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OPINION 2/13 ON THE EU ACCESSION TO THE ECHR

Abstract:

On 18 December 2014 the Court of Justice of the European Union delivered Opinion 2/13 on the European Union's accession to the European Convention on Human rights (ECHR). The Court ruled that the Draft Agreement on the Accession of the EU to the ECHR was incompatible with EU legal order. Opinion 2/13 is complex decision which finds the conflict with the Treaties on several main grounds: violation of the integrity and autonomy of the EU legal order; institutional innovations that were included in the Accession Agreement and are not compatible with EU legal order and the specific characteristics of EU law as regards judicial review in Common foreign and security policy (CFSP) matters was not respected.

This paper is focused on two reasons for the incompatibility: Protocol No 16 to the ECHR and Common foreign and security policy issues and it will try to answer further question : if the EU would access the ECHR, will the human rights protection be potentially better. Finally, the paper will reach the conclusion about two analysed reasons of incompatibility and propose possible solutions if there are some.

Key words: *European Convention on Human Rights, EU accession to ECHR, Opinion 2/13, Court of Justice, Protocol No 16, CFSP*

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I. INTRODUCTION

On 18 December 2014 the Court of Justice of the European Union (hereinafter: CJEU or the Court) delivered *Opinion 2/13* on the European Union's accession to the European Convention on Human rights (ECHR). The Court has always been a promoter of the autonomy of EU law. The Art 218 (11) TFEU which proscribes the advisory opinion of the Court is legal basis of its power to guard the EU autonomy. This is the second Court's opinion about the EU accession to the ECHR, back in 1996; in *Opinion 2/94* the CJEU ruled that European Community could not accede the ECHR. In the first part of this paper, the authors will give the analysis of the advisory opinion under Art 218(11) TFEU and the historical background of the accession procedure to the ECHR. It is essential for the understanding of the Court's ruling in the *Opinion 2/13*.

The Court ruled that the Draft Agreement on the Accession of the EU to the ECHR (the Accession Agreement) was incompatible with the EU treaties. *Opinion 2/13* is very complex decision which consists of 258 paragraphs and finds the conflict of draft agreement with the Treaties on several main grounds. Those grounds can be divided into three groups: violation of the integrity and autonomy of the EU legal order; institutional innovations that were included in the Accession Agreement and are not compatible with EU legal order and the specific characteristics of EU law as regards judicial review in Common Foreign and security Policy (CFSP) matters. It should be noted that only in just few days after the judgment was published, and it is a process that continues up to today, the judgments was a target of criticism among EU law bloggers¹ and in has been analysed in many different views among academics.²

While there are several reasons for the incompatibility, this paper will turn focus on two of them: Protocol No 16 to the ECHR and Common foreign and security policy. The authors will compare the Advisory opinion proscribed in the Protocol No 16 with the

¹ S. Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection', *EU L. ANALYSIS BLOG*, <http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html> (accessed 15 June 2015); S. Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice', *U.K. CONST. L. BLOG*, <http://uk-constitutionallaw.org>, (accessed 15 June 2015); G. Gotev, Court of Justice rejects draft agreement of EU accession to ECHR, <http://www.euractiv.com/sections/eu-priorities-2020/court-justice-rejects-draft-agreement-eu-accession-echr-310983>, (accessed 17 June 2015); Aidan O'Neill, Opinion 2/13 on EU Accession to the ECHR: the CJEU as Humpty Dumpty, *EUTOPIALAW* <http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/>, (accessed 15 June 2015); W. Michl, Thou Shalt Have No Other Courts Before Me <http://www.verfassungsblog.de/en/thou-shalt-no-courts>, (accessed 17 June 2015); T. Lock, Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR, <http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/>, (accessed 18 June 2015).

² For an academic appraisal see, inter alia, A. Łazowski and R.A. Wessel, S. Peers, D. Halberstam, S. O. Johansen, and C. Krenn in Special Section: Opinion 2/13, *German Law Journal*, Vol. 16. Issue. 1, 2015.

preliminary ruling procedure (Art 267 TFEU) and conclude if in fact it could potentially touch upon the autonomy of the EU. Further, the authors will touch the issue of the Common Foreign and Security Policy, which is the most troublesome. It is the fact that TEU specifically excludes the jurisdiction of the CJEU in field of the CFSP and Member States (MS) have no intention of so ever to give the CJEU the jurisdictions over the CFSP matter. On the other hand excluding the jurisdiction of the European Court of Human Rights (ECtHR) in the field of CFSP would significantly reduce the ability of ECtHR to conduct the review of the human rights in the field where the EU is capable of violating human rights. Being that there are two exceptions to the CJEU non jurisdiction in the field of CFSP. The first exception is to monitor Art 40 TEU (the relationship between CFSP and other areas of external action). The second exception is set out in Art 263 (4) TFEU (reviewing the legality of restrictive measures against natural or legal persons). This paper will analyse the proceedings brought under the Article 263 (4) TFEU and try to answer the question: if the EU will access the ECHR, will the human rights protection be potentially better. Finally, the paper will reach the conclusion about two analysed reasons of incompatibility and propose possible solutions if there are some.

II. IDEA OF ACCESSION OF THE EU TO THE ECHR AND THE ADVISORY OPINION UNDER ARTICLE 218(11) TFEU

The EEC Treaty (1957) had no specific provisions on the protection of fundamental rights. There are two reasons. Firstly, the EEC was primary economic integration and secondly the protection of the human rights was the point of the interest of another international organization – The Council of Europe. In a series of early cases, the CJEU even refused to recognize fundamental rights (e.g. *Stork, Geitling and Sgarlata*).³ The consequence was that some national courts reserved the right to declare Community law inapplicable if they found it incompatible with national constitutional provisions concerning protection of human rights. The most famous case is *Solange I*, the case before the German Bundeversammlung (hereinafter BvG).⁴

Due to the fear that autonomy and supremacy of EU law could be jeopardized, the CJEU started to emphasize the obligation to observe human rights in its own rulings. So, in 1963, in case *Stauder v. Ulm* clarified: “*fundamental human rights are enshrined in the general principles of Community law and protected by the Court.*”⁵

³ C-1/58 *Stork - High Authority* [1959] ECR 17; C-36, 37, 38 and 40/59 *Geitling - High Authority*, [1960] ECR 423 and C-40/64 *Sgarlata - Commission*, [1965] ECR 215.

⁴ *Solange I* BVerfGE 37, 271, 2, BvL 52/71

⁵ C-29/69, *Stauder - City of Ulm*, [1969] ECR 419

Since the European Communities did not have their own catalogue of human rights, the CJEU sought for inspiration elsewhere. In determining the scope of the fundamental rights, it looked to: “the constitutional traditions common to the Member States” and to “international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories”.⁶ The CJEU developed a series of “human rights cases”⁷ and this case law was later enshrined in EU law, in the Maastricht Treaty (TEU). Article F (later article 6 of the TEU) states that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”.⁸

In some member states, in particular in Germany, there was a persistent sense of unease that an organization as powerful as the European Union did not have its own binding catalogue of human rights.⁹ Therefore, during the German Presidency of the Council, the idea of its own Human Rights charter was thrown up. On the 7 December 2000, at the European Council in Nice, the Charter of Fundamental Rights (Charter) was proclaimed. The Lisbon Treaty gave the Charter legally binding status, meaning that from 1 December 2009, the Charter acquired the same legal status as the Treaties.

The sole idea of accession of the EU to the Convention is not the new one. The Commission was the first one who proposed the accession in 1979 and repeated in 1990. On 30 November 1994, the Council decided to seek the advice of the Court of Justice. The result was Opinion 2/94, in which the CJEU advised against accession. The Court observed that accession was impossible in the light of Community law since there was no firm legal basis for it.¹⁰

Ever since, things have significantly changed. Firstly, the new Treaty basis was introduced by the Lisbon. Article 6(2) TEU states: “*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties*”.¹¹ Furthermore, there is the Protocol 8, regulating aspects of the accession, as well as a Declaration requiring that accession to the ECHR must comply with the ‘specific characteristics’ of EU law. Apart from EU legal regulation in the Council of Europe legal order a new Protocol 14 in the Article 59(2) introduced that: “*The European Union may accede to this Convention*’

⁶ M. Kuijer, “The accession of the EU to the ECHR: a gift for the ECHR’s 60th anniversary or an unwelcome intruder at the party?” *Amsterdam Law Forum*, 2011, pp. 4, 17-32

⁷ C-36/75, *Rutili*, [1975] ECR 1219; C-149/77 *Defrenne - Sabena*, [1978] ECR 1365; C-44/79, *Hauer - Land Rheinland-Pfalz*, [1979] ECR 3727

⁸ See art F TEU (Maastricht).

⁹ Kuijer (n 6), p. 19

¹⁰ Kuijer (n 6) 20

¹¹ Article 6(2) TEU

Furthermore, Article 47 TEU explicitly recognizes the legal personality of the EU and as an integral part *ius contrahendi*. Finally, Art 218 TFEU (Lisbon) regulates the international agreements and in the Article 218(11) TFEU gives the possibility for Member State, the European Parliament, the Council or the Commission to obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.¹²

After the entering into force of the Lisbon Treaty, upon the recommendation of the Commission, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations for an accession agreement. Draft Accession Agreement of the EU to the ECHR was adopted at 5 April 2013.¹³ Based on the legitimacy under Article 218(11) to obtain the Opinion of the CJEU, the Commission requested an Opinion of the compatibility of the Accession Agreement with the Treaties. Finally, the CJEU published its negative Opinion on 18 December 2014.

III. BRIEF OVERVIEW OF THE REASONS FOR INCOMPATIBILITY

The Opinion 2/13 consist of 258 paragraph, it is a rather long judgment, but as far as the substance is concerned, only last 114 paragraph present the position of the CJEU whereas first 144 paragraphs involve long introduction and legal basis for the Court's decision. Actually, the largest part of the judgment is limited to the overview of the Accession Agreement, ECHR and presentation of the position of MS and European Commission that were submitted during the Court's proceedings.¹⁴ In this section of the paper focus will be on those 114 paragraphs that represent the substance of the Court's position.

Primarily, the CJEU ruled that the case was admissible¹⁵ and makes some preliminary points¹⁶. Interestingly, the Court in this introductory section repeats already well recognised principle that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly so-

¹² Article 218(11) TFEU

¹³ Council of Europe, cooperation with other international organisations http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp, (accessed 15 August 2015).

¹⁴ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par. 3 – 143.

¹⁵ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par. 144- 152.

¹⁶ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par. 153 – 177

phisticated institutional structure and a full set of legal rules to ensure its operation.¹⁷ It underlines what was found in the landmark judgments *van Gend & Loos*¹⁸ and *Costa*¹⁹ and it is accepted in the EU legal order for almost 50 years: EU is a *sui generis* autonomous legal order. Solely reason for the emphasis of a well-established principle can be found in the context of the whole judgment, whereas the violation of the integrity and autonomy of the EU legal order presents not one but it can found in all the reasons for incompatibility of the Accession Agreement with the EU treaties.

The Court holds that the Accession Agreement is incompatible with the Treaties for five basic grounds, some with multiple subparts, thus in total seven grounds for incompatibility. Those grounds can be divided into three groups: violation of the integrity and autonomy of the EU legal order (Article 53 of the ECHR; Principle of ‘mutual trust’ between EU Member States; Protocol No 16 to the ECHR; Article 344 TFEU)²⁰; institutional innovations those were included in the Accession Agreement and are not compatible with EU legal order (The co-respondent mechanism and the procedure for the prior involvement of the Court of Justice)²¹ and the specific characteristics of EU law as regards judicial review in CFSP matters.²²

3.1. Violation the integrity and autonomy of the EU legal order

First set of concerns that the Court has are about the violation of the integrity and autonomy of the EU legal order by the Accession Agreement. The Court finds that the Accession Agreement disregards the specific characterises of the EU law in several ways. Firstly, the Court refers to the Article 53 of the ECHR which sets out that Contracting Parties can lay down higher standards of protection of fundamental rights then those guaranteed by the Convention, whether in their national laws or n the international agree-

¹⁷ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 158

¹⁸ Case 26/62, *Van Gend en Loos* [1963] ECR 1; more recent analysis of Van gend en Loss can be found in European Journal of International Law and International Journal of Constitutional Law published a Joint Symposium on Revisiting Van Gend en Loos with half of the symposium published in EJIL and half in ICON: http://www.oxfordjournals.org/our_journals/ejilaw/ejil_icon_symposium.html, (accessed 15 July 2016)

¹⁹ Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585

²⁰ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par.178 – 214

²¹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 215 – 248

²² Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 249 – 258

ments.²³ The EU has similar (if not the same provision) in the Article 53 Charter of fundamental rights²⁴ on which the CJEU has already ruled in the *Melloni* judgment. The Court in *Melloni* determined that national authorities and courts remain free to apply higher national standards of protection of fundamental rights if they do not compromise the level of protection provided by the Charter or the primacy, unity and effectiveness of EU law.²⁵ The Court predicts that if the Accession Agreement would come into force MS could use higher protection of fundamental rights and not act in accordance with *Melloni* whereby they will not take into account primacy, unity and effectiveness of EU which could in the Court's opinion affect the autonomy of EU law. Although, the Court referred to a need of "coordination" between Article 53 ECHR²⁶ and Article 53 of the Charter, this can be understood as a request for an opt-out.²⁷

Further, the second Court's concern relates to the principle of mutual trust between EU Member States. The principle of mutual trust requires Member state to consider another MS as being in compliance with EU law and particularly with the fundamental rights recognised by the EU law. This principle is especially important in the area of freedom, security and justice and can be related with the principle of mutual recognition which is a subject of previously mentioned *Melloni* judgment in which the Court endeavoured to balance fundamental rights and the principle of mutual recognition in criminal matter.²⁸ One must bear in mind that the principle of mutual trust is essentially for the area of freedom, security and justice. On the contrary, there is a long lasting discrepancy between the CJEU and ECtHR jurisprudence regarding for example the Dublin system on the interstate transfer of asylum seekers to the Member State of first entry. For example in the *N. S. and Others* case *N.S.*, for instance, the Court explained that an individual only has a legal claim to resist transfer to the Member State of first entry if the sending state has evidence of "systemic deficiencies" in the receiving state meaning that they have "amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment" in the receiving state.²⁹ On contrary, *in M.S.S.*

²³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 53.

²⁴ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02, art. 53 ; also see : B de Witte, 'Article 53', in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oregon, CH Beck-Hart-Nomos, Oxford and Portland, 2014, pp. 1523-1537

²⁵ Case 399/11 *Melloni* [2013] ECR 107, par. 60 – 63

²⁶ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, , par 189

²⁷ A. Lazowski, R. A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', *German Law Journal* vol.16, 2015, pp. 179 – 212 ; 191

²⁸ Joined cases C 411/10 and C 493/10 *N. S. and Others* [2011] ECR I-13905 par. 78 – 80 and Case 399/11 *Melloni* [2013] ECR 107, par. 37 – 63

²⁹ Joined cases C 411/10 and C 493/10 *N. S. and Others* [2011] ECR I-13905 par. 94

v. Belgium and Greece, the ECtHR found Belgium liable under the Convention for having transferred an asylum seeker back to Greece (which the ECtHR had separately found to have violated Article 3 ECHR's prohibition on inhuman or degrading treatment).³⁰ All in all, the clash between CJEU and ECtHR is evident regarding the questions of mutual trust in the area of freedom, security and justice. Having above mention in mind, it is clear why it is the Courts opinion that the Accession Agreement did not take into account the specific characteristics of EU law cause with the entering into force of the Accession Agreement MS of the Union will be by the ECHR obliged to check one another in their observation of fundamental rights. According to the Court this situation is liable to upset the underlining balance of the EU and undermine the autonomy of EU law.³¹

The third objective made by the Court is related to the Protocol 16 of the ECHR (Protocol is open for signature in 2013 and has not yet entered into force) and according to Court it would also violate the specific characteristics of EU law. The protocol introduces the possibility for national courts of ECHR high contracting parties to send a request for advisory opinion to the ECtHR. The CJEU predicted that this protocol (of whom the EU would not become a party)³² is a potential threat to the autonomy of EU law. Reason for that is it's similarity to the preliminary ruling procedure in EU law whereby a national courts of MS of the Union may request a ruling from the CJEU on a question of EU law. The very fact that the Accession Agreement fails to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the Agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.³³ The comparison of the procedures will be done in the further chapter of this paper.

Finally, in this category of Court's objections we can find the Court's concern that the Accession Agreement is violating Article 344 TFEU which prescribes that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.³⁴ This provision provides an exclusive jurisdiction to the CJEU regarding interstate disputes between MS concerning the Union law. This Article can also be understood as a specific expression

³⁰ ECHR App. No. 30696/09 (Jan. 21, 2011), par. 264, further examples of difference in judgments between CJEU and ECtHR can be found in Daniel Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', *German Law Journal* vol.16, 2015, pp. 105 – 146, 126 – 130

³¹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 194

³² Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 197

³³ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 197

³⁴ Consolidated Version of the Treaty Establishing the European Union [2010] OJ C 83/47

of the MS duty of loyal cooperation under Article 4(3) TEU.³⁵ The tension is obvious: Article 344 TFEU proscribes for Member States to only bring disputes concerning EU law before the CJEU, whereas Article 55 ECHR demands a settlement of disputes relating to the ECHR before the ECtHR by means of the inter-State cases procedure (Article 33 ECHR). The Court finds that proceedings under Article 33 ECHR by one MS against another, or between EU and MS, would violate the Article 344 and by that the autonomy of EU law.³⁶

Discussion about the Article 344 TEU (ex Article 292 TEC) can be found in the Court's jurisprudence previously only in the case *European Commission v Ireland (MOX Plant)*³⁷ *MOX Plant* concerned a dispute between Ireland and the United Kingdom regarding the commissioning of a mixed oxide (MOX) plant at Sellafield, on the British coast of the Irish Sea. The plant was designed to convert spent nuclear fuel into MOX, which can be used as fuel in light water nuclear reactors. In 2001, when the plant was about to become operational, Ireland initiated proceedings against the United Kingdom under both the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the United Nations Convention on the Law of the Sea (UNCLOS).³⁸ Legal disputes between Member States of the European Union occur rarely. More common, within the EC legal order, were cases brought by the Commission against Member States for alleged failures to respect Treaty obligations. In this case, the Commission brought the case against Ireland whether the case should have been heard at the EC level, rather than in the arbitral tribunal and was relying for the first time on Articles 292 EC and 192 EAEC. The CJEU said that to respect the court's exclusive jurisdiction "must be understood as a specific expression of the Member States' more general duty of loyalty".³⁹ Main difference in *MOX plant* and *Opinion 2/13* reasoning can be found in the fact that the CJEU in *Opinion 2/13* constructs a stricter approach by choosing not to follow an interpretation that would allow for agreements with dispute resolution provisions as long as they make it possible for the member states to comply with TFEU Article 344, as laid down in *MOX Plant*. According to the *Opinion 2/13* the Member States cannot even be given a theoret-

³⁵ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 202

³⁶ See on this issue also P. Eeckhout, 'The European Convention on Human Rights and Fundamental Freedoms as an Integral Part of EU Law – Some Reflections', in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, pp. 87-99.

³⁷ *Case C-459/03, European Commission v Ireland*[2011] ECR I-04635

³⁸ N. Schrijver, *The MOX Plant Case – A Litigation Saga Without a Pronouncement on the Merits*, in THE MOX PLANT CASE (IRELAND V. UNITED KINGDOM): RECORD OF THE PROCEEDINGS 2001-2008 1–18, 2 (Permanent Court of Arbitration ed., 2010).

³⁹ P. J. Cardwell and D. French, 'Who Decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute', *Environmental Law*, vol.19(1), 2010, pp. 121-129

ical possibility of breaching Article 344 TFEU. This not only departure from the earlier CJEU practice but also it is in contrast with the views of Advocate General Kokott.⁴⁰

MOX Plant and *Opinion 2/13* are both cases that concern mixed agreements with provisions on inter-party disputes. There are many mixed agreements that Union has already conducted and if they are viewed in the lights of *Opinion 2/13* reassigning they must be considered incompatible with Article 344 TFEU. For example a suit by one MS against another or against the EU within in the WTO can in the light of this reasoning be found incompatible with Article 344 TFEU. This is a situation that will not invalidate those agreements as a matter of public international law but the Union and the MS would be under the obligation to terminate those agreements, or to opt out of the conflicting dispute mechanism.⁴¹ To solve this there is a possibility to exclude the jurisdiction of the ECtHR in the disputes between EU and MS or MS against MS. It is a possibility, if it would be actable by other contracting parties of the Convention whereby they would be in the situation to relay on the practice of the CJEU on which they have no access. The question is why any of them would accept this solution, knowing they are not bound by the EU treaties, it is a pat position for the negotiators.

3.2. Institutional innovations those were included in the Accession Agreement

All the above disused objectives are related to the possibility that EU accession to the ECHR can possibly violate the autonomy and integrity of EU legal order and that the Accession Agreement did not significantly taken into account the specific characteristics of the EU law. This may give the impression that previously there was no discussion of the fact that EU is not a state (as the Court itself declares in this *Opinion 2/13*) that the EU cannot accede to the ECHR by merely depositing its ratification instruments, that EU does not fit into standard Convention system (due to the fact the EU will not accede to the Council of Europe, from whose budget the Convention system is financed, but only to the ECHR, the EU's financial contribution has to be negotiated) etc.⁴² But in fact, all the above mentioned specific characteristics of the EU's accession were previously broadly discussed in the accession negotiations and in literature.⁴³ This led to the introduction

⁴⁰ Opinion of Advocate General Kokott, Opinion Procedure 2/13, CJEU Case C-2/13, par. 107–200

⁴¹ S. Ø. Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences,' *German Law Journal* vol.16, 2015, pp. 169 – 178, 176 – 177

⁴² C. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13,' *German Law Journal*, vol. 16, 2015., pp. 147 – 168.; 150.

⁴³ T. Lock, 'The ECJ and the ECHR: The Future Relationship Between the Two European Courts,' *Law and Practice of International Courts and Tribunals* vol.8., 2009, pp. 375-398; T. Lock 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg,' *European Law Review* vol.35., 2010, pp. 777-798 ; J. P. Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms,' *Common Market Law Review* vol 48. No. 4, 2011, pp. 995-1023.; T. Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Or-

of special institutional mechanisms, on which in the Opinion 2/13 the Court objects. The first one is the “co- respondent mechanism” which has the aim to ensure that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.⁴⁴ It is the Courts opinion that this mechanism is not in accordance with the specific characteristics of EU law merely by the fact that this procedure would still require the ECtHR to assess rules of EU when deciding on the co-respondent.

Also, the Court objects to another institutional innovation: the prior involvement mechanism. This is the procedure would allow the CJEU to assess the compatibility of the EU law with ECHR before the case is heard in the ECtHR. On this procedure there was a discussion of the presidents of the two courts before it was included into the Accession Agreement ⁴⁵ Nevertheless, the CJEU found that the design of this mechanism would violate EU law. According to this procedure, the ECtHR would be called upon to decide whether the CJEU has already previously ruled on the same question. It is the Court’s opinion that merely by granting the ECtHR the power to access this question, the ECtHR would be called upon to interpret the EU law. ⁴⁶

Finally, the Court of Justice declares the that the Accession Agreement is incompatible with the specific characterises of EU law regarding the ECtHR competence in the field of Common Foreign and Security Policy of which there will be further elaboration in the next chapter.

IV. PROTOCOL NO 16 TO THE ECHR

As it is already stated, in the event of the accession, the ECHR would become an integral part of EU law. The CJEU found Protocol 16 to the ECHR very contentious. Namely, Protocol 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto.⁴⁷

der’, 48Common Market Law Review 4, 2011, pp. 1034–37; T. Lock, ‘End of an epic? The draft agreement on the EU’s accession to the ECHR’, *Yearbook of European Law*, vol.31, no. 1, 2012, pp. 162-97

⁴⁴ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 216

⁴⁵ *Joint Communication from Presidents Costa and Skouris*, CCBE (Jan. 24, 2011) http://www.ccbe.eu/file-admin/user_upload/document/Roundtable_2011_Luxembourg/Joint_communication_from_Presidents_Costa_and_Skouris_EN.pdf (accessed 15 June 2015)

⁴⁶ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 229-234.

⁴⁷ See art. 1 of the Protocol 16. Notion: protocol 16 is not yet in force.

The AG Kokkot named this mechanism as a “voluntary preliminary ruling procedure in the ECHR system”⁴⁸

The CJEU found that the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided for by the Article 267 TFEU. It would become a problem in cases where rights guaranteed by the Charter correspond to rights secured by the ECHR. There is a risk that the preliminary ruling procedure might be circumvented. The CJEU considers that the draft agreement fails to make any provision in respect of the relationship between those two mechanisms.⁴⁹

We would like to highlight a few controversial conclusions by the CJEU. Firstly, the Protocol No 16 is not among the legal instruments to which the EU is to accede in accordance with the draft agreement. It is not even entered into force to date. According to the Opinion of the AG Kokkot, this protocol should not have been the subject of review by the CJEU.⁵⁰ The CJEU did so-called “*ex ante* attack.”⁵¹ As it is noticed by the Lazowski, the Court did not offer any solution that would be satisfying.⁵²

Secondly, the CJEU prevented the accession to the ECHR but problem still remains. Even without accession, Member States who ratified the protocol can ask advisory opinions from the ECtHR instead of referring to the CJEU.⁵³ We are sharing the opinion that this problem is already solved by the EU treaties. The Article 267(3) TFEU takes precedence over national law and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No 16 to the ECHR.⁵⁴ Namely, according to Article 267(3) TFEU the courts of last instance are in obligation to refer the questions to the CJEU. If they infringe its obligation, there is possibility to engage called infringement proceeding against the member state. Our conclusion is that the threat of Protocol No 16 to the preliminary reference procedure exists with or without EU accession to the ECHR.

⁴⁸ Opinion of Advocate General Kokott, Opinion Procedure 2/13, CJEU Case C-2/13 par. 137.

⁴⁹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 197-198

⁵⁰ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 138. Same view is shared by other authors. See e.g.: Adam Lazowski, Ramses A. Wessel, ‘When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’ (2015) German Law Journal 16, 179 – 21,

⁵¹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 192.

⁵² Lazowski, Wessel (n 27).

⁵³ See more at: <http://europeanlawblog.eu/?p=2731#sthash.goNn6mZJ.dpuf>, (accessed 20 August 2015)

⁵⁴ Opinion of Advocate General Kokott, Opinion Procedure 2/13, CJEU Case C-2/13, par 14.

V. COMMON FOREIGN AND SECURITY POLICY

It should be noted at the begging of the elaboration that the Common Foreign and Security Policy is *de facto* specific and clearly separate from other EU policies. It is only policy regulated by the TEU⁵⁵ it has specific instruments⁵⁶, *sui generis* competence and indeed represents a separate pillar. It should also be noted that it is prescribed in the Article 24(1) TEU that the CJEU shall not have jurisdiction with respect to the CFSP, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.⁵⁷ Article 275 prescribes that the first exception of Court non jurisdiction in the CFSP is to monitor Art 40 TEU (the relationship between CFSP and other areas of external action). The second exception is set out in Art 263 (4) TFEU (reviewing the legality of restrictive measures against natural or legal persons). The problem is clear, the Accession Agreement does not exclude the jurisdiction of the ECtHR regarding the CFSP matters. To use the language of the Court in the Opinion 2/13 “ the ECtHR would be able to rule on the compatibility with the ECHR of certain acts, actions or omission preformed in the context of the CFSP”⁵⁸ meaning that ECtHR will have jurisdiction in the part of the EU law where the CJEU jurisdiction is explicitly excluded.

The Court’s jurisdiction in the field of CFSP has been analysed broadly in the literature,⁵⁹but still there is no answer what is the scope of the Court’s jurisdiction. Moreover, the Court itself states in the Opinion 2/3 that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.⁶⁰ Jurisdiction over CFSP that has not been delegated to the CJEU

⁵⁵ Article 21 – 46 TEU regulate the external actions and CFSP all the other Eu’s external policies (and other policies are regulated in TFEU

⁵⁶ Article 25 TEU

⁵⁷ Article 24 (1) TEU

⁵⁸ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par 254

⁵⁹ L. Saltinyté, ‘Jurisdiction of the European Court of Justice over issues relations to the Common Foreign and Security Policy under the Lisbon Treaty’, *119 Jurisprudence*, 2010, p.261 ; S. Griller, ‘The Court of Justice and the Common Foreign and Security Policy’, in A. Rosas, E. Levits and Y. Bot (eds), *Court of Justice of the European Union - Cour de Justice de l’Union Européene, T.M.C. Asser Press*, 2013, pp. 675-692; Bart van Vooren and Ramses A.Wessel, *EU External Relations Law – Text, Cases and Materials*, Cambridge, Cambridge University Press , 2014; C Hillion, ‘A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy’, in M. Cremona and A. Thies (eds), *The ECJ and External Relations: Constitutional Challenges*, Oxford, Hart Publishing, 2014; R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *2 European Foreign Affairs Review*, 2015, pp. 123-145.

⁶⁰ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 251

stays in the jurisdiction of national courts of MS.⁶¹ Basically; until the CJEU clarifies its jurisdiction under Article 275 TFEU Member States high courts will have final say in the interpretation of the Charter rights in some CFSP matters. The Treaty in its article 19(1) TEU suggest that MS courts are courts of the Union, meaning that when MS interprets the EU law in CFSP matter they have an obligation to take into account the EU law, but there is no control of the behaviour in this matter. It is the fact, that goes from the ECtHR UN- related case law⁶² that ECtHR can adjudicate CFSP- related actions only indirectly (only insofar as the actions is at least partly attributed to a Member State). If MS is partly responsible, the ECtHR will charge the MS with liability under ECHR for the MS own EU related CFSP activity.⁶³ Of course, if the action is exclusive under the EU actions, the ECtHR has no jurisdiction in protection of human rights.

At this point, we will do the jurisdiction analysis to answer the question: if the EU would join the ECHR, will the human rights protection in the CFSP matter be better? The analysis will look at CJEU judgments in the field of CFSP and see how many there are and what rights under ECtHR could be protected if the EU would access the ECHR.

When we search Eurlex Domain: EU law and related documents, Subdomain: EU case law, Results containing: "Common foreign and security policy" In title and text, we get 411 results, of which there is 170 CFSP subject related judgments, of which there is 72 successful actions for annulment of the restrictive measure; 52 unfound actions of annulment and 30 inadmissible actions of annulment.⁶⁴

We will look at the unfound actions of annulment of restrictive measures imposed on certain persons. The reason is that the ECHR proscribes the reasons for admissibility. Not to elaborate all the reasons, we will focus on two-admissibility criteria as a filter the selection of judgments on which the article will refer.⁶⁵ First criteria, the Court may receive applications from any person, non-governmental organisation or group of individuals⁶⁶ As it is broadly described in "The Practical Guide on Admissibility Criteria for the ECtHR" there are strict condition for "non-governmental" organisation, to avoid going into analysis if the legal persons who are applicants in CJEU proceeding are satisfying the

⁶¹ Article 274 TFEU

⁶² *Al Jedda v. United Kingdom*, ECHR App. No. 27021/08 (July 7, 2011). Cf. Marko Milanovic, Al-Skeini and Al-Jedda in Strasbourg, 23 EUR. J. INT'L L. 121 (2012).

⁶³ Halberstam (n 30), p. 139

⁶⁴ The search was done 06 July 2015 : http://eur-lex.europa.eu/search.html?textScope=ti-te&qid=1436172994060&CASE_LAW_SUMMARY=false&DTS_DOM=EU_LAW&type=advanced&lang=en&andText0=%22common%20foreign%20and%20security%20policy%22&SUBDOM_INIT=EU_CASE_LAW&DTS_SUBDOM=EU_CASE_LAW&CT_CODED=PESC

⁶⁵ The Practical Guide on Admissibility Criteria http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (accessed 6 July 2015)

⁶⁶ Article 34 ECHR

ECtHR criteria, for the purpose of this analysis we will use the CJEU judgments relating only to individuals. Second criteria used, the Court may only deal with the matter after all domestic remedies have been exhausted.⁶⁷ So, here we can look at the possible application from individuals that have exhausted domestic (meaning here EU proceedings having in mind the fact that they have started the annulment procedure of the restrictive measure against them which was by the CJEU decided to be unfound. It is important to notice that the authors will not go into subject matter analysis of any of the judgments or legality of the restrictive measures (it is the Courts jurisdiction to do so) but purely analyse the reasons for the action for annulment as a possible ground for ECtHR proceeding.

Of in total 52 CJEU unfound annulment procedures against restrictive measures imposed on certain persons and entities, in 25 of them the applicants are individuals and in the 27 of them applicants are legal persons. In each of the analysed judgments we can find that applicants state the “fundamental rights protection” as a reason for action for annulment. It is noticeable that after Charter of fundamental rights become binding the application for annulment are specifying the fundamental rights from Charter : right to property, right to respect for private life, rights of the defence, right to effective judicial protection etc. Needless to say, all this rights are also guaranteed by the ECHR. Thus, if the EU will access the ECHR in this situations the applicants will be able (if they fulfil all other admissibility criteria) to ask for protection of their fundamental right in front of the Strasburg court.

VI. CONCLUSION

On 18 December 2014 the CJEU gave the negative Opinion 2/13 on the EU accession to the ECHR. The Opinion 2/13 consists of 258 paragraphs, it is a rather long judgment, but as far as the substance is concerned, only last 114 paragraphs present the position of the CJEU. The Court in this introductory section repeats already well recognised principle that the EU is a *sui generis* autonomous legal order. Solely reason for the emphasis of a well-established principle can be found in the context of the whole judgment, whereas the violation of the integrity and autonomy of the EU legal order presents not one but it can found in all the reasons for incompatibility of the Accession Agreement with the EU treaties. If we know that all the countries that have signed the ECHR and members of the Council of Europe also have autonomous legal order, to the general public it can seem strange that this in fact can be solely reason for incompatibility. But if we look the Opinion from the angle of the Court to Court relations it is clear that the accession will violate integrity and autonomy of the CJEU which has to be understood as a basic reason for the CJEU decision.

⁶⁷ Article 35 (1) ECHR

Of all the mention reasons for incompatibility (Article 53 of the ECHR; Principle of 'mutual trust' between EU Member States; Protocol No 16 to the ECHR; Article 344 TFEU) ; institutional innovations (The co-respondent mechanism and the procedure for the prior involvement of the Court of Justice) and the specific characteristics of EU law as regards judicial review in CFSP matters, this article has put an emphasis on two : Protocol No 16 to the ECHR and specific characteristics of EU law as regards judicial review in CFSP matters and has produces further conclusions :

Regarding the Protocol No 16 it is firstly important to stress that the Protocol is not among the legal instruments to which the EU is to accede in accordance with the draft agreement. It is not even entered into force to date. Secondly, the CJEU prevented the accession to the ECHR but problem remains. Even without accession, Member States who ratified the Protocol can ask advisory opinions from the ECtHR instead of referring to the CJEU. We are sharing the opinion that this problem is already solved by the EU treaties. Namely, according to Article 267(3) TFEU the courts of last instance are in obligation to refer the questions to the CJEU. If they infringe its obligation, there is possibility to engage so-called infringement proceeding against the member state. Our conclusion, regarding the matter of Protocol No 16 is that the threat of Protocol 16 to the preliminary reference procedure exists with or without EU accession to the ECHR

On the question relating to the incompatibility of the Accession Agreement with the specific characterises of the EU law regarding the judicial review of the CFSP it is evident that CJEU rejects to define the extent to which its jurisdiction is limited in CFSP matters and that there is a number of legal situation where the CJEU has no jurisdiction. Within the analysis of the jurisprudence of the CJEU related to the Article 263(4) TFEU that exists so far, even though the extent of CJEU jurisdiction is not defined, we have concluded that there are may request for the procreation of fundamental rights that could be addressed in front of the ECtHR if the EU would accede the ECHR. In all the analysed judgments, the applicants stated the "fundamental rights protection" as a reason for action for annulment. Thus, if the EU will access the ECHR in this situations the applicants will be able (if they fulfil all other admissibility criteria) to ask for protection of their fundamental right in front ECtHR Consequently, it would possibly lead to the higher protection of fundamental rights.