] *Les Verts v Parliament* cit. particularly at paras 24–25.

[67] J Heliskoski, 'Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy' cit. 4 ff.

Third, in dismissing the potential role of domestic courts under art. 274 TFEU, AG Ćapeta overlooks that the complete system of remedies provided by EU law is a two-way street.[68] The potential access to domestic courts is a weighty argument against extending the scope of the CJEU's jurisdiction over the CFSP by way of interpretation. The courts of the EU Member States are Union courts too, and can thus also serve as guardians of the Union's legal order.[69]

Acting as Union courts in this manner, they should be able to offer sufficient judicial protection (at least in most cases). A domestic court faced with a damages claim against a CFSP mission must therefore apply the Union law non-contractual liability regime laid down in art. 340(2) TFEU in CFSP cases. They may not apply their national non-contractual liability law regime, as asserted by AG Ćapeta.[70] Moreover, they would still be able to ask for preliminary rulings on the interpretation of non-CFSP provisions of Union law that are relevant in CFSP cases – notably provisions of the Charter of Fundamental Rights.[71]

That CFSP cases are left to the domestic courts of the EU Member States would undoubtedly cause complications than the Union's ordinary judicial architecture avoids,[72] but those complications are the result of a deliberate choice by the masters of the treaties. EU accession to the ECHR would not exacerbate those complications.

Fourth, the principle of effective judicial protection cannot override these jurisdictional limitations. While it undoubtedly affects the interpretation of art. 24(1) TEU and art. 275 TFEU, it cannot be used to effectively amend those provisions. It also cannot act as a head of jurisdiction on its own. Moreover, the principle of effective judicial protection entails a duty entrusted to both the CJEU and the domestic courts of EU Member States.[73] It is therefore possible to respect the limitations set out in art. 24(1) TEU and art. 275 TFEU, while at the same time ensuring effective judicial protection via the domestic courts of EU Member States.

These apparent objections to AG Ćapeta's lines of reasoning[74] resonate in the judgment that the CJE Grand Chamber handed down on 10 September 2024. Complex and

[68] A Alemanno, 'What Has Been, and What Could Be, Thirty Years after *Les Verts/European Parliament*' in MP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 324, 328.

[69] See e.g. Opinion 1/09 *European and Community Patents Court* ECLI:EU:C:2011:123 para. 66.

[70] *KS and KD v Council and Others*, opinion of AG Ćapeta, para. 144.

[71] C Hillion and RA Wessel, '"The Good, the Bad and the Ugly": Three Levels of Judicial Control over the CFSP', in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) 65, 85.

[72] C Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' European Papers www.europeanpapers.eu 55, 63-66. For a discussion of further difficulties, see SØ Johansen, *The Human Rights Accountability Mechanisms of International Organizations* cit. 154-160.

[73] See e.g. Opinion 1/09 cit. paras 68–69.

[74] Joined cases C-29/22 P and C-44/22 P KS and KD v Council and Others ECLI:EU:C:2024:725. As the judgment was handed down while this special issue was in production, the following paragraphs were added as postscript.

perplexing, the Court's judgment is not easy to decipher. What we can say for sure, though, is that it does not neatly pave the way for EU accession to the ECHR.

The first, and most thoroughly reasoned, of the two main parts of the judgment opens with an outright acknowledgement that the allegedly fundamental rights-violating acts and omissions in the case "do not concern [...] restrictive measures".[75] The CJEU then turns to analyse, in essence, whether it has jurisdiction over all allegations of fundamental rights violations – including within the CFSP.

In doing so, it emphasizes that the CFSP is subject to specific rules and procedures (one of which being the rule that the CJEU's jurisdiction is in principle excluded), and adds that the principles of conferral and institutional balance also apply in the CFSP.[76] Consequently, the Court finds that the allegations of fundamental rights violations are "not in itself sufficient" for it to have jurisdiction.[77] Otherwise, art. 24(1) TEU and 275(2) TFEU would be "deprived of their effectiveness in part and the principles of conferral and institutional balance infringed".[78] Moreover, as the CJEU stresses by referencing an array of ECtHR case-law, limitations on the jurisdiction of courts in the foreign policy field are compatible with the ECHR.[79]

That KS and KD are bringing actions for damages rather than actions for annulment is, according to the CJEU, of no relevance for this analysis: "neither the exclusive nature of that jurisdiction nor the independent nature of an action to establish non-contractual liability of the European Union can have the effect of extending the limits of the jurisdiction conferred on [the CJEU] by the Treaties".[80]

That is because, as the CJEU concludes, the jurisdictional limitations in art. 24(1) TEU and art. 275 TFEU are not concerned with "the type of procedure under which the Court may review the legality of certain decisions, but rather the type of decisions whose legality may be reviewed by the Court, within any procedure that has as its aim such a review of legality".[81]

So far, the judgment reads as a total loss for KS and KD, and a rejection of AG Ćapeta's fundamental rights-oriented reasoning. The CJEU's emphasis on conferral, institutional balance, the need to ensure that the jurisdictional limitations in the CFSP are not deprived of their effectiveness, and the ECHR-compliant nature of jurisdictional limitations in the

[75] *KS v Council and Others*, cit. para. 64.
[76] *Ibid*. paras 65–72.
[77] *Ibid*. para. 73.
[78] *Ibid*. para. 73.
[79] *Ibid*. paras 77–81.
[80] *Ibid*. para. 91.
[81] *Ibid*. para.92. This issue had arguably already been settled by the CJEU in case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793 paras 23–52. In that case, the CJEU found that it had jurisdiction to hear an action for damages caused by traditional CFSP restrictive measures (targeted sanctions). To the extent the CJEU has jurisdiction *ratione materiae* over other fundamental rights claims in CFSP cases, the general and principled reasoning in *Bank Refah Kargaran* seems easily extendable to such cases.

foreign policy field points towards dismissal. *KS and KD* is a case concerning factual conduct within a CSDP mission – a type of case that is probably the most difficult to square with the language of "restrictive measures" in art. 275 TFEU.[82] To assert jurisdiction over such conduct, e.g. by classifying it as a "restrictive measure", seems impossible without undermining the effectiveness of art. 24(1) TEU and 275 TFEU – thus upsetting the institutional balance and violating the principle of conferral.

Surprisingly, however, this is more-or-less what the CJEU appears to do in the second of the two main parts of its judgment in *KS and KD*.

This part of the judgment opens with the assertion by the CJEU that there are two steps that one must take when assessing whether the Court has jurisdiction over a CFSP case. First one must assess whether the case at hand falls within the scope of art. 24(1) TEU and art. 275 TFEU.[83] If that is not the case, one must assess whether the jurisdiction of the CJEU "may be based on the fact that the acts and omissions at issue are not directly related to the political and strategic choices" made by Union organs in the context of the CFSP.[84]

It is in this second step that the novelty is hidden – within three paragraphs that to the untrained eye come across as brief restatements of well-established legal principles.[85] The CJEU alleges that it is "apparent, in essence" from the above-mentioned cases of *Elitaliana*, *H*, and *SatCen* that only issues directly related to "political and strategic choices" fall outside the scope of the CJEU's jurisdiction. However, such a distinction is not drawn in any of these three cases. As pointed out above, the lines of reasoning adopted in *Elitaliana*, *H*, and *SatCen* emphasize the connection between the CFSP conduct at hand and a non-CFSP policy area. The "political and strategic choices"-test that suddenly appears in *KS and KD* is paradigmatically different.

The CJEU offers no further reasoning for this paradigm shift, that appears to significantly expand its jurisdiction over the CFSP. It merely formulates a new test with no obvious root in provisions of the Treaties. This is perplexing, given the Court's emphasis on the principle of conferral and institutional balance in the first main part of the judgment.

At the same time, the new test is in line with AG Ćapeta's opinion. She also drew an initial distinction between "political or strategic decisions, on the one hand, and merely administrative CFSP measures, on the other" – based on speculation that this "might reflect the intention of the authors of the Treaties".[86] The key difference between her and the Court is thus that AG Ćapeta wanted to go further. She claimed that the CJEU had

[82] M Spernbauer, *EU Peacebuilding in Kosovo and Afghanistan: Legality and Accountability* (Brill Nijhoff 2014) 361; SØ Johansen, *The Human Rights Accountability Mechanisms of international Organizations* cit. 142.

[83] *KS v Council and Others* cit. para. 115.

[84] *Ibid*. para. 116.

[85] *Ibid*. paras 116–118.

[86] *KS and KD v Council and Others*, opinion of AG Ćapeta, cit. para. 112.

jurisdiction to review "any CFSP measure, including a political and strategic one" in light of fundamental rights.[87]

Having set out its new test, the CJEU turns to applying it to the acts and omissions that were alleged by KS and KD as constituting fundamental rights violations.[88] It finds that allegations of lack of resources to conduct an effective investigation and the decision to remove EULEX Kosovo's executive mandate concerns "political and strategic choices" – thus falling outside the jurisdiction of the CJEU. The other allegations, however, were considered to fall within the scope of the CJEU's jurisdiction. These included allegations of a lack of appropriate personnel to perform an effective investigation, and the failure to take remedial action following KS and KD's successful complaint to the Human Rights Review Panel.

Having thus reached a different outcome than the General Court, but without having the necessary information to render a final decision, the CJEU remanded the case to the General Court.[89]

From the perspective of EU accession to the ECHR, it is difficult to say what to make of *KS and KD*. On the one hand, the CJEU's new test seems to expand its jurisdiction over the CFSP quite significantly. Much CFSP conduct that was hard to imagine as falling within the scope of the CJEU's jurisdiction will, according to the new test, clearly fall within it.

On the other hand, there is fundamental rights-relevant conduct – such as (inadequate) funding – which we now know does fall outside the scope of the CJEU's jurisdiction. The CJEU also seems quite fixated on *decisions* when applying its new test to the allegations by KS and KD, while many fundamental rights violations are caused by factual conduct. Moreover, while the issue of ECHR accession featured prominently in the arguments of the parties and at the hearing, it is only mentioned once in the judgment – in rather negative terms: "Article 6(2) TEU cannot be interpreted as having the effect of extending the jurisdiction" of the CJEU.[90]

Is this sufficient for the CJEU to be able to find the revised DAA compatible with the Treaties? To what extent is it even possible to understand the scope and application of the new "political and strategic choices"-test before we have a judgment by the General Court and, probably, a new appeal by KS and KD to the CJEU? How stable is an expansion of the Court's jurisdiction built on such flimsy grounds? While *KS and KD* will probably be hailed for providing answers, serious questions remain.

[87] *KS and KD v Council and Others*, opinion of AG Ćapeta, cit. para. 116.
[88] *KS v Council and Others.*, cit. paras 125–137.
[89] *Ibid*. paras 159–166.
[90] *Ibid*. para 82.

IV. What would work: Formally extending the jurisdiction of the CJEU

All the potential ways to overcome the CFSP issue have their problems, either of a legal or practical nature – or both. Overcoming those challenges may not be impossible. However, I submit that it is indeed impossible to resolve the CFSP issue if one takes the CJEU's stance in *Opinion 2/13* for granted *and* at the same time rules out amending or supplementing the EU treaties. The combination of those two positions is what doomed the different options considered by the negotiators.

The underlying problem is *Opinion 2/13*. It is simply a wrongly decided case, particularly when it comes to the CFSP issue. Instead of resorting to what Steve Peers aptly termed "judicial politics of the playground",[91] the CJEU should have recognised that, as a consequence of its limited jurisdiction over the CFSP, the principle of autonomy does not apply equally to this area.[92] Traditional notions of autonomy and exclusivity of CJEU jurisdiction are particularly difficult to justify in cases where the CJEU itself lacks jurisdiction, since art. 274 TFEU explicitly allows the courts of the Member States to step in to ensure that the EU system of remedies is complete.[93]

Accordingly, the CJEU's lack of jurisdiction should not have been a bar to the accession to the ECHR. If the EU treaties indeed provide a complete system of remedies, consisting of both the Union courts and the courts of the Member States, the ECHR admissibility criterion of exhaustion of local remedies should protect the autonomy of EU law to a sufficient degree.

Yet, we cannot escape the fact that *Opinion 2/13* exists. It is perhaps too risky to simply re-litigate the CFSP issue in the forthcoming opinion proceedings concerning the revised DAA.

But there is no need for *contra legem* interpretations or legally complex workaround mechanisms when there is a (strictly legally speaking) simple and watertight alternative available: amending or supplementing the EU treaties.[94] From a legal point of view, all that is needed is one additional treaty provision. This provision would not even need to

[91] S Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (18 December 2014) EU Law Analysis eulawanalysis.blogspot.com.

[92] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2475, view of AG Kokott, para. 101.

[93] C Hillion 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' cit.; J Heliskoski, 'Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy' cit. 20; C Hillion and RA Wessel, '"The Good, the Bad and the Ugly": Three Levels of Judicial Control over the CFSP' cit. 84-85.

[94] J Czuczai and F Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice* cit. 305; P Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' cit. 1758; G Butler, 'Jurisdiction of the EU Courts in the Common Foreign and Security Policy Reflections on the Opinions of AG Ćapeta in KS and KD, and Neves 77 Solutions' (29 November 2023) EU Law Live eulawlive.com.

give the CJEU general jurisdiction over the CFSP. It could merely add a third claw-back. This exception could be modelled on AG Ćapeta's conclusion, by giving the CJEU jurisdiction over all allegations of fundamental rights violations caused by CFSP-related conduct.

Such a provision can only be added to the text of art. 24(1) TEU and art. 275(2) TFEU through the ordinary revision procedure laid down in art. 48(2)–(5) TEU.[95] This is a rather convoluted process, which would entail a separate procedure that is independent of the package of accession instruments negotiated in the 46+1 *ad hoc* group. Moreover, there is an obvious risk that suggesting one treaty amendment under this procedure could trigger the submission of other suggestions, which in turn could lead to a more comprehensive and drawn-out process with an uncertain outcome.

To ensure that Pandora's box is not opened in this manner, and that the accession instruments remain a tight-knit package deal, the possibility of expanding the CJEU's jurisdiction with a treaty provision *outside* the EU treaties should be considered.[96] The CJEU has explicitly confirmed that "an international agreement concluded by the [Union] may confer new powers on the Court, provided that in so doing it does not change the nature of the function of the Court" as conceived in the EU treaties.[97] There is also precedent for expanding the CJEU's jurisdiction via external treaties. The 1971 Protocol to the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters conferred on the Court of Justice jurisdiction to interpret provisions of the 1968 Convention.[98]

Admittedly, that example and the expansion of the CJEU's jurisdiction to cover CFSP cases are not completely parallel cases. An EU-external treaty expanding the CJEU's jurisdiction over the CFSP would give the Court additional jurisdiction over *an area of Union law*, rather than the provisions of the external treaty itself. This could, perhaps, be seen as a treaty amendment in circumvention of the procedure laid down in art. 48 TEU. On the other hand, giving the CJEU jurisdiction over external treaties could have been challenged in the same manner, since its jurisdiction *ratione materiae* is positively delimited to the EU treaties in art. 19 TEU. At the very least it therefore seems useful to explore this option.

If it is indeed possible to expand the CJEU's jurisdiction over the CFSP by separate treaty, it could easily form part of the package of accession instruments. Since the DAA

[95] The simplified procedure laid down in art. 48(6) TEU cannot be used for amendments to these institutional provisions.

[96] This possibility was brought up by the Council of Europe's Director for Legal Advice and Public International Law during the (re)negotiation of the DAA, but was not followed up. See Report of the 13th Negotiation Meeting cit. para. 38. See also J Polakiewicz and L Panosch, Das Spannungsverhältnis zwischen Hammer und Amboss' in C Seitz, RM Straub and R Weyeneth (eds), *Rechtsschutz in Theorie und Praxis: Festschrift für Stephan Breitenmoser* (Helbing Lichtenhahn 2022) 1031, 1039-1040.

[97] Opinion 1/92 *Draft agreement between the Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area* ECLI:EU:C:1992:189 para. 32.

[98] Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters [1990].

will need to be ratified by all EU Member States either way, adding an instrument extending the jurisdiction of the CJEU to the package would thus not significantly increase the legal complexity of the ratification process.

Still, it remains that the legal issues are not the most difficult aspect. The central problem with amending or supplementing the treaties is perceived to be political feasibility. But why is it politically more acceptable that the CJEU's jurisdiction is expanded through a *contra legem* interpretation rather than by the expressed will of the EU Member States? Formally extending the jurisdiction of the CJEU through a political decision, rather than by judicial fiat, would reinforce the position of the EU Member States as masters of the treaties. Thus, perhaps the knee-jerk reaction against amending or supplementing the EU treaties ought to be resisted.

ARTICLES

THE REVISED DRAFT AGREEMENT
ON THE ACCESSION OF THE EU TO THE ECHR
edited by Stian Øby Johansen, Geir Ulfstein, Andreas Follesdal *and* Ramses A. Wessel

SHADES OF TRUST: THE ECTHR, THE ECJ AND THEIR EVOLVING RELATIONSHIP IN LIGHT OF THE 2023 REVISED DRAFT ACCESSION AGREEMENT

VASSILIS PERGANTIS*

TABLE OF CONTENTS: I. Introduction. – II. Trust and distrust: Delineations and reflections on the protagonists of the EU accession saga. – III. *Opinion 2/13* and its aftermath: The politics of distrust. – IV. The mirage of trust: The ECtHR and the draft accession instruments. – V. The road ahead: (Re-)building trust post-accession. – VI. Conclusion.

ABSTRACT: The EU accession to the ECHR has been a complex and at times politically charged topic. Questions of trust and distrust between the two protagonists, namely the supranational courts that will be called upon to cooperate for the enhancement of human rights protection in Europe (but also more generally between the Union and its Member States), were extremely important for the successful conclusion of this second round of negotiations. Nevertheless, the obsession of control that underpins the CJEU's *Opinion 2/13* and many of the EU proposals in the renewed negotiation do not bode well for the establishment and furtherance of trust between the two institutions. Additionally, the ECtHR is called upon to show blind trust to the EU and its Court under the revised Draft Accession Agreement. Ultimately, trust will be (re)built only if the CJEU and the ECtHR adopt a constructive attitude by, respectively, following due process/rule of law guarantees or showcasing jurisprudential consistency and accommodating mutual trust.

KEYWORDS: EU accession to the ECHR – trust – distrust – Draft Accession Agreement – Court of Justice of the European Union – European Court of Human Rights.

I. INTRODUCTION

While the European Union's (EU) tortuous trajectory towards accession to the European Convention on Human Rights (ECHR) has been examined through multiple prisms, the concepts of trust and distrust have taken a back seat; perhaps because speaking in sociological

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terms brings to light a bundle of subjective feelings, such as insecurity, antagonism or suspicion, which should not be blended into a technical discussion on the arrangements that would make the accession possible. Yet, there is no doubt that much of the negotiation and its background events revolve(d) around the notions of trust and distrust.[1]

In this *Article* I will first flesh out the content of trust and distrust and how they both relate to the current topic (II), before going on to highlight those elements of *Opinion 2/13* and the subsequent renewed negotiations that express the Court of Justice of the European Union's (CJEU) deep distrust towards the accession proposal (III). Afterwards, I will analyse how much trust the European Court of Human Rights is required to showcase towards the EU and its Court for the EU accession to function under the revised accession instruments (IV), before laying down the prospects and challenges in terms of trust dynamics regarding the relations between the two Courts *post*-accession (V). Section VI concludes.

II. Trust and distrust: delineations and reflections on the protagonists of the EU accession saga

Research on trust and distrust has only recently expanded to the legal field.[2] This might be due to the fact that trust is a feeling that develops at the interpersonal level and does not concern non-living legal subjects. Yet nowadays it is widely admitted that considerations of trust are equally pertinent to interinstitutional relations, trust specifically being a necessary component for the effective collaboration of judicial organs in the context of multilevel governance.[3]

Trust is employed not when dealing with the familiar but with the unknown, namely in situations involving risk due to the lack of sufficient information, when a "leap of faith" is required.[4] This is precisely the case of judicial institutions, which are by design geared to function independently and are not always fully transparent, two elements that render more challenging but also necessary the embeddedness of trust *vis-à-vis* other judicial institutions when cooperation is warranted. Of course, increased transactions between judicial institutions usually reduce frictions and create a common language and greater familiarity, allowing the trustor to grant more discretion to the trustee.[5] This highlights another

[1] E Dubout, 'Une question de confiance: nature Juridique de l'Union européenne et adhésion à la Convention européenne des droits de l'homme' (2015) Cahiers de droit européen 73.

[2] R Barradas de Freitas, 'Introduction: The Virtue of Trust' in R Barradas de Freitas and S Lo Iacono (eds), *Trust Matters: Cross-disciplinary Essays* (Hart 2021) 1, 4.

[3] V Pergantis, 'The Advent and Fall of Trust as a Cornerstone of Judicial Cooperation in Multilateral Regimes in Europe: A Cautionary Tale' in L Gruszczynski, M Menkes, V Bilkova and P Farah (eds), *The Crisis of Multilateral Legal Order: Causes, Dynamics and Implications* (Routledge 2022) 146, 149. This part draws from that contribution.

[4] S Van de Walle and FE Six, 'Trust and Distrust as Distinct Concepts: Why Studying Distrust in Institutions is Important' (2014) Journal of Comparative Policy Analysis 158, 159.

[5] See, in the specific context of the CJEU preliminary reference mechanism, JA Mayoral, 'Impact through

important facet of trust – namely, that trust is most fragile at the "constitutive moments" establishing the transactional relationship between the trustor and the trustee, rather than during the cooperation, when the "rules of the game" have already been set. At that moment, familiarity becomes prevalent and there is less room for manoeuvre. This is crucial in the case at hand, where accession is perceived as such a "constitutive moment", whereas considerations of trust might not be so evident once accession is concluded and the relationship between the two Courts starts evolving within the set framework.

Moreover, through trusting, the transaction costs are reduced, but this is only achieved by embracing the vulnerability that trusting – that is, depending on someone not controlled by you – induces.[6] Such vulnerability is more pronounced if the trustor is conscious that the cooperation with the trustee creates an element of hierarchy. This hierarchical conundrum has been constantly present in the various stages of the saga that might lead to the EU's accession to the ECHR: The subjection of the EU to an external judicial authority has certainly stirred some negative feelings in Kirchberg, reflected in *Opinion 2/13*,[7] while the revised draft accession instruments[8] bestow upon the CJEU the final say in numerous questions related to the EU's participation in proceedings before the European Court of Human Rights (ECtHR).[9]

Additionally, trust evokes a choice; instead of isolation and inaction, a trustor opts for cooperation. In that, trust distinguishes itself from confidence, where no alternative exists.[10] In our case concerning the relations between the ECtHR and the CJEU, this should be complemented with a discussion on the trust-specific traits of both the trustor and the trustee that shape their relationship. On the one hand, it is important to examine a trustor's general, but also contextual, propensity to trust.[11] In other words, the question should be raised whether the trustor is construed in a way that favours trusting and whether it has showcased in the specific context of human rights protection a tendency to trust. To start answering this question, there is no denying that the CJEU had and still has a conflictual relationship with national high courts that has not facilitated its capacity to trust other judicial institutions.[12] The EU legal order's autonomy and the CJEU's

Trust: The CJEU as a Trust-enhancing Institution' in M Wind and A Follesdal (eds), *International Courts and Domestic Politics* (CUP 2018) 160, 170 ff.

[6] A Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2020) 12.

[7] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[8] 46+1 ad hoc group Report to the CDDH, 46+1(2023)35FINAL of 30 March 2023 on the Accession of the European Union to the European Convention on Human Rights.

[9] See *infra*.

[10] N Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Regimes* (OUP 2000) 94, 97.

[11] P Popelier, M Glavina, F Baldan and E van Zimmeren, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System' (2022) Maastricht Journal of European and Comparative Law 351, 356.

[12] MA Pollack, 'The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence' in N Grossman, HG Cohen, A Føllesdal and G Ulfstein (eds), *Legitimacy and International Courts* (CUP

concomitant one, were partly embedded as an answer to the aforementioned troubled relationship, making the Luxemburg Court an institution that is geared to not easily trust.[13] Additionally, the EU's external autonomy has been deployed to shield the CJEU from any hierarchical subjection to an external source of control, in our case regarding human rights protection.[14] Thus, one can safely conclude that the CJEU's propensity is not necessarily to trust other judicial institutions.

On the other hand, the trustworthiness of the trustee is equally important for the construction of a smooth relationship of trust. A series of elements must be satisfied for someone to be deemed trustworthy:[15] the capacity to serve the interests of the trustor; a notion of co-responsibility in the sense of shared norms and values; the trustee's willingness to preserve its reputation by complying to the trustor's requests; and the benevolence (good faith) of the trustee, which is crucial to build lasting trust.[16] The ECtHR shares many of these attributes, and the draft accession instruments provide for some of them, but most importantly, the Strasbourg Court has oftentimes accommodated the special features of the EU legal order, particularly on the basis of the *Bosphorus* doctrine of equivalent protection, showing benevolence towards the CJEU and, more generally, the EU.[17]

A final variant of the trust equation relates to the question of constraints and controls imposed upon the trustee. It is suggested that if the trustee is subjected to a strict system of legal deference or if the trustor imposes a system of heavy monitoring, trust cannot develop; instead the trustee might feel resentment for these limitations and this surveillance.[18] In contrast, a system of graduated control, encompassing institutionalised mechanisms, sanctions and incentives, might help enhance trust between the two parties.[19]

2018) 143, 163; KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001).

[13] G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd ed. OUP 2021) 480, 489.

[14] Opinion 2/13 cit. paras 180-183; Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* ECLI:EU:C:2016:84, paras 45-47.

[15] RC Mayer, JH Davis and FD Schoorman, 'An Integrative Model of Organizational Trust' (1995) Academy of Management Review 709, 717.

[16] M Levi, 'A State of Trust' in M Levi and V Braithwaite and M Levi (eds), *Trust and Governance* (Russell Sage 1998) 77; FD Schoorman, R Mayer and JH Davis, 'An Integrative Model of Organizational Trust: Past, Present and Future' (2007) Academy of Management Review 344, 346.

[17] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App n. 45036/98 [30 June 2005] para. 155. See also R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' (2024) European Papers 647 www.europeanpapers.eu.

[18] J Mayoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe' (2017) JComMarSt 551, 554; K Jones, 'Trust: Philosophical Aspects' in JD Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier 2015) 668, 671.

[19] M Levi, 'Trust, Sociology of' in JD Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* cit. 664, 665.

The balance between overtly surveying and a system of gradual monitoring is not easy to attain, as we will see regarding the draft accession instruments.

Turning now to distrust, this should not be simply conceptualised as the absence of trust. Distrust is a much more negative stance *vis-à-vis* the other and has the potential of self-reinforcement, where distrust is amplified through the creation of a distorted image of the other.[20] Distrust usually stems from value incongruence and an attribution of negative motives, antagonistic or injurious ones, on the other side of the cooperation scheme.[21] In such a context, distrust leads to mobilisation and participation of the trustor in the common endeavour instead of letting the trustee proceed alone according to the agreed terms. It can equally lead to a lack of cooperation, conflictual relations, instances of misinformation, and the impossibility of shifting back to trust.

The stance of the CJEU regarding the EU accession to the ECHR is illustrative of such distrust, as we will see: its lack of flexibility is palpable in *Opinion 2/13*,[22] while its constant insistence on being involved in human rights protection, as exemplified in the current draft, showcases either a very low level of trust or an utter distrust not only *vis-à-vis* the ECtHR, but equally towards the EU Member States and their national courts.[23]

III. *Opinion 2/13* and its aftermath: The politics of distrust

Whereas *Opinion 2/13* raises a series of valid points on how the EU accession to the ECHR should be effectively implemented, it also presents glimpses of distrust *vis-à-vis* the ECtHR and the EU Member States. In the next few lines, I will analyse how iterations of distrust can be found both in *Opinion 2/13* and during the renewed negotiations. Two caveats are crucial. Our analysis will take as granted that much of EU's representations in the renewed negotiations was aimed at dissecting CJEU's views as expressed in *Opinion 2/13* and at presenting solutions that could allegedly be deemed admissible by the Luxemburg court in the event of a new opinion.[24] Thus, EU negotiators served primarily as

[20] SB Sitkin and K Bijlsma-Frankema, 'Distrust' in RH Searle, AMI Nienaber and SB Sitkin (eds), *The Routledge Companion to Trust* (Routledge 2018) 50, 52-53.

[21] K Bijlsma-Frankema, S Sitkin and A Weibel, 'Distrust in the Balance: The Emergence and Development of Intergroup Distrust in a Court of Law' (2015) Organization Science 1018, 1020.

[22] Editorial Comments, 'The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) CMLRev 1.

[23] E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 35, 46.

[24] General Secretariat of the EU Council, Summary of Discussion, Doc. 7977/15 of 16 April 2015 1 ff; Presidency of the EU Council, Accession of the European Union to the European Convention for Protection of Human Right and Fundamental Freedoms (ECHR) – State of Play, Doc. 12528/15 of 2 October 2015, para. 20; General Secretariat of the EU Council, Accession of the European Union to the European Convention for Protection of Human Right and Fundamental Freedoms (ECHR), Doc. 12349/19 of 20 September 2019, para. 3. See also F Ronkes Agerbeek, 'EU Accession to the European Convention on Human Rights: A New Hope' (2024) European Papers 695 www.europeanpapers.eu; A Chablais, 'EU Accession to the ECHR: The Non-EU Member States Perspective' (2024) European Papers 715 www.europeanpapers.eu.

interlocutors of the CJEU, which did not and could not participate in the negotiations or give direct instructions to the EU negotiators. As a result, proposals of EU negotiators will indirectly be attributed to the Luxemburg court.

Additionally, the analysis will shed light on the complex interactions between different actors, beyond the two courts, pursuing different goals that influence the CJEU-ECtHR relationship. In other words, an institutional dialogue at the level of supranational judicial governance in Europe might hide a wider conversation "between multiple direct and indirect actors with different purposes", which shapes the trust dynamics.[25] In the case at hand, such other actors comprise the national courts of EU Member States, the EU institutions, or the applicants before the ECtHR, all of which might play an important role on the trust/distrust shown by the CJEU towards the ECtHR and *vice versa*, as we will see.

Having said that, CJEU's distrust *vis-à-vis* the Strasbourg Court is not always easy to pinpoint, since it frequently blends with the autonomy discourse that underpins much of the Luxemburg Court's jurisprudence on the compatibility with Union law of international agreements reached by the EU that include dispute settlement mechanisms.[26] However, some of the stances adopted by the CJEU and the negotiators go beyond what is strictly required by the principle of autonomy, and illustrate the Court's distrust towards the ECtHR. For instance, the CJEU insists on being fully informed of all pending cases involving an EU Member State in order to decide if any case touches upon EU law.[27] In the affirmative, the Court of Justice should then be empowered to examine if it has already ruled on the topic or not in order for the prior involvement mechanism to be activated.[28] The requirement of a constant information flow aims at reducing the risks inherent in the trust that must be displayed by the CJEU to the ECtHR, and showcases that the CJEU is suspicious about the ECtHR proceeding to an even superficial assessment of whether a case has been decided by the CJEU or not. Nevertheless, this assessment would not have been a substantive one, like the *acte clair* doctrine, but only a procedural one that could have been considered compatible with the autonomy of the EU legal order, as explained in the 2013 Draft Accession Agreement (DAA).[29] In the same context of the prior

[25] P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' in M Belov (ed), *Judicial Dialogue* (Eleven International 2019) 51, 52.

[26] See, indicatively, Opinion 1/91 *EEA Agreement* ECLI:EU:C:1991:490; Opinion 1/92 *EEA Agreement II* ECLI:EU:C:1992:189; Opinion 1/00 *ECAA Agreement* ECLI:EU:C:2002:231; Opinion 1/09 *Agreement creating a Unified Patent Litigation System* ECLI:EU:C:2011:123.

[27] AG Kokott stressed that without a system of automatic communication of all the cases involving EU Member States to the EU and *vice versa*, the co-respondent mechanism could not function; Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2475, opinion of AG Kokott, para. 224.

[28] Opinion 2/13 cit. para. 241.

[29] 47+1 ad hoc group, Final Report to the CDDH of the Fifth Negotiation Meeting 47+1(2013)008rev2 of 10 June 2013 between the CDDH and the European Commission on the Accession of the European Union to the European Convention on Human Rights, (2013 DAA) art. 3(6); Draft Explanatory Report, *ibid*., Appendix V, para. 66. See the analysis by KS Ziegler, 'The Second Attempt at EU Accession to the ECHR: Opinion

involvement procedure, the CJEU demanded the amendment of the 2013 DAA with regard to the notion of assessment of compatibility so as to encompass equally the interpretation of EU secondary law that was left out of the Draft Explanatory Report, whereas AG Kokott suggested that a clarification would have been sufficient on this point – this point equally highlighting the Luxemburg court's inflexible position.[30]

Questions about the ECtHR's trustworthiness are also indirectly posed in *Opinion 2/13*. Specifically, the CJEU focuses on the issue of mutual trust, raising concerns about how the ECtHR's case law might impede the proper functioning of EU rules in the Area of Freedom, Security and Justice.[31] The CJEU's warnings were surely related to the tensions regarding the asylum case law of the two supranational courts, which were very pronounced at that time.[32] Such tensions exacerbated the CJEU's doubts as to whether the ECtHR shared the same values and norms as the CJEU, and could serve the Union's interests – two very important traits for a trustee. Consequently, the CJEU insinuated that additional constraints upon the ECtHR should be put in place when mutual trust was at play as a guarantee that the latter will not force EU Member States to disregard Union law on human rights grounds. This has been the goal of the EU representation in the renewed negotiations,[33] despite the fact that the case law of the two courts had in the meantime converged and only minor issues remained outstanding.[34] And while the Secretariat proposal reverted to a formula of *non-automatic and mechanical application of mutual trust*, it still attempted to impose specific standards of review on the ECtHR in order to accommodate EU's concerns.[35] Hence, the EU took some time before waiving its distrust over

2/13' in G Butler and R Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022) 755, 765.

[30] Cf. the linguistic difference between Opinion 2/13 cit. para. 243 and opinion AG Kokott cit. paras 132 ff; see also the comments on the CJEU's bad faith reading of the DAA/Explanatory Report on this point in H Labayle and F Sudre, 'L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: pavane pour une adhésion défunte?' (2015) Revue française de droit administratif 3, 11; JP Jacqué '*Pride and/or prejudice*? Les lectures possibles de l'avis 2/13 de la Cour de justice' (2015) Cahiers de droit européen 19, 37.

[31] Opinion 2/13 cit. para. 194.

[32] L Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR' (2015) HRLRev 485, 507 ff.

[33] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 of 25 March 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 4, suggesting a clause that would require EU Member States to "consider…that fundamental rights have been observed by the other EU member states", which would have restricted the evolution of the ECtHR's case law (*Ibid*. para. 7).

[34] Cf. case C-404/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 para. 92, and ECtHR *Avotiņš v Latvia* App n 17502/07 [23 May 2016] paras 113–6. See also R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' cit.

[35] 47+1 ad hoc group, Report of the 10th Meeting, 47+1(2021)R10 of 2 July 2021 on the Accession of the European Union to the European Convention on Human Rights, Appendix III, 20.

the ECtHR's approach to the principle of mutual trust, acceding to language that could allow the Strasbourg court's case law to evolve.[36]

In the same vein, the CJEU unjustifiably perceived Protocol No. 16 ECHR, providing for the possibility of the highest courts of Member States to submit a request for an advisory opinion to the ECtHR, as antagonistic to the CJEU's role and functions, particularly to the preliminary ruling procedure.[37] This seemed to be an indication that the CJEU did not trust that the ECtHR will prevent Member States from abusing Protocol No. 16.[38] That was confirmed when the EU delegation presented its proposal in the renewed negotiations, where it insisted upon the establishment of a new mechanism, beyond that of prior involvement, that would bestow upon the CJEU the power to assess if a request for an advisory opinion under Protocol No. 16 involved matters of EU law.[39] It was only after persistent objections by various delegations[40] that the EU ceded to the pressure and introduced a proposal that clearly left to the national courts and the ECtHR to determine if the request involved an EU law question.[41] It remains to be seen if the CJEU will find this compromise acceptable when it again takes on the revised DAA.

More broadly, there is a general impression throughout *Opinion 2/13* that the CJEU viewed the ECtHR with suspicion.[42] Writing in his private capacity, then CJEU Judge Malenovský observed, in the aftermath of *Opinion 2/13*, that "*il serait illusoire de croire que la Cour européenne se comportera toujours et invariablement avec retenue et n'affectera jamais le droit de l'Union, les compétences de la Cour de justice et l'acquis de sa jurisprudence*".[43] This is reflected, for instance, in the CJEU's suggestion that the ECtHR will "encourage" EU Member States to lay down higher standards *via* art. 53 ECHR or that the plausibility test for the co-respondent mechanism would necessarily mean an ECtHR assessment on the division of

[36] 47+1 ad hoc group, Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states"), 47+1(2021)14, of 10 September 2021, para. 6; 47+1 ad hoc group, Report of the 12th Negotiation Meeting 47+1(2021)R12 of 10 December 2021, Appendix V.

[37] Opinion 2/13 cit., paras 197–8.

[38] See the observations of AM Guerra Martins, 'Opinion 2/13 of the Court of Justice in the Context of Multilevel Protection of Fundamental Rights and Multilevel Constitutionalism' (2016) Zeitschrift für öffentliches Recht 27, 50.

[39] 47+1 ad hoc group, Report of the 7th Negotiation Meeting 47+1(2020)R7 of 26 November 2020 on the Accession of the European Union of the European Convention on Human Rights, para. 14.

[40] 46+1 ad hoc group, Report of the 13th Negotiation Meeting 46+1(2022)R13 of 13 May 2022, para. 24.

[41] 46+1 ad hoc group, Report of the 14th Negotiation Meeting 46+1(2022)23 of 20 June 2022, para. 8, stressing the responsibility incumbent upon the requesting court and the ECtHR under the new proposal – a sign of trust shown towards both of them.

[42] D Dero-Bugny, *Les rapports entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme* (Bruylant 2015) 99.

[43] J Malenovský, 'Comment tirer parti de l'avis 2/13 de la Cour de l'Union européenne dur l'adhésion à la Convention européenne des droits de l'homme' (2015) RGDIP 705, 712: "it would be illusory to believe that the ECtHR will always and invariably behave with restraint and will never affect Union law, the CJEU's competences and the *acquis* of its case-law".

powers between the EU and the EU Member States.[44] In other words, the CJEU did not try to accommodate some of those difficulties by presenting the ECtHR as a good faith trustee that will be conscious of EU's concerns, as it had shown with the invention of the *Bosphorus* doctrine, and consequently, take those concerns into account when adjudicating cases involving the EU and its Member States after the accession. This is the opposite of what can be observed, for example, in Opinion 1/17. There, the Luxemburg Court scaled back the ambit of the principle of autonomy and adhered to the view of an external dispute settlement body interpreting EU law as a "matter of fact" rather than law.[45]

Moreover, both *Opinion 2/13* and the draft accession instruments showcase the deep distrust of the CJEU and the EU *vis-à-vis* EU Member States.[46] At times, such distrust is palpable. For instance, while art. 4 of the revised Draft Accession Agreement on interparty cases clearly admits that EU Member States "can be expected to act in accordance with Article 344 [TFEU]", a safeguard clause is added that enables the Union to monitor such interparty cases that are brought before the ECtHR and assess if some of them involve – and to what extent – the interpretation or application of EU law.[47] Here, the distrust towards EU Member States leads the Union to closely monitor them, negating in a way the trust that should be the cornerstone of the EU's accession to the ECHR, and diminishing the role of the Strasbourg Court, since it is up to the Union to decide the extent to which an interparty case can be adjudged by the ECtHR.

In the case of advisory opinions under Protocol No. 16 to the ECHR, distrust is reflected in the "downgrading" of the highest courts of EU Member States that should not be considered as highest courts and consequently, as having the power to submit a request for an advisory opinion before the ECtHR, when the question involves the application of European Union law.[48] A different kind of "downgrading" of the national dimension in the EU judicial system takes place in the most challenging issue of the negotiation regarding the Common Foreign and Security Policy (CFSP). In this framework, the CJEU highlighted that judicial review of EU acts that fall outside the review ambit of the Court

[44] Opinion 2/13 cit. paras 189, 194 and 223–4. See, for instance, how stylistically different the approach of AG Kokott is with regard to the plausibility test, while reaching the same conclusion, where she starts by saying that "[e]ven if the ECtHR can generally be expected to approve requests for leave to become a co-respondent, it is not inconceivable that it could, in some cases, deny the plausibility of the reasons put forward in support of such request" (Opinion 2/13 cit., AG Kokott para. 231).

[45] Opinion 1/17 *CETA)* ECLI:EU:C:2019:341 paras 130 and 136; C Contartese and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' (2021) European Papers www.europeanpapers.eu 621, 624; C Rapoport, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) CMLRev 1725. See also J Buckesfeld and RA Wessel, 'The Effect of Opinion 1/17 on the EU-ECHR Draft Accession Agreement: Lessons Learned?' (2024) European Papers 769 www.europeanpapers.eu.

[46] S Besson, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme après l'avis 2/13' (2014) Annuaire suisse de droit européen 423, 445.

[47] Draft Accession Instruments cit. para. 84.

[48] *Ibid*. art. 5.

of Justice should not be exclusively reviewed by a non-EU body,[49] conveniently taking out of the picture national courts,[50] which can review issues pertaining to the CFSP and perhaps even ask for preliminary rulings thereon.[51] Such downgrading of the trustee in reality distorts its role (here, that of national courts) and constitutes one of the most common effects of distrust according to the relevant jurisprudence.[52]

IV. The *mirage* of trust: The ECtHR and the revised Draft Accession Agreement

Whereas the CJEU's distrust has led to further concessions towards it during the negotiation, the ECtHR is required to show a considerable amount of trust on the basis of the draft accession instruments.[53] This aspect is crucial because the Strasbourg court will equally be called upon to express its own opinion on the draft accession instruments.[54] Hence, demands of blindly trusting the Union and its court might render more challenging a positive opinion by the ECtHR. Having said that, trust issues arise at four different levels.

First, the absence of checks and balances, which are essential in judicial cooperation networks when trust is low and must be enhanced,[55] is particularly glaring in the co-respondent mechanism, where the Draft Explanatory Report to the revised DAA introduces two fully self-judging clauses on activating and terminating co-respondentship.[56] Specifically, it provides that EU assessments on those two steps are determinative and authoritative.[57] Moreover, in the case of activation, self-judgment becomes even more palpable,

[49] Opinion 2/13 cit. paras 252–6.

[50] See the different approach by Opinion 2/13 cit., AG Kokott paras 96–101 and 195.

[51] JP Jacqué, 'CJUE-CEDH: 2-0' (2014) RTDE 823, 829. For the evolution of the CJEU's case law on its jurisdiction over CFSP matters, see G Butler, 'Public and Private Enforcement Possibilities within the EU's Common Foreign and Security Policy' in M Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar 2023) 199; C Hillion and RA Wessel, "The Good, the Bad and the Ugly': Three Levels of Judicial Control over the CFSP' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) 65.

[52] R Kramer, 'The Sinister Attribution Error – Paranoid Cognition and Collective Distrust in Organizations' (1994) Motivation and Emotion 199, 225.

[53] Trust is here employed not as a unidirectional parameter, but as a reciprocal tool, where the two judicial institutions, namely the CJEU and the ECtHR, shift from the position of trustor to that of trustee and back in our analysis; for this reciprocal logic, see P Cramér, 'Reflections on the Roles of Mutual Trust in EU Law' in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009) 43, 43.

[54] 46+1 ad hoc group, Report of the 15th Negotiation Meeting 46+1(2022)R15 of 7 October 2022, para. 24.

[55] P Popelier, M Glavina, F Baldan and E van Zimmeren, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System' cit. 359.

[56] On the problematic aspect of self-judging clauses generally, see ICJ *Certain Norwegian Loans (France v Norway)* [6 July 1957], separate opinion of judge Sir Hersch Lauterpacht 48; S Schill and R Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) MaxPlanckUNYB 61.

[57] Draft Accession Instruments cit. paras 61, 66, 76.

since the report provides that in case of objections by the applicant, the EU is not subjected to an obligation to reconsider its assessment in light of the critical comments but enjoys discretion as to whether to do so or even to reply thereto in the first place.[58] Such is the extent of self-judgment, that one wonders what is the purpose of the reasoned opinion by the EU, when there will be no judicial instance that can review this reasoning and override it.[59]

One might pose the question what will happen if a bad faith Union or its court determine that the co-respondent mechanism should not be activated in a case, where it seems evident or necessary, for the adoption of the most effective remedial action, to adjudicate on the basis of the co-respondent mechanism and for the Union and its MS to jointly share responsibility.[60] Moreover, how can the ECtHR react if the Union decides to terminate the co-respondent mechanism in order to avoid being found in violation of the ECHR? Granting to the one that will be found accountable the power to decide whether a gap in accountability should be filled[61] might not be the best strategy for the effective protection of human rights after the EU's accession to the ECHR. Besides, such a solution might undermine the compulsory jurisdiction of the ECtHR,[62] as I explain elsewhere.[63]

Second, the effectiveness of the co-respondent mechanism and the fairness of prior involvement hinge on soft promises of the trustee, which this time is the CJEU and the Union, more generally. The draft declaration in Appendix 2 proves this point, since the Union simply vows that it will ensure to become co-respondent when the conditions of art. 3(2) of the revised DAA are fulfilled or that other High Contracting Parties to the draft accession instruments will be able to submit observations when the CJEU will be assessing EU law's compatibility with the Convention according to art. 3(7) of the revised DAA on prior involvement.[64] This interpretation of the draft declaration is, in a way, confirmed by AG Kokott, who in the previous iteration of the draft agreement had considered that no contracting party was obliged to become co-respondent under the 2013 DAA.[65]

[58] *Ibid.* para. 63.

[59] For instance, *ibid.* para. 66.

[60] See D Franklin and VP Tzevelekos, 'The 2023 Draft Agreement on the EU Accession to the ECHR: Possible "Gaps" and "Cracks" in the Co-respondent Mechanism and the Implications for the *Bosphorus* Doctrine' (2024) European Papers 745 www.europeanpapers.eu.

[61] *Ibid*. para. 47.

[62] T Lock, 'The Future of EU Accession to the ECHR after Opinion 2/13: Is it still possible and is it still desirable?' (2015) EuConst 239, 249.

[63] V Pergantis, 'The Third Party Effects of IO Internal Rules for Responsibility Allocation with Reference to the EU Accession to the ECHR: A *Lex Specialis* Torn between Third Party Consent and Human Rights Safeguards?' in R Deplano, R Collins and A Berkes (eds), *Reassessing the Articles on the Responsibility of International Organizations: From Theory to Practice* (Edward Elgar 2024, forthcoming).

[64] Draft Accession Instruments cit. Annex 2.

[65] Opinion 2/13 cit., AG Kokott para. 217, though there is some ambivalence in her stance (*Ibid*., para. 219).

In other words, the Union is granted wide discretion without having shown beforehand that it is a trustworthy partner.[66]

Third, at various instances, the explanatory report defers the detailed regulation of various matters to EU internal rules,[67] creating gaps in the whole picture of the EU accession that render the ECtHR's assessment of the agreement much more difficult. From the beginning, the dilemma was whether the EU should externalise its internal power struggles and reflect them on the agreement or whether it should internalise issues that touched upon the function of the external dispute settlement mechanism. Both choices (externalising problems or controlling the external judicial actor) highlight a heightened distrust. *Opinion 2/13* surprisingly insisted on further externalisation,[68] but the negotiators opted for increased internalisation as a solution to the impasse of the negative CJEU opinion.

Specifically, this idea of internalisation of processes at the EU level was floated around already before *Opinion 2/13* and repeated afterwards,[69] and when the renewed negotiations were launched, it was embraced as a solution both by the Chair's paper[70] and, by non-EU Member States of the Council of Europe.[71] These matters include, for instance, the activation and termination of the co-respondent mechanism and, consequently, also questions of attribution, or the more innocuous issue of the referral to the Grand Chamber.[72] The same applies for the prior involvement mechanism or the problem of interparty cases, where procedures and assessments pertain exclusively to the EU realm.[73]

In the last two situations, the ECtHR must show trust under conditions that are problematic in respect of due process guarantees. For instance, in both cases it is not clear which EU organ will proceed to the requisite assessments,[74] and there are ambiguities on the procedure and the timeframe. Regarding interparty disputes, the Draft Explanatory Report

[66] A Baier, 'Trust and Antitrust' (1986) Ethics 231, 236-238.

[67] Draft Accession Instruments cit. para. 25.

[68] It was surprising, because the more it is included in the DAA the broader ECtHR's review powers thereon would be; see V Pergantis and S Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and a Hard Place' in C Kaddous, N Levrat, and RA Wessel (eds), *The EU and Its Member States' Joint Participation in International Agreements* (Hart 2022) 231, 246.

[69] T Lock, 'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR' (2012) Yearbook of European Law 162, 171; B de Witte and S Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) ELR 683, 698-699; JP Jacqué, 'Encore un effort camarades…l'adhésion de l'Union à la Convention européenne des droits de l'homme est toujours à votre portée' (2020) Europe des Droits & Libertés/Europe of Rights & Liberties 27, 35.

[70] 47+1 ad hoc group, Report of the Sixth Negotiation Meeting 47+1(2020)2 of 31 August 2020, paras 26 and 41.

[71] 47+1 ad hoc group, Report of the Sixth Negotiation Meeting 47+1(2020)R6 of 22 October 2020, Appendix III 21.

[72] Draft Accession Instruments cit. para. 72.

[73] *Ibid*. paras 75 and 84.

[74] See, however, 46+1 ad hoc group, Report of the 17th Negotiation Meeting 46+1(2023)R17 of 2 February 2023, para. 19, where the EU representative insinuates that the assessment for prior involvement will be made by the CJEU.

provides both for "sufficient time" to make the assessment and for avoiding "undue delays", whereas for prior involvement it is stipulated that the EU would make the necessary assessment at the time of examining the need to trigger the co-respondent mechanism "[i]nsofar as possible".[75] Ultimately, this mobilisation and claim for participation in the assessment procedure on the part of the EU is a clear sign of distrust towards the way the ECtHR is expected to exercise its functions after accession. In this context, the ECtHR is called upon to trust that the EU internal procedures will be respectful of the essence and judicial function of the ECHR. In other words, the Strasbourg Court is asked to show trust without having any information whatsoever on how the EU will shape the relevant rules, placing the ECtHR in a unique position of extraordinary vulnerability.[76]

Finally, the ECtHR and the non-EU Member States of the Council of Europe are perhaps most exposed to a claim of unconditional trust in the case of the Common Foreign and Security Policy conundrum.[77] There, a protracted negotiation led to an EU proposal, according to which CFSP acts would be attributed by the Union to one or more EU Member States in case the CJEU determines that it lacks jurisdiction to review them,[78] a proposal heavily criticised by various delegations and finally dropped.[79] Instead, under the current state of affairs the negotiating parties have delegated to the EU the task to resolve the issue *internally*, carving it out of the work of the "46+1 Group". These stakeholders will only need to be informed of the solution reached and consider the way the issue was arranged, meaning that even if there are objections, any further solution will always stem from intra-EU negotiations.[80]

This option is unsatisfactory because it removes the issue of the CFSP altogether from the negotiations and, *perhaps*, from the text of the revised DAA, not allowing the ECtHR to review or comment upon the solution reached, since its eventual opinion will possibly concern only the DAA, excluding any arrangements external to it. In this case, the ECtHR's trust is ethereal or, alternatively, blind, since there is no substance to what the trustee has undertaken to perform, on the basis of which the trustor can then exercise control and measure said performance.

[75] Draft Accession Instruments cit. paras 76 and 84, respectively.

[76] The vague *renvoi* to internalization had caused concern even to the EU judicial organs when they assessed the 2013 DAA; see Opinion 2/13 cit., AG Kokott paras 20–2; Opinion 2/13 cit. paras 71 and 92.

[77] Generally, on this conundrum, see SØ Johansen, 'The (Im)possibility of a CFSP "Internal Solution"' (2024) European Papers 783 www.europeanpapers.eu.

[78] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 cit. para. 11; 47+1 ad hoc group, Negotiation Document of the 12th Meeting on the Accession of the European Union to the European Convention on Human Rights submitted by the European Union, Proposals in the Area of Basket 4 ("Common Foreign and Security Policy") 3 ff.

[79] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 cit. paras 12–3.

[80] Steering Committee for Human Rights, Interim Report to the Committee of Ministers for information, on the negotiations on the accession of the European Union to the European Convention on Human Rights, including the revised draft accession instruments in appendix, CDDH(2023)R_EXTRA ADDENDUM, 4 April 2023, p. 4, para. 8.

V. The road ahead: (re-)building trust *post*-accession

Having examined in detail the trust dynamics between the CJEU and the ECtHR as well as other involved actors in relation to *Opinion 2/13* and the current draft accession instruments, it is appropriate to (re)build trust *post*-accession. There is no denying that a lot needs to be done to embed trust, yet glimpses of trust are already present in the draft accession instruments. In relation to Protocol No. 16, for instance, the EU delegation accepted the assessment about whether issues of EU law are implicated to be made by the competent national courts and the ECtHR. Moreover, in the case of the prior involvement mechanism the EU representative has objected to the idea of imposing strict time limits on the CJEU by stating that the two courts "could be relied to act and co-operate in good faith". But what exactly does good faith entail?

On a micro-level, embedding trust will depend on how the various mechanisms established by the draft accession instruments will function. Respecting due process in the sense of short delays[81] and fully reasoned assessments on the part of the EU in the case of co-respondentship triggering and termination, prior involvement initiation and inter-party disputes, is of primordial importance. Moreover, the CJEU can gradually articulate a series of doctrines that will give more leeway to the ECtHR in the aforementioned assessments, in the mould of the *acte clair* and *acte éclairé* doctrines,[82] especially concerning the co-respondent mechanism. Shifting responsibilities back to the ECtHR will be a sign of increased trust and will allow the Strasbourg Court to reciprocate.

Conversely, the ECtHR's *post*-accession take on the *Bosphorus* doctrine[83] and the principle of mutual trust[84] will equally contribute to enhancing or undermining trust. In respect of the *Bosphorus* doctrine, recently the ECtHR has twice warned, though ambivalently,[85] that the European Economic Area (EEA) Agreement and its law do not ensure equivalent human

[81] For the idea that long procedures frustrate trust, see P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' cit. 61.

[82] See, case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335 paras 16–21 and 14, respectively.

[83] See, in this *Special Section*, D Franklin and VP Tzevelekos, 'The 2023 Draft Agreement on the EU Accession to the ECHR: Possible "Gaps" and "Cracks" in the Co-respondent Mechanism and the Implications for the *Bosphorus* Doctrine' cit.

[84] A Rosas, 'The Court of Justice of the European Union: A Human Rights Institution?' (2022) Journal of Human Rights Practice 204, 210-211.

[85] ECtHR *Konkurrenten.No AS v Norway* App no 47341/15 [5 November 2019] para. 43, where the lack of equivalence was pronounced in an *obiter dictum*; ECtHR *Norwegian Confederation of Trade Union (LO) and Norwegian Transport Workers' Union (NTF) v Norway* App no 45487/17 [10 June 2021] para. 108, where the Court declares that there is no equivalence in the case at hand, namely *prima facie*, leaving a full review of equivalence for another occasion. Scholars have also split between recognizing equivalence (HH Fredriksen and SØ Johansen, 'The EEA Agreement as a Jack-in-the-box in the Relationship between the CJEU and the European Court of Human Rights?' (2020) European Papers www.europeanpapers.eu 707, 735) and rejecting it (U Lattanzi, 'The Inapplicability of the *Bosphorus* Presumption to the European Economic Area Agreement: A Risk for the Coherence of Legal Systems in Europe' (2023) EuConst 441, 459).

rights protection. Consequently, it proceeded in the context of the EEA Agreement to an indirect, full review of EU law *qua* EEA law regarding the strained relationship between human rights and fundamental freedoms.[86] Should the Strasbourg Court recognise equivalence for the EEA Agreement *post*-accession, thus narrowing its standard of review only to manifest deficiencies, this could be seen as a conciliatory gesture by the Luxembourg court. Moreover, granting a wide margin of appreciation to the EU *post*-accession, when the latter "balances" fundamental rights and fundamental economic freedoms, will reduce the distrust remaining in the relations between the two courts.[87]

Regarding mutual trust, the jurisprudential evolution of the relationship between this principle and fundamental rights will equally impact on the trust dynamics between the two institutions. Whereas only minor differences remain in their respective case law on this front, there is still potential for further building or undermining trust. Two points are worth considering. First, and very schematically, the CJEU persistently pursues a two-step methodology for the rebuttal of the presumption of other EU Member States' human rights compliance, which is premised on mutual trust, requiring both systemic or generalised deficiencies *and* individual risk. Conversely, the ECtHR consistently declares that cooperation premised on mutual trust should be suspended when there is an individual risk for the basic fundamental rights of the applicant, even if there are no systemic or generalised deficiencies observed.[88] This difference might remain a source of tension *post*-accession, thus weakening trust. Second, it remains to be seen whether the case law of the ECtHR could create awareness about systemic violations of fundamental rights by an EU Member State, on which the CJEU and the EU, in general, could rely in order to suspend mutual trust and to initiate the art. 7 TEU procedures, particularly on instances of rule of law backsliding.[89] Such a development could serve as a trust-building mechanism,[90] though it must be observed that the ECtHR's contribution to the determination of systemic deficiencies is rather minimal considering that its main function revolves around the paradigm of individual rather than collective/constitutional justice.[91]

[86] HP Graver, 'The *Holship* Ruling of the ECtHR and the Protection of Fundamental Rights in Europe' (2022) ERA Forum 19.

[87] H Ellingsen, 'Reconciling Fundamental Social Rights and Economic Freedoms; The ECtHR's Ruling in *LO and NTF v Norway* (the *Holship* Case)' (2022) CMLRev 583, 601-602.

[88] Cf. Case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 paras 109–11; ECtHR *Bivolaru and Moldovan v France* App nos 40324/16 and 12623/17 [25 March 2021] paras 106 and 114. See also the pertinent observations by J Callewaert, 'Two-Step Examination of Potential Violations of Fundamental Rights in the Issuing Member State: Towards "Systemic or Generalised" Differences with Strasbourg? (13 September 2022) johan-callewaert.eu.

[89] L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3, 41.

[90] I would like to thank Professor Andreas Føllesdal for suggesting this point.

[91] P Leach, 'Resolving Systemic Human Rights Violations – Assessing the European Court's Pilot Judgment Procedure' in S Besson (ed), *The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives* (Schulthess 2011) 223, 227 and, specifically, on rule of law backsliding, L Potvin-Solis, 'L'équilibre fragile des rapports entre le droit de l'Union et le système de la CEDH' in D Petrlik, M Bobek, JM

Furthermore, an improved framework of direct and indirect dialogue should be established with a view to increasing cross-references to the case law of the two courts.[92] In this context, the ECtHR will also need to abandon its piecemeal approach and proceed to a more principled evolution of its case law, creating clear precedents that can be relied upon by the CJEU. To put it differently, jurisprudential consistency is an indispensable condition for building trust between judicial institutions,[93] and this should be kept in mind by both courts, particularly the ECtHR, which has a penchant for tailor-made reasonings.[94] Moreover, judicial dialogue equally means regular exchanges of views between the judges of the two courts, which can be further systematised despite their current frequency.[95] For example, the *Dialogue between Judges* initiative by the ECtHR can be replicated with an exclusive focus on the CJEU.[96]

On a macro-level, the CJEU must recognise and embrace the partial value incongruence that may exist between itself and the ECtHR, the first prioritising the fundamental freedoms of the internal market whereas the latter is dedicated to the protection of fundamental rights.[97] Accepting a certain shift of emphasis towards the second goal will facilitate the reception of the Strasbourg case law by the CJEU and will allow the cooperation of the two supranational courts to move forward.[98]

VI. Conclusion

The EU's accession to the ECHR has been a complex and at times politically charged topic. Questions of trust and distrust between the two protagonists – namely, the supranational courts that will be called upon to cooperate for the enhancement of human rights protection in Europe (but also more generally between the Union and its Member States) – are extremely important for the successful conclusion of this second round of negotiations.

Passer and A Masson (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiri Malenovsky* (Bruylant 2020) 381, 403.

[92] For the current, insufficient reference to the ECtHR's case law by the CJEU, see S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 37, 42-43; V Davio and E Muir, 'Introduction. The ECtHR in the ECJ's Case Law Post-Charter: A Dual Perspective' (2023) European Papers www.europeanpapers.eu 317, 320.

[93] P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' cit. 61.

[94] See E Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights' (2020) EJIL 73, 84, who argues that tailor-made reasoning is the default function of the ECtHR.

[95] See Copenhagen Declaration [2018], para. 63. The last meeting took place on 16 October 2023.

[96] For the last relevant document, see ECtHR, Proceedings of the Seminar of 27 January 2023, 'Judges preserving democracy through the protection of human rights', www.echr.coe.int.

[97] Opinion 2/13 cit., AG Kokott. para. 206.

[98] P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' cit. 69.

Nevertheless, the obsession of control that underpins the CJEU's *Opinion 2/13*[99] and many of the EU proposals in the renewed negotiation does not bode well for the establishment and furtherance of trust between the two institutions. Additionally, the ECtHR is called upon to show blind trust to the EU and its court under the revised DAA. Ultimately, trust will be (re)built only if the CJEU and the ECtHR adopt a constructive attitude by respecting due process/rule of law guarantees or showcasing jurisprudential consistency and accommodating mutual trust, respectively. It thus remains to be seen if the revised accession instruments will contribute to the embedment of trust and to a new chapter of cooperation for the protection of human rights between the CJEU and the ECtHR.

[99] N Petit and J Pilorge-Vrancken, 'Avis 2/13 de la CJUE: l'obsession du contrôle?' (2014) Revue des affaires européennes 815.

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