CENTRAL EUROPEAN UNIVERSITY

EU Accession to the European Convention of Human Rights
An Analysis of the Impacts of the 2023 Draft Accession Agreement on the Effectiveness of the Convention System

by Gabriel Mitablinda

LLM / Final Thesis
SUPERVISOR: Prof. Marie-Pierre Granger
Central European University - Private University

June 16, 2023

List of abbreviations

CoE: Council of Europe

Court of Justice: Court of Justice of the European Union

CFSP: Common Foreign and Security Policy

EAW: European Arrest Warrant

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EU: European Union

EU Charter: Charter of Fundamental Rights of the European Union

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

VCLT: Vienna Convention on the Law of Treaties

2013 Accession Agreement: Draft Accession Agreement from 2013

2023 Accession Agreement: Draft Accession Agreement from 2023

Abstract

The history of the EU accession to the ECHR is well known and has been subject to countless discussions. Recent developments advance the story into its next chapter. On March 17 2023, the Negotiations Group presented a new Draft Accession Agreement for the EU to become a party to the European Convention on Human Rights.

This thesis analyzes the 2023 Accession Agreement to understand how the objections of the Court of Justice from Opinion 2/13 on the 2013 Accession Agreement are integrated in the new draft. This thesis looks at how the implementation of Opinion 2/13 in the 2023 Accession Agreement impacts the effectiveness and functioning of the Convention system. The effectiveness of the Convention system is defined by the national implementation of the Convention, the authority and supervision of the ECtHR, and the execution of the judgments delivered by the ECtHR. The focus is on how the 2023 Accession Agreement affects the jurisdiction of the ECtHR and the applicability of the Convention to the EU and its member States. This analysis engages ongoing academic debates on the EU Accession to the Convention.

The 1st Chapter analyses the co-respondent mechanism and the prior involvement procedure from the 2023 Accession Agreement. The focus of the chapter is on the applicability of the co-respondent mechanism in proceedings in front of the ECtHR. Secondly, the chapter analyzes the conditions required to trigger the mechanism for the prior involvement of the Court of Justice. The 2nd Chapter analyses how Article 33 of the Convention, *the Inter party procedure*, is applied to the EU and its member States. And what are the limitations imposed by the 2023 Accession Agreement on the use of Article 33 of the Convention, by the EU and its member States. Secondly, the chapter looks at the conditions required to apply Protocol 16. The 3rd Chapter analyses the applicability of the EU mutual trust doctrine in the 2023 Accession Agreement, primarily considering the dialogue between the Court of Justice and the ECtHR. Next, the chapter considers the issues concerning the coordination of Articles 53 of the Convention with Article 53 of the EU Charter. Lastly, the 4th Chapter looks at issues related to CFSP and why this area needs to be under the jurisdiction of the ECtHR.

Word count: 376

Introduction

The EU accession to the European Convention of Human Rights is discussed within the EU since the late 1970s.[1] The EU attempted in 1994 to open accession negotiations, however, the Court of Justice in Opinion 2/94 concluded that under the then EU treaty framework, accession would not be possible.[2] After changes to the EU treaties, accession negotiations between Council of Europe and the EU started in 2010. When presented with the 2013 draft Accession Agreement, the Court of Justice delivered Opinion 2/13 and found the 2013 Accession Agreement incompatible with EU law.[3]

The history of the EU accession to the ECHR is well known and has been subject to countless discussions. Recent developments advance the story into its next chapter. On March 17 2023, the Negotiations Group presented a new Draft Accession Agreement for the EU to become a party to the European Convention on Human Rights.[4] For the adoption of the 2023 Accession Agreement, the Court of Justice must give again an opinion on the compatibility of the Agreement with EU law.

When Opinion 2/13 was delivered by the Court of Justice, it was widely acknowledged that the conditions set by this opinion became difficult obstacles for the future accession of the EU to the Convention. The main concern was the complete lack of reference in Opinion 2/13 to article 6 of

[1] Daniel Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," *SSRN Electronic Journal*, 2015, 6, https://doi.org/10.2139/ssrn.2567591.
[2] Opinion of the Court of 28 March 1996. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/94. (ECJ 1994).
[3] Opinion 2/13, No. 2/13 (European Court of Justice December 18, 2013).
[4] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights" (Council of Europe, April 5, 2023).

the TEU, as if the Court of Justice chose to ignore the accession obligation deriving from EU primary law.[5]

A drastic solution was suggested by *Leonard F.M. Besselink* when he initially recommended that the EU accession to the Convention should happen by amending the EU founding treaties with a *Notwithstanding Protocol* including the following text:[6]

> *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014."*

Protecting the autonomy and characteristics of the EU legal order.

The defenders of the Court of Justice state that Opinion 2/13 is not completely unjustified. When the Court of Justice was asked if the EU could accede to the Convention, Opinion 2/94 stated that accession requires substantial changes to the EU competences.[7] In response, the political actors mandated the EU to accede to the Convention by introducing article 6 TEU and adopted Protocol no. 8, to preserve the characteristics of the EU and its legal order.[8] In other words, the required changes of constitutional proportions resulted in minimal changes to the EU legal framework. For this reason, Opinion 2/13 is not a complete surprise.[9]

Protecting the effectiveness and functioning of the Convention System.

The 2023 Accession Agreement had the challenging task to address the objections of the Court of Justice as found in Opinion 2/13. The Negotiations group had to balance the integrity of the

[5] Polakiewicz Jörg, "EU Accession to the ECHR: How to Square the Circle? - Directorate of Legal Advice and
Public International Law - Publi.Coe.Int," Directorate of Legal Advice and
Public International Law, accessed January 26, 2023, https://www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle-.
[6] Leonard F. M. Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13," *Verfassungsblog*, Dezember 2014, https://doi.org/10.17176/20181005-151453-0.
[7] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 6.
[8] Halberstam, 7.
[9] Halberstam, 7.

Convention system with the specificity of the EU legal order. In a declaration from January 2013, presented by the non-EU Council of Europe members, it was stated that EU accession to the Convention should not be achieved disregarding the integrity and effectiveness of the Convention system.[10]

Nevertheless, the EU accession to the Convention is important for the creation of a unified system dedicated to the protection of human rights in Europe.[11] A delayed or no accession, widens the gap between the standards existing in the two human rights protection systems. This way, the EU would become a signatory of the Convention, a condition which is imposed on the states that want to become EU members, but not on the EU itself.[12] The main argument for accession is the creation of a common space for the protection of human rights in Europe. [13]

It is widely acknowledged that the conditions set by the Court of Justice in Opinion 2/13 risk undermining the creation of a common space for the protection of human rights in Europe. For the applicability of the Convention and for the jurisdiction of the ECtHR, no accession is better than accession under the terms of the Court of Justice.

This thesis analyzes the 2023 Accession Agreement to understand how the objections from Opinion 2/13, are integrated in the new Accession Agreement. It questions to what extent the implementation of Opinion 2/13 in the Accession Agreement impacts the effectiveness and

[10] "Fourth Negotiation Meeting Between The CDDH Ad Hoc Negotiation Group And The European Commission On The Accession Of The European Union To The European" (Council of Europe, January 2013), para. 3, https://rm.coe.int/47-1-2013-r04-en-final-/1680a3f621.
[11] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?* (LU: Publications Office, 2016), 26, https://data.europa.eu/doi/10.2861/07148.
[12] European Parliament. Directorate General for Internal Policies of the Union., 26.
[13] Johan Callewaert, "Do We Still Need Article 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and Its Consequences," *Common Market Law Review* 55, no. Issue 6 (December 1, 2018): 1715, https://doi.org/10.54648/COLA2018142.

functioning of the Convention system. The effectiveness of the Convention system is defined by (1) national implementation of the Convention, (2) the authority and supervision of the Court, and (3) the execution of the Court's judgments.[14] The focus of the thesis is on how the 2023 Accession Agreement affects the jurisdiction of the ECtHR and the applicability of the Convention to the EU or its member States. This analysis engages ongoing academic debates and places the framework of the 2023 Accession Agreement within these debates.

This thesis is limited by the recent nature of the 2023 Accession Agreement. At this point, neither Council of Europe nor any EU institution presented their position on the draft. The provisions of the 2023 Accession Agreement can still be changed in the future. Secondly, some important issues are not regulated by the 2023 Accession Agreement, for example the EU internal mechanisms that complements the Accession Agreement, or the area of Common Foreign and Security Policy, which is left undecided.

The 1st Chapter analyses the co-respondent mechanism and the prior involvement procedure from the 2023 Accession Agreement. The focus of the chapter is on the applicability of the co-respondent mechanism in proceedings in front of the ECtHR. Secondly, the chapter analyzes the conditions that trigger the mechanism for the prior involvement of the Court of Justice.

The 2nd Chapter discusses how Article 33 of the Convention the *Inter party procedure*, is applied to EU and its member States and what are the limitations imposed by the 2023 Accession

[14] "The Place Of The European Convention On Human Rights In The European And International Legal Order" (Strasbourg: Council of Europe, Steering Committee for Human Rights (CDDH), November 26, 2019), 13, https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/the-place-of-the-european-convention-on-human-rights-in-the-european-and-international-legal-order.

Agreement on the use of Article 33 of the Convention. Secondly, the chapter looks at the conditions required for the highest national courts to apply Protocol 16.

The 3rd Chapter analyses the applicability of the EU mutual trust doctrine in the 2023 Accession Agreement, looking primarily the dialogue between the Court of Justice and the ECtHR. Next, the chapter considers the issues concerning the coordination of Articles 53 of the Convention with Article 53 of the EU Charter.

Lastly, the 4th Chapter looks at issues related to CFSP and why this area needs to be under the jurisdiction of the ECtHR.

Chapter I The EU specific mechanisms during proceedings before the ECtHR

Under the EU specific mechanisms before the ECtHR, two main topics are regulated by the 2023 Accession Agreement: (1) the co-respondent mechanism and (2) the mechanism for the prior involvement of the Court of Justice.[15] This chapter contains two subchapters, each dedicated to one of the topics. The chapter analyzes how the 2023 Accession Agreement incorporates the concerns of the Court of Justice from Opinion 2/13, regarding the EU specific mechanisms for the procedure before the ECtHR. Simultaneously, the chapter considers how the conditions of the Court of Justice risk limiting the discretion of the ECtHR and undermine the effectiveness of the Convention system.

For the effectiveness of the Convention system the co-respondent and prior involvement mechanisms are important for the proceedings in front of the ECtHR. In other words, these are sensitive issues for the procedural authority of the ECtHR. For example, not allowing the ECtHR to decide who can participate as co-respondent weakens the control of the ECtHR over its proceedings.

1.1 The application of the co-respondent mechanism

The introduction of the co-respondent mechanism is one of the most significant adjustments to the Convention system.[16] This mechanism allows the EU, a non-state actor, and its member States to

[15] "2013 Draft Accession Agreement of the European Union to the European Convention of Human Rights" (Council of Europe, April 5, 2013), art. 3 Co-respondent mechanism, https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf.

[16] Johan Callewaert, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme* (Strasbourg: Ed. du Conseil de l'Europe, 2013), 66.

appear together as respondent and co-respondent in proceedings in front of the ECtHR.[17] The co-respondent mechanism can be triggered in two situations:[18]

(1) *Test I – The EU member State/s as main respondent/s – the EU as co-respondent.*

When an application is lodged to the ECtHR against one or more EU member States, the EU may become co-respondent if the application questions the compatibility of an EU adopted legal instrument with the Convention. In this case, the source of an alleged violation committed by a member State is a Directive or Regulation or other EU adopted legal instrument. For example, in case of a violation of the Convention, the EU member State cannot amend or change the Regulation, the EU is a co-respondent because it can change or amend the legal instrument, which is the source of an alleged violation of the Convention.

(2) *Test II – the EU as respondent – the EU Member State/s as co-respondent/s.*

When an application is lodged against the EU, the EU member States can become co-respondents when the alleged violation could have been avoided by the EU, only by disregarding its obligations under the TFEU, TEU, EU Charter or any other instrument with a similar value. In other words, member States are co-respondents because they can change or amend the legal framework (TEU, TFEU, EU Charter) which is the source of an alleged violation of the Convention. The EU itself does not have the competence to amend or change the TFEU, TEU, EU Charter.

[17] Callewaert, 65.
[18] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," Article 3.2 and 3.3, p. 6.

For example, if we take the famous *Bosphorus* case[19], the complaint would not be addressed against Ireland but against the EU, because the EU is the author of the Regulation, which imposed the contested sanctions. Ireland would be co-respondent as it is the country that applied the sanctions.

The co-respondent mechanism is intended to be applied by the ECtHR during its proceedings, applying the provisions of the 2023 Accession Agreement. The co-respondent mechanism is almost the same mechanism as in the 2013 draft Accession Agreement. However, three main aspects of the co-respondent mechanism got the disapproval of the Court of Justice in Opinion 2/13.

The first issue concerns the risk of the ECtHR interpreting the division of competences between the EU and its member States during the application of Test I and II. The Court of Justice stated that this risks happening when the ECtHR decides if the EU or its member States are allowed or not to participate as co-respondents in a case.[20]

The second issue is linked to the status and applicability of reservations to the Convention made by EU member States when they participate as co-respondents.[21] The Court of Justice does not want the EU member States to be held responsible for violations of the Convention when they participate as co-respondents, but they made reservations to the article of the Convention relevant for the case in which they participate as co-respondent.

The third issue is the allocation of responsibility by the ECtHR under the framework of the co-respondent mechanism. The Court of Justice considers that any allocation of responsibility by the

[19] Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland, No. 45036/98 (ECtHR [GC] June 30, 2005).
[20] Opinion 2/13 paragraphs 215–225.
[21] Opinion 2/13 paragraphs 226–228.

ECtHR requires an interpretation of the division on competence between the EU and its member States.[22] According to the Court of Justice, any potential interpretation by the ECtHR on the division of competences between the EU and its member States is incompatible with EU law.

There are divided opinions over the validity of the arguments raised by the Court of Justice regarding the co-respondent mechanism. *Halberstam* argues that all three problems are *"well founded"* and worthy of serious attention, because the objections are important for the effectiveness and autonomy of EU law.[23] *Łazowski and Wessel* call the arguments *"flawed in principle"* and *"overly cautious"*.[24] Nevertheless, when designing the co-respondent mechanism for the 2023 Accession Agreement, the Negotiations group took note of the objections raised by the Court of Justice in Opinion 2/13. Next, we look at how the co-respondent mechanism is reflected in the 2023 Accession Agreement.

A. The ECtHR decides who can participate as co-respondent

Under the 2023 Accession Agreement, the EU or its member States can become co-respondents either by (1) accepting an invitation from the ECtHR or by (2) submitting a request to the ECtHR to participate as co-respondents.[25] The first situation, when the party is invited to participate as co-respondent is accepted by Court of Justice in Opinion 2/13, because the invitation is not mandatory and parties can choose to ignore the invitation.[26] The problem is with the second situation, when

[22] Opinion 2/13 paragraphs 229–235.
[23] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 12.
[24] Adam Łazowski and Ramses A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR," *German Law Journal* 16, no. 1 (March 2015): 199, https://doi.org/10.1017/S2071832200019477.
[25] Opinion 2/13 paragraph 218.
[26] Opinion 2/13 paragraph 220.

the EU or its member States submit requests to the ECtHR, asking for permission to join as co-respondents.

The Court of Justice found that following the request to join as co-respondent, the ECtHR needs to carry out an assessment of whether the conditions to trigger the co-respondent mechanism are met, in order to apply Test I and II from the Accession Agreement. According to the Court of Justice, the assessment carried by the ECtHR is based the interpretation of EU law, mainly on the division of competences between the EU and its member States.[27] This assessment carried out by the ECtHR, to find the source of an alleged violation and which EU actor has the competence, creates the risk of the ECtHR deciding on questions regarding the division of competences between the EU and its member States.[28] According to the Court of Justice, this concerns the rules regarding the division of competences between the EU and its member States, which violates the notion of the autonomy of EU law.[29]

Most commentators find that practically this is not an issue. The concern raised by the Court of Justice lacks a solid foundation and it is not an accurate reflection on how the co-respondent mechanism works.

First, questions concerning the interpretation of the division of competence between the EU and its member States is not something that only appears in the context of the co-respondent mechanism.[30] The same situation appears during the EU participation in the World Trade Organization (WTO), where decisions on the division of competences between the EU and its

[27] Opinion 2/13 paragraph 222.
[28] Opinion 2/13 at 224.
[29] Inga Daukšienė and Simas Grigonis, "Accession of the EU to the ECHR: Issues of the Co-Respondent Mechanism," *International Comparative Jurisprudence* 1, no. 2 (December 2015): 9, https://doi.org/10.1016/j.icj.2016.01.001.
[30] Fisnik Korenica and Dren Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly: The Co-Respondent Mechanism in the Light of Opinion 2/13," *Maastricht Journal of European and Comparative Law* 24, no. 1 (February 2017): 97, https://doi.org/10.1177/1023263X17693190.

member States can appear. At the WTO, the EU assumes responsibility regardless of the EU internal division of competences, something to which the Court of Justice did not object before.[31] The division of competence is not followed consistently in order to fit the judicial framework of the WTO.[32] A stricter approach to the importance of an external interpretation concerning the division of competencies between the EU and its member States was not necessary for the co-respondent mechanism.

Second, when the ECtHR evaluates the requests to allow co-respondents in the proceedings, the ECtHR looks at the interpretation of EU law provided in the request, which is the contracting Party's position or interpretation of EU law.[33] In this case, the ECtHR rejects or approves the interpretation provided by the EU or its member States. The ECtHR does not engage itself in a full interpretation of EU law nor in issues concerning the division of competences.[34] According to some authors, when first reviewing such requests, the ECtHR needs to decide the legal source of the alleged violation of the Convention, which is not enough to allow the ECtHR to engage in issues concerning division of competences.[35] For example, when the source of an alleged violation is the EU treaty, member States should be allowed to participate as co-respondents (Test I).

According to Opinion 2/13, a solution that satisfies the demands of the Court of Justice, is to remove the possibility of the ECtHR to engage in the interpretation of the division of competence and to allow contracting parties to become co-respondents on request, without any intervention or objection from the ECtHR.[36] In other words, the power to decide who can participate as co-

[31] Korenica and Doli, 97.
[32] Łazowski and Wessel, "When Caveats Turn into Locks," 199.
[33] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 97.
[34] Korenica and Doli, 97.
[35] Daukšienė and Grigonis, "Accession of the EU to the ECHR," 103.
[36] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 98.

respondent will belong to the EU and its member States.[37] This solution is reflective only of the EU legal autonomy.[38]

From the perspective of the effectiveness of the Convention system, such a solution makes the co-respondent mechanism irrelevant. The whole purpose of the co-respondent mechanism is to correctly identify the relevant parties during proceedings before the ECtHR.[39] And equally important is for the ECtHR to have a say on who can participate in its proceedings. Even more, such a solution would be against the requirements set out in Protocol no. 8, which requires that a mechanism be created which ensures that complaints are addressed correctly against the EU or its member States.[40]

Regarding the functioning of the co-respondent mechanism, the 2023 Accession Agreement in Article 3 paragraph 5 states the following:[41]

> *"5. The 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[Test I and II] of this article are met. The Court communicates its decision to the parties. Before a High Contracting Party becomes co-respondent, the Court shall grant the applicant an opportunity to state its views on the matter. The admission of the co-respondent does not prejudge the Court's decision on the case."*

First, the EU or its member Stats can participate as co-respondents by (1) accepting an invitation from the ECtHR or by (2) submitting a request to the ECtHR to participate as co-respondent. Nothing changes here, these are the same rule as in the 2013 Accession Agreement.

[37] Daukšienė and Grigonis, "Accession of the EU to the ECHR," 103.
[38] Tobias 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?," *European Constitutional Law Review* 11, no. 2 (September 2015): 248, https://doi.org/10.1017/S1574019615000243.
[39] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 98.
[40] Korenica and Doli, 98.
[41] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," art. 3 para. 5.

The Explanatory Report of the 2023 Accession Agreement acknowledges that the applicability of the co-respondent mechanism involves an analysis of the EU law governing the division of competences between the EU and its member States.[42] To this end, the decision of the ECtHR to accept the request of a party to become co-respondent has to consider an assessment presented by the EU on whether the conditions for applying the co-respondent mechanism are met.[43] In other words, the EU presents a report if the conditions to trigger the Test I or II are met. It is not clear from the text of the 2023 Accession Agreement, if EU internal rules would regulate the creation of this assessment or simply the EU representative in the case is responsible for creating the assessment.

In the case in which EU internal rules regulate the creation of the reasoned assessment, and the Court of Justice is involved in this process, the position of the EU and its member States on the attribution of the co-respondent mechanism will be coordinated with the Court of Justice. This way, any interpretation of the applicability of the Test I or II, which involves decisions on the division of competences, will be approved by the Court of Justice.

On the other side, the 2023 Accession Agreement does not oblige the ECtHR to automatically accept the requests to become co-respondent, even after the EU presents its assessment. However, the discretionary power of the ECtHR is narrowed by the 2023 Accession Agreement obliging the ECtHR to respect the assessment presented by the EU because the assessment is "*determinative*

[42] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 22, para 61.
[43] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 22, para. 61.

and authoritative".[44] However, the condition to consider the assessment presented by the EU as determinative and authoritative does not drastically limit the discretionary power of the ECtHR.

The second part of Article 3 Paragraph 5 gives the applicant the opportunity to state its views on the applicability of the co-respondent mechanism in front of the ECtHR. This shows, in my opinion, that the question of whether to accept the request of a party to become co-respondent or not, is treated like any other procedural question. Both parties to the proceedings can present their position, and in the end the ECtHR takes the final decision.

In conclusion, the 2023 Accession Agreement creates a framework under which the EU and its member States present a common position regarding the interpretation of the Test I and II, about their participation as co-respondents. In other words, this excludes the risk of the EU and its member States putting the ECtHR in a position to decide on questions of EU law or the division of competences. On the other side, the common position or assessment is not binding on the ECtHR. The ECtHR approves or rejects the common position presented by the EU, regarding the applicability of the co-respondent mechanism.

B. The reservations to the Convention made by the EU member States are valid under the co-respondent mechanism

The second issue with the co-respondent mechanism is the status of the reservations to the Convention made by EU member States, when the EU member States participate as co-respondents in proceedings in front of the ECtHR. The issue of reservations is connected to the power of the ECtHR to decide what articles of the Convention to apply against the EU member

[44] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 22 para. 61.

States, when they participate as co-respondents. We will see bellow that a strict reading of the reservations made by the EU member States risks limiting the ability of the ECtHR to allocate responsibility for violations of the Convention, when the co-respondent mechanism is applied.

In Opinion 2/13 the Court of Justice held that nothing from the 2013 Accession Agreement precludes the EU member States from being held responsible together with the EU for a violation of the Convention, based on a provisions on which the EU member States made reservations.[45] According to the Court of Justice, such a situation is contrary to Protocol no. 8 of the EU treaties, which requires that EU accession to the Convention does not affect the responsibility of EU member States under the Convention system.[46]

The Court of Justice is well intended here because it wants to prevent the EU member States from having their reservations to the Convention circumvented by EU accession. Most importantly, this requirement derives directly from Protocol no. 8.[47]

Polakiewicz argues that the Court of Justice confused the nature of reservations regulated by the Vienna Convention on the Law of Treaties (VCLT) with reservations under the Convention, which only concern national law.[48] Reservations to the Convention fall under the rules of the VCLT, but they are also part of a self contained regime.[49] In cases in which, the national law subject to a reservation is modified by EU law, the law and the reservation do not exist anymore.[50] And for

[45] Opinion 2/13 paragraph 227.
[46] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 99.
[47] Korenica and Doli, 99.
[48] Jörg, "EU Accession to the ECHR," 2.
[49] Stefan Kirchner, "Reservations and the European Convention on Human Rights," SSRN Scholarly Paper (Rochester, NY, June 3, 2020), 3, https://doi.org/10.2139/ssrn.3617901.
[50] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 22.

cases, in which national legislation is not modified by EU law, the reservation is not relevant for the co-respondent mechanism.[51]

The main issue with the position of the Court of Justice is the failure to consider the different status of the reservation, when the EU member States participate as co-respondents.[52] When the EU member States are co-respondents, they have the role to implement measures dictated by the EU, which is the main respondent.[53] This changes the nature of the reservations. When EU member States are co-respondents, they loose their individual sovereign capacity. The EU member States made reservations to the Convention as sovereign states, not as EU members.[54] This individual sovereign capacity is not the same when EU member States act as agents of the EU and implement decisions and acts originating from EU law.[55] When EU member States implement obligations deriving from EU law, they do not consider the reservations to the Convention.[56]

The Court of Justice chooses a very strict reading of the reservations. Nonetheless, the Court of Justice sets the condition that reservations made by the EU member States to the Convention must prevent responsibility when member States participate as co-respondents.

The 2023 Accession Agreement, in *Article 2 – Reservations to the Convention and its protocols,* adds a new paragraph 3, designed to address the concerns of the Court of Justice. This prevents the EU member States from being held responsible based on provisions to which they made reservations prior to the EU accession to the Convention: [57]

[51] European Parliament. Directorate General for Internal Policies of the Union., 22.
[52] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 101.
[53] Daukšienė and Grigonis, "Accession of the EU to the ECHR."
[54] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 100.
[55] Korenica and Doli, 100.
[56] Korenica and Doli, 100.
[57] "2013 Draft Accession Agreement of the European Union to the European Convention of Human Rights," art. 2.

> *"3. Reservations made by High Contracting Parties in accordance with Article 57 of the Convention shall retain their effect in respect of any such High Contracting Party which is a co-respondent to the proceedings."*

According to the Explanatory Report of the 2023 Accession Agreement, the introduction of this new paragraphs 3 prevents member States from participating as co-respondent and being held responsible based on provisions of the Convention to which they made reservations.[58] This is the case only if that reservation is considered valid by the ECtHR and the complaint falls within the scope of the reservation.[59]

Concluding, under the current provisions of the 2023 Accession Agreement, the reservations extend to cases in which the EU member States act as agents of EU law. I consider that such a broad application of the reservations creates the risk of undermining the effectiveness of the Convention system. This is because reservations made by the EU member State are not intended to be applied when they implement EU law. [60] Nevertheless, the ECtHR retains its competence to assess the nature of the reservation and whether the case falls within the scope of the reservation at the admissibility stage. This rule gives more flexibility to the mechanism.[61]

C. The ECtHR decides only on joint responsibility

The third and final issue with the co-respondent mechanism concerns the possibility of the ECtHR to hold responsible for a violation of the Convention only the respondent or co-respondent. The general rule of the responsibility regime under the 2013 Accession Agreement was that both the respondent and co-respondent are responsible for violations of the Convention.[62] Creating an

[58] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 20.
[59] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 20.
[60] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 102.
[61] Korenica and Doli, 102.
[62] "2013 Draft Accession Agreement of the European Union to the European Convention of Human Rights," art. 3 (7).

exception to the rule, the ECtHR can decide that only one of the respondents is responsible.[63] This individual responsibility appears when the respondent presents arguments against joint responsibility.[64] The Court of Justice does not approve of the exception. The Court of Justice considers that authorizing the ECtHR to decide on separate responsibility for the respondent or co-respondent, creates the risk of the ECtHR indirectly ruling on the division of powers and competences between the EU and its member States.[65] This is because the ECtHR decides to attribute measures taken under EU law to one of the respondents. The decision of the ECtHR results in a decision on the division of competences, something of constitutional importance for the EU over which the Court of Justice holds exclusive jurisdiction.[66] The Court of Justice held that in order to protect the autonomy of EU law, the ECtHR cannot attribute responsibility only to one of the respondents.[67]

For the effectiveness of the Convention system, it is very important that the ECtHR maintains full discretion to attribute responsibility for violations of the Convention. This is connected to the ability of the ECtHR to apply the Convention to cases and complaints.

We can argue again that during the allocation of responsibility, the ECtHR accepts or rejects an interpretation of EU law provided by the EU or its member States.[68] According to general international law rules, responsibility is decided regardless of internal law, because municipal law

[63] "2013 Draft Accession Agreement of the European Union to the European Convention of Human Rights," art. 3 (7).
[64] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 22.
[65] Opinion 2/13 paragraph 231.
[66] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 22.
[67] Korenica and Doli, "The CJEU Likes to Blame Loudly and to Applaud Quietly," 103.
[68] Korenica and Doli, 104.

cannot justify the breach of an international obligation.[69] Particular only to the EU in international agreements, is that the EU is perceived as a single entity.[70] For the attribution of responsibility, the EU also wants to be treated like a single entity, which prefers to set its internal rules on finding the actual responsible.[71] From the human rights perspective, applying joint responsibility in the Accession Agreement is better for the protection of human rights, because it avoids uncertainty on which respondent is actually responsible.[72] Critics argue that this complicates things and takes an essential part of the Convention system and implants it into EU law.[73] By allowing the EU to decide who is actually responsible for a violation of the Convention, it makes it difficult for the human rights institutions to monitor and understand how the process of the execution of the judgments unfolds.[74]

In short, the difficulty arises because the ECtHR currently has the sole responsibility to decide who bears responsibility for violations of the Convention.[75] On the other side, from the perspective of the EU, determining on responsibility and remedies are questions decided only in the context of EU law.[76]

[69] Daukšienė and Grigonis, "Accession of the EU to the ECHR," 103.
[70] Daukšienė and Grigonis, 103.
[71] Daukšienė and Grigonis, 103.
[72] Daukšienė and Grigonis, 103.
[73] Tina Korošec, "The Co-Respondent Mechanism before the European Court of Human Rights: An Adequate Procedural Solution or a Flawed Mechanism?," in *Contemporary Issues of Human Rights Protection in International and National Settings*, ed. Stefan Lorenzmeier and Vasilka Sancin, 1st ed. (Portland: Hart/Nomos, 2018), 177, http://www.bloomsburycollections.com/book/contemporary-issues-of-human-rights-protection-in-international-and-national-settings/the-co-respondent-mechanism-before-the-european-court-of-human-rights-an-adequate-procedural-solution-or-a-flawed-mechanism/.
[74] Korošec, 107.
[75] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 13.
[76] Halberstam, 13.

The 2023 Accession Agreement excluded the possibility of the ECtHR to decide on separate responsibility for one of the respondents. The text of Article 3 Paragraph 8 is the following[77]:

> *"8. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the Court in its judgment shall hold the respondent and the co-respondent jointly responsible for that violation. The Court shall communicate its judgment to the parties."*[78]

According to the Explanatory Report, the ECtHR must hold both the respondent and co-respondent responsible for any alleged violations of the Convention and communicate the decision to the parties.[79] This way the ECtHR decides that both respondents are responsible and leaves the question on who bears the primary responsibility undecided.[80]

In conclusion with regards to responsibility, the solution presented in the 2023 Accession Agreement is tailored to meet the demands of the Court of Justice.[81] This solution is favored because it allows the Strasbourg and Luxembourg courts to accommodate their positions with regard to responsibility.[82] This allows for the EU alone to decide on the allocation of individual responsibility.[83] The next step is for the EU to adopt internal rules that elaborate on the effects of being held responsible under co-respondent mechanism.[84]

[77] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," art. 3 para. 8.
[78] The 2013 Accession Agreement contained the same text plus the following continuation: [..*unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.]*
[79] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 22 para. 71.
[80] Daukšienė and Grigonis, "Accession of the EU to the ECHR," 13.
[81] Daukšienė and Grigonis, 13.
[82] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 13.
[83] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 33.
[84] Korošec, "The Co-Respondent Mechanism before the European Court of Human Rights: An Adequate Procedural Solution or a Flawed Mechanism?," 172.

Looking at the co-respondent mechanism as a whole, the 2023 Accession Agreement is tailored to address the concerns of the Court of Justice, regarding the question of joint responsibility and the applicability of reservation. This helps to preserve the special characteristics of the EU legal system.[85] At the same time, for the decision on who can participate as co-respondent, the 2023 Accession Agreement does not limit the discretionary power of the ECtHR because it does not bind the ECtHR on any decisions presented by the EU.

Now we move to the second subchapter, that analyzes the prior involvement procedure. Issues concerning the participation of co-respondents and the prior involvement are closely connected, they will be decided simultaneously.[86]

[85] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 246.
[86] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 25 para. 76.

1.2 The application of the mechanism for prior involvement of the Court of Justice

The prior involvement mechanism is created to allow the Court of Justice to assess the compatibility of EU law with the Convention, in cases when the EU is co-/respondent before the ECtHR.[87] When national courts did not ask for preliminary rulings under Article 267 TFEU, the prior involvement mechanism is intended to avoid situations when the ECtHR decides on cases based on the interpretation of EU law given by national courts.[88] The prior involvement mechanism gives the Court of Justice the opportunity to assess the interpretation and validity of EU law with the Convention. For the effectiveness of the Convention system, the prior involvement procedure ensures the reflection of the subsidiary nature of the Convention and of the jurisdiction of the ECtHR in the Accession Agreement.[89]

In Opinion 2/13, the Court of Justice stressed that this mechanism is also necessary to ensure the proper functioning of the EU judicial system.[90] According to the working documents of the Negotiations group, the mechanism was of particular interest to the Court of Justice.[91] Two main aspects of the prior involvement procedure are disapproved by the Court of Justice in Opinion 2/13. The first one being, who decides if the Court of Justice has already assessed the compatibility of EU law with the Convention. The second issue is related to what can the Court of Justice do during the prior involvement procedure, which is only to interpret EU primary law and not EU secondary law.[92]

[87] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," art. 3 (7).
[88] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 24 para. 74.
[89] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 25 para. 77.
[90] Opinion 2/13 paragraph 236.
[91] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 250.
[92] Opinion 2/13 paragraph 242.

A. The EU decides if the Court of Justice has already assessed the compatibility of EU law with the Convention

In Opinion 2/13, the Court of Justice highlights the risk of the ECtHR deciding by itself if the Court of Justice already assessed the validity of the EU legal provisions with the Convention.[93] The Court of Justice concluded that nothing from the 2013 Accession Agreement excluded such a possibility.[94] As a result, the autonomy of EU law is considered violated, because this decision needs be taken by the EU.[95]

According to *Tobias Lock,* the arguments of the Court of Justice on this point are not convincing.[96] This is backed by the text of the 2013 Accession Agreement which does not expressly allow the ECtHR to engage in an analysis of the case law of the Court of Justice, to asses when an EU law provision was subject to human rights scrutiny.[97] He argues, that the ECtHR takes a *"superficial glance"* similar to when it decides the question of exhaustion of domestic remedies.[98]

On the other side, we have authors that do not agree with the level of discretion given to the ECtHR.[99] According to them, this creates the risks of the ECtHR being too liberal and finding very often that the Court of Justice assessed the compatibility of EU law with the Convention, in cases when the Court of Justice did not.[100]

[93] Opinion 2/13 paragraph 238.
[94] Opinion 2/13 paragraph 240.
[95] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 250.
[96] Lock, 251.
[97] Lock, 251.
[98] Lock, 251.
[99] Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13," *German Law Journal* 16, no. 1 (March 1, 2015): 154, https://doi.org/10.1017/S2071832200019453.
[100] Krenn, 154.

In Opinion 2/13, the Court of Justice stated its preference that the competent EU institutions should conduct such an assessment.[101] If according to their findings, the Court of Justice did not assess the compatibility of certain provision of EU law with the Convention, the institution must initiate the prior involvement procedure.[102] In other words, the EU institutions have to present their position if the specific EU legal provision was subject to interpretation concerning the compatibility with the Convention.[103] According to the European Parliament's position from a study published on Opinion 2/13, another solution is desirable. The Accession Agreement should specify that the Court of Justice is to decide when the compatibility of EU law with the Convention occurred, and when to trigger the prior involvement procedure.[104]

The Explanatory Report of the 2023 Accession Agreement places the responsibility on the EU, to trigger the prior involvement mechanism:[105]

> *77. "Determining whether it is necessary to initiate the prior involvement of the CJEU under Article 3, paragraph 7, depends upon a finding by the EU of whether the CJEU has already undertaken the assessment described in paragraph 75. This finding by the EU will be considered as determinative and authoritative…. Insofar as possible, the EU will examine the need to initiate the prior involvement procedure at the same time as examining the need to trigger the co-respondent mechanism…."*

The creation of the assessment will be regulated by the EU internal procedures. At this point, it is not clear which institutions are involved in the creation of the assessment. However, in the end, the ECtHR is not bound by the assessment presented by the EU.

[101] Opinion 2/13 at 241.
[102] Opinion 2/13 paragraph 241.
[103] Krenn, "Autonomy and Effectiveness as Common Concerns," 154.
[104] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 33.
[105] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 24 para. 77.

B. The Court of Justice can interpret and assess the validity of the EU secondary legislation

Next, we consider what the Court of Justice can do during the prior involvement procedure. The issue raised by the Court of Justice concerns the limit on its ability to interpret provision of EU primary law and to only assess to the validity of EU secondary law with the Convention. This issue touches on the judicial pride for the Court of Justice.[106] The Court of Justice wants the Accession Agreement to allow it to interpret EU secondary law, during the prior involvement procedure.[107] By presenting this objection to the Accession Agreement, the Court of Justice asks for something allowed to all highest national courts, a final say on the compatibility with the Convention, of the legal provisions under their jurisdiction.[108]

The accession 2023 Accession Agreement includes the possibility for the Court of Justice to interpret any provision of EU law or acts of EU institutions:

> *"If the prior involvement of the CJEU applies, assessing the compatibility with the Convention shall mean to rule on the validity* ***or the interpretation*** *of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments."*

The part containing the ***"or the interpretation"*** was introduced to expressly allow the Court of Justice to interpret secondary law.

In conclusion, for the effectiveness of the convention system, it is important that the interpretation of the Court of Justice does not bind the ECtHR. Secondly, the Court of Justice is limited only to the interpretation of the legal compatibility with the Convention. The Court of Justice cannot decide if the Convention was violated in the particular case, when the prior involvement

[106] Krenn, "Autonomy and Effectiveness as Common Concerns," 154.
[107] Opinion 2/13 paragraph 244.
[108] Krenn, "Autonomy and Effectiveness as Common Concerns," 154.

mechanism was activated. All this is prevented by the 2023 Accession Agreement which does not bind the ECtHR on the interpretations given by the Court of Justice.[109]

[109] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 25 para 78.

Chapter II The relation between the EU and its member States under Article 33 of the Convention and the applicability of Protocol 16

The second chapter looks at the relationship between the EU and its member States under the Convention system. The first subchapter looks at how Article 33 of the Convention, the inter-state procedure, is applied for cases when the EU and its member States file complaints against each other. Article 33 allows the signatories of the Convention to file complaints against each other, for failing to respect the provisions of the Convention. Under this article, the EU and its member States can file cases against each other in front of the ECtHR for failing to respect the Convention.

The second subchapter looks at the applicability of Protocol 16 of the Convention, according to which, highest national courts can address questions concerning the interpretation of the Convention to the ECtHR. We analyze the risk of EU highest national courts circumventing the preliminary ruling procedure under Article 267 TFEU.

The problems analyzed in this chapter are important for the effectiveness of the convention system because they concern the applicability of the Convention. Any limitation on the provisions of the Convention limits the ability of the ECtHR to apply the Convention and to exercise judicial control. At the same time, the chapter is important because it touches on areas that reflect the subsidiarity nature of the Convention.

The first subchapter is dedicated to the applicability of Article 33 of the Convention to the EU and its member states. This subchapter finds that Article 33 does not apply when issues concerning the interpretation or application of EU law are raised.

The second subchapter analyses the applicability of Protocol 16 of the Convention and the risk of EU national courts circumventing the preliminary ruling procedure. The 2023 Accession

Agreement prevents national courts from asking advisory opinions from the ECtHR when EU law requires the court or tribunal to ask for a preliminary ruling from the Court of Justice.

2.*1 The EU and its member States can file cases to the ECtHR under Article 33 of the Convention, if Article 344 TFEU is not circumvented*

Under Article 33 of the Convention, *Inter-State Cases*, signatories of the Convention can bring cases to the ECtHR against other states (parties) for failing to meet their obligations under the Convention.[110] The inter state procedure forms an integral part of the Convention system because it allows for a mechanism of peer pressure and offers an avenue to primarily address systemic violations of the Convention.[111] This article is rarely used. Only approximately 20 applications under article 33 have been submitted to the ECtHR so far.[112]

In Opinion 2/13, the Court of Justice expressed the potential risk of the EU and member States submitting complaints against each other to the ECtHR under Article 33 of the Convention, even when the complaint is important for EU law. The ECtHR will find itself competent to rule on the complaint, based on Article 33 of the Convention.[113] Article 344 TFEU, establishes that the EU or the member States should not submit issues concerning the interpretation of EU law, to other procedures than those established by the treaties. This situation goes against the exclusive jurisdiction of the Court of Justice and its exclusive internal competence to settle disputes

[110] Council of Europe, "Convention for the Protection of Human Rights and Fundamental Freedoms," Council of Europe Treaty Series 005 § (1950), art. 33.
[111] Isabella Risini, "The Accession of the European Union to the ECHR and the Inter-State Application under Article 33 ECHR," in *Contemporary Issues of Human Rights Protection in International and National Settings*, ed. Stefan Lorenzmeier and Vasilka Sancin, 1st ed. (Portland: Hart/Nomos, 2018), 180, http://www.bloomsburycollections.com/book/contemporary-issues-of-human-rights-protection-in-international-and-national-settings/the-accession-of-the-european-union-to-the-echr-and-the-inter-state-application-under-article-33-echr/.
[112] Risini, 181.
[113] Opinion 2/13 paragraph 209.

concerning EU law.[114] According to the Court of Justice, the solution is to expressly exclude the jurisdiction of the ECtHR under Article 33 of the Convention, for cases submitted by the EU or its member States in relation to the application of the Convention within the scope of EU law.[115]

On one hand, authors find it difficult to agree with the Court of Justice, because this goes against the nature of the Strasbourg system, external judicial control for violations of the Convention.[116] The interpretation provided by the Court of Justice on Article 344 TFEU contradicts the main reasons why the EU wants to join the Convention.[117] Halberstam points out the main reasons for such a position from the Court of Justice. He argues that EU member States can abuse Article 33 of the Convention, by bringing abusive cases against the EU or other member States.[118] The ECtHR is competent to hear the cases by virtue of its jurisdiction under Article 33 of the Convention.[119] The abusive nature of the case is of little relevance to the ECtHR, because the case is abusive according to EU law and not according to the Convention.[120]

The Accession Agreement does open the opportunity for the EU member States to file abusive complaints under Article 33 of the Convention. However, this does not justify the position of the Court of Justice, to demand a complete exclusion of Article 33 between the EU and its member States, under the Accession Agreement.[121] The EU Commission filed a case against Ireland to the Court of Justice for disregarding Article 344 TFEU.[122] In the case *Ireland v. the Commission* (*Mox*

[114] Opinion 2/13 paragraph 210.
[115] Opinion 2/13 paragraph 213.
[116] Łazowski and Wessel, "When Caveats Turn into Locks," 194.
[117] Łazowski and Wessel, 1295.
[118] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 16.
[119] Halberstam, 16.
[120] Halberstam, 16.
[121] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 254.
[122] Commission of the European Communities v Ireland, No. Case C-459/03 (ECJ May 30, 2006).

Plant case), the Court of Justice found that Ireland violated Article 344 for taking a case against the UK in front of the International Tribunal of the Law of the Sea.[123] The Court of Justice relies heavily on this case, and shows no trust for the EU member States to respect the EU legal system.[124] Even when member States violate Article 344, EU internal mechanisms are applicable, for example the EU Commission can start the infringement procedure, like in the case *Ireland v. the Commission*.[125]

The request of the Court of Justice to expressly exclude the jurisdiction of the ECtHR for Article 33 cases is disputed. This excludes the possibility of the ECtHR applying Article 33 when a complaint is not abusive or does not concern EU law. Some authors suggest disconnection clauses or declarations from the EU member States not to initiate abusive cases under Article 33 of the Convention.[126] Another solution is the signing of declaration from the EU member States, not to sue each other in front of the ECtHR disregarding Article 344 TFEU.[127] Even Halberstam, who found the position of the Court of Justice defendable, wants the Court of Justice to show some tolerance for any potential solution.[128]

According to the 2023 Accession Agreement Article 4 on Inter-Party cases:

> *3. The European Union and its member States in their relations with each other shall not avail themselves of Article 33 of the Convention. Nor shall the member States of the European Union avail themselves of Article 33 of the Convention insofar as a dispute between them concerns the interpretation or application of European Union law.*
>
> *4. The Court shall provide the European Union upon request with sufficient time to assess, as a matter of priority, whether and to what extent an inter-party dispute under Article 33*

[123] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 255.
[124] Lock, 155.
[125] Lock, 254.
[126] Łazowski and Wessel, "When Caveats Turn into Locks," 197.
[127] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 17.
[128] Halberstam, 17.

of the Convention between member States of the European Union concerns the interpretation or application of European Union law.

According to the Explanatory Report, the EU and its member States have the possibility to submit complaints under Article 33 of the Convention. The solution of the Negotiations group is to allow the ECtHR to apply Article 33. The ECtHR has the competence to analyze the complaint and to decide whether the complaint is abusive or not.

To safeguard the procedure from abusive complaints, Article 33 will not apply when issues concerning interpretation or application of EU law are raised. According to the Explanatory Report of the 2023 Accession Agreement, EU member States are expected to respect Article 344 of the TFEU.[129] This way, Paragraph 4 represents a safeguard, which gives the EU the opportunity to assess whether the EU member State did not circumvent Article 344 TFEU.[130] When only parts of the application concerns EU law (mixed application), the EU will identify what parts of the application concern the interpretation or application of EU law. The procedure or the mechanism, which the EU will use to take such a decision is unknown.

In conclusion, future Article 33 cases between the EU member States will lead to EU participating in the case to present an assessment of EU law, to answer the question whether Article 344 TFEU is circumvented. The ECtHR maintains its competence to hear complaints under Article 33 of the Convention between the EU and its member States, and to have the final say on whether the complaint is abusive. The assessment presented by the EU does not bind the ECtHR. This type of case is expected to occur rarely, and if they do, the ECtHR can declare them inadmissible if the EU member States intend to circumvent Article 344 TFEU.

[129] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 25 para. 84.
[130] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 26 para.84.

2.2 Under Protocol 16 of the Convention, the Court of Justice is the highest national court for questions related to EU law

Protocol 16 of the Convention entered in force in 2018. It allows the highest national courts of the states that ratified the protocol, to address questions to the ECtHR on the interpretation of the Convention.[131] Protocol 16 was adopted following the Izmir declaration, with the purpose of strengthening the cooperation between highest national courts and the ECtHR.[132] This cooperation strengthens the implementation of the Convention and reinforces the principle of subsidiarity.[133] Lastly, opinions delivered under Protocol 16 are not legally binding on national courts.

In Opinion 2/13, the Court of Justice found that Protocol 16 risks affecting the effectiveness of the preliminary ruling procedure from Article 267 TFEU. There is a risk, that national courts can circumvent the Court of Justice and address questions regarding the compatibility of EU law with the Convention to the ECtHR.[134] Considering that after accession, the Convention becomes part of the EU legal system, the Court of Justice wants to have priority to interpret the compatibility of EU law with the Convention.[135] For this reason, the Court of Justice declared the possible applicability of Protocol 16 incompatible with EU law.

However, this interpretation of Protocol 16 contradicts the prior case law of the Court of Justice. According to previous jurisprudence, the EU legal autonomy is violated when another court has competence to give binding interpretations of EU law.[136] Advisory opinions under Protocol 16,

[131] "Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms," (CETS No. 214) § (2018), art. 1 (1), https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=214.
[132] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[133] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[134] Opinion 2/13 paragraph 197.
[135] Opinion 2/13 paragraph 197.
[136] Opinion of the Court (Full Court) of 8 March 2011. Opinion pursuant to Article 300(6) EC. Opinion delivered pursuant to Article 218(11) TFEU - Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties. Opinion 1/09. (ECJ 2009).

are not binding on highest national courts. Even more, according to EU law, when questions of EU law are raised during a case, the last instance national courts have the duty to refer the case to the Court of Justice.[137] Otherwise, national courts risk breaching EU law and the EU Commission can start infringement proceedings.

It is challenging to fully grasp the practical implications of Protocol 16 for the effectiveness of the Convention system. When Opinion 2/13 was delivered, the Protocol was not in force. It only entered into force in 2018 after 10 states ratified the protocol. Nevertheless, I consider that any limitations for the highest national courts to ask for advisory opinions under Protocol 16 represents a challenge to the ability of the ECtHR to reinforce the implementation of the Convention.

Next, we consider possible solutions, and how to balance Protocol 16 with the effectiveness of the preliminary ruling procedure under Article 267 TFEU.

To satisfy the demands of the Court of Justice, one solution could be for all the EU member States *not* to ratify Protocol 16.[138] Not ratifying the Protocol leads to national courts not having the possibility to address any questions, including those related to the compatibility of national law not covered by EU law. Nevertheless, I consider that this creates an impediment for the ECtHR to effectively reinforce the implementation of the Convention. In addition, at this point France and Estonia already ratified the Protocol, with other EU members having signed it. As a result, this solution is unrealistic at this point.

Another suggestion would be the inclusion of a clause in the Accession Agreement, which prevents national courts from addressing questions to the ECtHR in cases when issues are connected to the

[137] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 262.
[138] Lock, 263.

interpretation or applicability of EU law.[139] The main risk is the Court of Justice finding this solution incompatible with the EU legal autonomy, because the ECtHR will decide what is connected to the interpretation or applicability of EU law.[140] The 2023 Accession Agreement adopts a similar solution to this approach.

The solution is in the 2023 Accession Agreement Article 5 *Advisory Opinions under Protocol No. 16 to the Convention:*

> *Where a court or tribunal of a member State of the European Union that has ratified Protocol No. 16 to the Convention, in the context of a case pending before it, encounters a question relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of Article 1, paragraph 1, of Protocol No. 16 to the Convention if the question falls within the field of application of European Union law.*

According to the Explanatory Report, this clause is intended to prevent national courts from asking advisory opinions from the ECtHR when EU law requires the court or tribunal to ask for a preliminary ruling from the Court of Justice.[141] This gives the ECtHR the power to decide if the request for an opinion under Protocol 16 is admissible or not. The risk of national courts circumventing the preliminary reference procedure is apparently eliminated.

The case law developed by the ECtHR puts an obligation on the EU highest national courts, to make use of Article 267 TFEU and to ask for preliminary references from the Court of Justice.[142] If the national courts do not make use of Article 267 TFEU, they have to justify their decision.[143]

[139] Lock, 263.
[140] Lock, 263.
[141] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 26 para. 86.
[142] Sanofi Pasteur v. France, No. 25137/16 (ECtHR February 13, 2020).
[143] Sanofi Pasteur v. France paragraph 78.

This shows that the ECtHR is interested to avoid situations, in which the highest national courts circumvent Article 267 TFEU.

In conclusion, the 2023 Draft Accession Agreement eliminates the risk of the EU national courts, circumventing Article 267 TFEU, by asking for advisory opinions from the ECtHR under Protocol 16 of the Convention.

Chapter III Issues connected to the mutual trust doctrine between EU member States and the realtion of Article 53 of the ECHR with Article 53 of the EU Charter

This chapter looks at the principle of mutual trust and the dialogue between the ECtHR and the Court of Justice regarding the limitation of this principle. The principle of mutual trust was considered the most sensitive topic of the Accession Agreement. Since Opinion 2/13 was delivered, the Court of Justice and the ECtHR engaged in a dialogue through their case law, in order to find a common position on the principle of mutual trust. The first subchapter, considers the most important cases between the two courts, and their relevance for the reflection of the principle of mutual trust in the 2023 Accession Agreement.

In the second subchapter, the thesis looks at the relation between Article 53 of the Convention with Article 53 of the EU Charter. The Court of Justice, in Opinion 2/13 asked for Article 53 of the Convention to be coordinated with the interpretation of the Court of Justice of Article 53 of the EU Charter, when this applies within the scope of EU law.

3.1 The dialogue between the ECtHR and the Court of Justice on the principle of mutual trust

According to the Court of Justice, the principle of mutual trust is a fundamental principle of EU law. The principle of mutual trust allows EU member states to presume that fundamental rights are respected by all member States when they implement EU law.[144] In Opinion 2/13, the Court of Justice considered that EU accession to the ECHR should properly reflect the principle of mutual trust. The Court of Justice stressed the importance of the principle of mutual trust for the creation of an area without internal borders and its essential role for the functioning of the area of freedom,

[144] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 258.

security and justice. [145] Mutual trust serves as a guarantee between member States, that they respect the fundamental rights protected by EU law when they implement EU law.

The ECtHR often hears cases concerning the compatibility of extraditions, expulsions, or judicial cooperation between EU member states with the Convention.[146] In this context, the ECtHR faces questions regarding the compatibility of the principle of mutual trust with the obligations of the EU member States under Article 3 of the Convention.[147]

The Court of Justice and the ECtHR have different understandings on what are the limitations of the principle of mutual trust. To better understand the differences between the two systems towards the principle of mutual trust, we must analyze the case law of the two courts. It is important to mention that in recent years, the ECtHR and the Court of Justice made considerable progress in trying to find a common position vis-à-vis the principle of mutual trust.

Mutual trust in the EU asylum system versus the obligations of the EU member States under Article 3 of the ECHR

One of the first cases displaying the tensions between the obligations of the EU member States under the Convention and under EU law, is the case *M.S.S v. Belgium and Greece,*[148] decided in 2011 by the ECtHR. The case was filed to the ECtHR by an Afghan national which illegally entered Greece in 2008. He was registered as an asylum seeker and then traveled to Belgium.[149] Belgian authorities decided to send him back to Greece, which was his registration point.[150] Under

[145] Opinion 2/13 paragraph 191.
[146] Matti Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," in *International Actors and the Formation of Laws*, ed. Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen (Cham: Springer International Publishing, 2022), 31, https://doi.org/10.1007/978-3-030-98351-2_3.
[147] Pellonpää, 31.
[148] M.s.s. v. Belgium and Greece, No. 30696/09 (ECtHR [GC] January 21, 2011).
[149] M.s.s. v. Belgium and Greece paragraph 9.
[150] M.s.s. v. Belgium and Greece paragraph 23.

the Dublin II Regulation, asylum requests should be processed by the country that first registered the asylum seeker.

The principle of mutual trust is essential for the functioning of the framework established by the Dublin II Regulation, according to which, EU member States can almost automatically transfer asylum seekers between them.[151] The ECtHR ruled that Belgium violated its obligations under Article 3 of the Convention, because it transferred the applicant to Greece.[152] According to the ECtHR the Greek asylum system had major deficiencies and the right of the applicant under Article 3 of the Convention was violated.[153] The ECtHR interpreted the Dublin II regulation and concluded that the principle of mutual trust should not have been applied in this case.[154]

The Court of Justice took note of the judgment delivered by the ECtHR. In the case *N.S. and M.E. and Others*[155], the Court of Justice addressed the tensions between the principle of mutual trust in the EU asylum system and the obligations of the EU member states under the Convention.[156] This case had similar circumstances as the previous case, *M.S.S v. Belgium and Greece*, this time concerning the transfer of asylum seekers from Ireland and the United Kingdom to Greece.[157] The Court of Justice admitted that EU member States can face difficulties in protecting the fundamental rights of asylum seekers.[158] Those difficulties can appear due to systemic deficiencies to the asylum system in certain EU member States.[159] In cases of systemic deficiencies, member States

[151] Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," 36.
[152] M.s.s. v. Belgium and Greece paragraph 424.
[153] M.s.s. v. Belgium and Greece paragraph 424.
[154] Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," 37.
[155] N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, No. Joined cases C-411/10 and C-493/10 (ECJ December 21, 2011).
[156] Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," 38.
[157] N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform paragraph 34.
[158] N S (C-411/10) M E and Others (C-493/10), No. Joined cases C-411/10 and C-493/10 (ECJ December 21, 2011).
[159] N S (C-411/10) M E and Others (C-493/10) paragraph 86.

should not transfer asylum seekers and should avoid putting them at risk of having their fundamental rights violated. Otherwise, according to the Court of Justice, EU member states risk violating article 4 of the EU Charter, which is identic to Article 3 of the ECHR.[160]

The Court of Justice decided that only systemic deficiencies can justify an exception to the principle of mutual trust.[161] This standard was different from that of the ECtHR, which required states to asses the risk of treatment incompatible with Article 3 of the ECHR, regardless of the existence of systemic deficiencies.[162] The Court of Justice adjusted the limits of mutual trust closer to that of the ECtHR in the case of *C.K* from 2017.[163] The Court of Justice admitted that transfers under the Dublin system can take place only when there is no real or proven risk of the persons being subject to degrading or inhumane treatment.[164] This case, aligned even more the interpretation of the Court of Justice to that of the ECtHR in cases concerning the limits of mutual trust for asylum cases.

Mutual trust in the European Arrest Warrant versus the obligations of the EU member States under Article 3 of the ECHR.

The European Arrest Warrant (EAW) replaced traditional extraditions between the EU member States. Under the EAW citizens can be extradited between the EU member States based on the direct cooperation between judicial authorities.[165]

The execution of the EAW raised similar issues as in cases of asylum transfers, questioning to what extent can human rights justifications limit the execution of an EAW. In the case *Aranyosi*

[160] N S (C-411/10) M E and Others (C-493/10) paragraph 106.
[161] Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," 39.
[162] Pellonpää, 39.
[163] C K and Others v Republika Slovenija, No. Case C-578/16 PPU (ECJ February 16, 2017).
[164] C K and Others v Republika Slovenija paragraph 96.
[165] Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," 41.

and Căldăraru a German court asked the Court of Justice whether prison conditions, including overcrowding, can justify the non execution of an EAW, creating an exceptions to the principle of mutual trust.*[166]* The Court of Justice decided that limitations to the principle of mutual trust are possible during the execution of an EAW.[167] Those limitations are justified under Article 4 of the Charter which has an absolute character.

The Court of Justice placed the responsibility on national courts to consider the existence of systemic deficiencies in the prisons of EU member States.[168] The courts responsible for the execution of an EAW should ask for additional information from competent authorities in order to determine if there is a real risk for the person being subjected to inhumane or degrading treatment.[169] The Court of Justice added that decisions of the ECtHR can serve as an indicator of systemic deficiencies in prisons.[170] This way, the Court of Justice brought its case law closer to the case law of the ECtHR with regard to prison conditions and the applicability of Article 3 of the ECHR.[171]

On the other side, the ECtHR recognizes the importance of the principle of mutual trust for the functioning of the area of freedom, security and justice in the judgments *Avotiņš v. Latvia (2016)*[172]*and Bivolaru and Moldovan v. France (2021).*[173]

[166] Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, No. Joined Cases C-404/15 and C-659/15 PPU (ECJ April 5, 2016).
[167] Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen paragraph 92.
[168] Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen paragraph 93.
[169] Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen paragraph 89.
[170] Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen paragraph 89.
[171] Pellonpää, "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe," 44.
[172] Avotiņš v. Latvia, No. 17502/07 (ECtHR [GC] May 23, 2016).
[173] Bivolaru and Moldovan v. France, No. 40324/16, 12623/17 (ECtHR March 25, 2021).

In Avontis, the ECtHR faced questions regarding the execution and enforcement of judgments between EU member States under Regulation 44/2001.[174] The ECtHR declared the creation of an area of freedom, security and justice compatible with the Convention and acknowledged the crucial role played by the principle of mutual trust.[175] The ECtHR reaffirmed the applicability of the *Bosphorus* principle and reaffirmed the duty of the applicant to overturn the presumption of equivalent protection.[176] In this case, the ECtHR found no violation of the ECHR because the safeguards provided by EU law are sufficient to avoid violations of the fundamental rights protected by the ECHR.[177] Furthermore, the ECtHR emphasized that national judges cannot refrain from analyzing a complaint by invoking the principle of mutual trust. In addition, national courts need to ensure that EU law offers sufficient safeguards to protect the rights recognized by the Convention.[178] In other words, the principle of mutual trust should not be applied automatically, disregarding human rights concerns.[179]

The 2023 Draft Accession Agreement, in Article 6 regulates the principle of mutual trust.

> *"Article 6 – Mutual trust under European Union law*
>
> *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."*[180]

[174] Giacomo Biagioni, "Avotinš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights," *European Papers - A Journal on Law and Integration* 2016 1, no. 2 (August 30, 2016): 579–96, https://doi.org/10.15166/2499-8249/70.
[175] Avotiņš v. Latvia paragraph 113.
[176] Avotiņš v. Latvia paragraph 125.
[177] Paul Gragl, "An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case: ECtHR 23 May 2016, Case No. 17502/07, *Avotiņš* v *Latvia*," *European Constitutional Law Review* 13, no. 3 (September 2017): 566, https://doi.org/10.1017/S1574019617000165.
[178] Avotiņš v. Latvia paragraph 116.
[179] Avotiņš v. Latvia paragraph 116.
[180] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 7.

The Explanatory Report mentions the limitations of the principle of mutual trust from the case law of the Court of Justice.[181] In particular, the Report mentions paragraph 78 from *Avontis* and Caldararu, that requires EU member states to derogate from the principle of mutual trust in exceptional circumstances. Also, the Explanatory Report mentions the interpretation of the principle of mutual trust in the case law of the ECtHR.[182] First, the increased convergences between the two system is acknowledged, in particular the common understanding that mutual trust can be limited by the existence of real and individual risks to the rights protected by the ECHR.[183] Second, the Explanatory Report mentions that mutual trust should not be applied automatically and mechanically to the disadvantage of human rights.[184]

In conclusion, the 2023 draft Accession Agreement reflects the dialogue between the two courts regarding mutual trust. I consider that the 2023 Accession Agreement strikes a good balance between upholding the Convention standards and recognizes importance of the principle of mutual trust in the area of freedom, security and justice.

[181] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 26. para.87.
[182] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 26 para. 87.
[183] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 26 para. 88.
[184] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 26 para. 88.

3.2 Coordinating Article 53 of the Convention with Article 53 of the Charter

Article 53 of the Convention allows States to enact higher human rights standards than those guaranteed by the Convention.[185] Article 53 of the EU Charter is inspired from Article 53 of the Convention and contains a similar rule.[186] In Opinion 2/13 the Court of Justice considered that Article 53 of the Convention could threat the primacy of EU law.[187]

First, the Court of Justice is worried that EU member States can use Article 53 of the Convention to justify not applying EU law. More precisely, the Court of Justice wants to coordinate the interpretation of the two articles under the *Melloni* doctrine. In *Melloni*, the Court of Justice decided that implementing higher human rights standards under Article 53 of the EU Charter cannot compromise the primacy, unity, and effectiveness of EU law.[188] Second, the Court of Justice wants to prevent the ECtHR from sanctioning the EU for stopping its member States from applying higher human rights standards.[189]

In *Melloni*, an Italian citizen was arrested in Spain after being convicted in absentia by an Italian court.[190] An EAW was issued to initiate the extradition procedure.[191] He argued that extradition based on a conviction *in absentia*, violates the right to a fair trial as guaranteed by the Spanish Constitution.[192] In Spain, the right to a fair trial allows for a special appeal if convicted *in absentia.*[193] The Italian right to a fair trial does not recognize any special appeal for convictions *in*

[185] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 53.
[186] "Charter of Fundamental Rights of the European Union," 326 OJ C § (2012), art. 53, http://data.europa.eu/eli/treaty/char_2012/oj/eng.
[187] Opinion 2/13 paragraph 189.
[188] Stefano Melloni v Ministerio Fiscal, No. Case C-399/11 (ECJ February 26, 2013).
[189] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 34.
[190] Stefano Melloni v Ministerio Fiscal paragraph 13.
[191] Stefano Melloni v Ministerio Fiscal paragraph 13.
[192] Stefano Melloni v Ministerio Fiscal paragraph 18.
[193] Stefano Melloni v Ministerio Fiscal paragraph 18.

absentia.[194] In this case, the right to a fair trial is higher in Spain than in Italy. Questions related to the interpretation of Article 53 of the EU Charter appeared in this case. Can Spain execute the EAW even when it violates the right to a fair trial as recognized by its Constitution?[195] The Court of Justice decided that national institutions cannot set aside the application of EU law because their constitution sets higher standards for the protection of a right.[196] Article 53 cannot be interpreted to compromise the primacy, unity, and effectiveness of EU law.[197]

The Court of Justice is worried that EU member States can use article 53 of the Convention to implement higher standards and circumvent the *Melloni* requirement to respect the primacy of EU law.[198] In other words, EU member states could create higher standards under Article 53 of the Convention, to justify the non implementation of EU law.[199]

Most authors disagree with the interpretation of Article 53 of the Convention given by the Court of Justice. First, this article does not grant itself the power to enact higher standards.[200] This article does not create rights or obligations, just declares a functioning rule of the Convention.[201] The rule that the Convention sets the minimum level of standards, signatory states are free to enact higher standards than those of the Convention. In addition, in cases when States enact higher standards, Article 53 prevents the use of the Convention to limit the standards of rights enacted by these States.[202]

[194] Stefano Melloni v Ministerio Fiscal paragraph 18.
[195] Stefano Melloni v Ministerio Fiscal paragraph 26.
[196] Stefano Melloni v Ministerio Fiscal paragraph 56.
[197] Stefano Melloni v Ministerio Fiscal paragraph 60.
[198] Lock, "The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13," 256.
[199] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 22.
[200] Halberstam, 22.
[201] Halberstam, 22.
[202] Halberstam, 22.

The power of the EU member States to enact higher standards in EU law is limited by the *Melloni* doctrine. The problem invoked by the Court of Justice has no foundation, currently member States cannot enact more protective norms that challenge the primacy of EU law.[203] The use of Article 53 of the Convention to implement EU law would have to respect the principle of primacy of EU law and would be subject to the *Melloni* doctrine.[204]

The 2023 Accession Agreement in Article 1 paragraph 9 mentions the applicability of article 53 of the Convention:

> *"Article 53 of the Convention 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."*

The text of the article suggests that the *Melloni* doctrine can be applied if the standard of rights respects the minimum threshold guaranteed by the Convention.

On the second issue, that of the ECtHR sanctioning the EU from preventing its member states from enacting higher standards, the Explanatory Report mentions the case *M.N. v. Belgium* decided by the ECtHR.[205] In this case, a family of Syrian refugees applied for visas at the Belgian embassy in Beirut.[206] The family intended travel to Belgium and apply for asylum, they applied two times for visas and got two refusals[207]. Under Belgian law they had the right to contest the visa refusal decisions.[208] However, the ECtHR declared the case inadmissible because the right to contest a

[203] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 34.
[204] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 22.
[205] M.n. and Others v. Belgium (déc.), No. 3599/18 (ECtHR [GC] May 5, 2020).
[206] M.n. and Others v. Belgium (déc.) paragraph 9.
[207] M.n. and Others v. Belgium (déc.) paragraph 10.
[208] M.n. and Others v. Belgium (déc.) paragraph 13.

visa refusal does not fall under Article 6 of the ECtHR.[209] In this case, the ECtHR recognized the right of Belgium under Article 53 of the Convention, to grant a judicial right to contest visa refusals. The ECtHR will not hear such cases under Article 6 of the Convention, because it does not recognize such right.[210] This case shows that the ECtHR will not find violations of the Convention when states grant more extensive rights, as long as the minimum standard of rights set by the ECtHR is respected. In this case, there is no risk of the EU violating the Convention by preventing its member States from enacting higher protection standards.

[209] M.n. and Others v. Belgium (déc.) paragraph 140.
[210] M.n. and Others v. Belgium (déc.) paragraph 140.

Chapter IV Questions regarding the area of Common Foreign and Security Policy (CFSP)

The area of CFSP is left undecided by the 2023 Accession Agreement. In Opinion 2/13, the Court of Justice opposed the idea of the ECtHR having full jurisdiction over CFSP, while its own jurisdiction is very limited in this field. The Court of Justice based its reasoning on the current provisions of EU law, according to which the Court of Justice does not have jurisdiction over certain acts adopted under the CFSP.[211] Under the 2013 Accession Agreement, the ECtHR would decide on the compatibility with the Convention of EU acts, omissions or actions in the context CFSP, while the Court of Justice does not have the jurisdiction to do so.[212] Furthermore, according to the Court of Justice, EU law does not allow agreements that grant exclusive jurisdiction to an international court outside the institutional framework of the EU, to review acts or omissions on the part of the EU.[213] This rule or interpretation of EU law was first given by the Court of Justice in Opinion 1/09, which concerned the creation of the European Patent Court. [214]

4.1 Can the EU reach an agreement in the area of CFSP without compromising the jurisdiction of the ECtHR?

One of the solutions is to exclude the competence of the ECtHR over CFSP. However, the Council of Europe non-EU member States will not accept such a situation.[215] Because this excludes an important part of EU law from the supervision of the ECtHR. Secondly, this is considered a reservation to the Convention, made by the EU, broad reservations of general character can be declared incompatible with the Convention by the ECtHR.[216]

[211] Opinion 2/13 paragraph 250.
[212] Opinion 2/13 paragraph 254.
[213] Opinion 2/13 paragraph 256.
[214] Opinion 2/13 paragraph 256.
[215] European Parliament. Directorate General for Internal Policies of the Union., *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?*, 37.
[216] European Parliament. Directorate General for Internal Policies of the Union., 37.

The 2023 Accession Agreement is completely silent on this issue. However, it is mentioned that the EU intends to solve internally the issues raised in Opinion 2/13 over CFSP.[217] The decision taken by the EU will be presented to the Negotiations group and the EU will inform the Negotiations group regularly about the status of the discussion.[218]

The area of CFSP raised many issues concerning the protection of human rights, mainly because of the lack of remedies in this area. The Court of Justice does not have full jurisdiction, and the national courts should fill this gap. However, Advocate General *Kokkot* in her Opinion mentioned that under the current legal framework the CFSP does not meet the requirements of Article 13 of the Convention to provide effective remedies.[219] This can serve as a reason for the EU to grant human rights jurisdiction to the Court of Justice over the area of CFSP.

In Conclusion, one thing is evident, the 2023 Accession Agreement does not contain any provision that limits the jurisdiction of the ECtHR over CFSP. I assume that the most realistic solution is to grant human rights jurisdiction to the Court of Justice over CFSP. This solution was suggested by several authors including by Krenn[220] and Halberstam[221]. Such a solution requires amendments to the EU treaties, which, however, can slow down the process of finding a solution.

[217] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 3.
[218] "2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights," 3.
[219] View of Advocate General Kokott delivered on 13 June 2014. Opinion pursuant to Article 218(11) TFEU. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties. Case Opinion 2/13. (ECJ 2013).
[220] Krenn, "Autonomy and Effectiveness as Common Concerns," 166.
[221] Halberstam, "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward," 41.

Conclusion

The 2023 Draft Accession Agreement deals primarily with the issues raised by the Court of Justice in Opinion 2/13. At the same time, the draft strikes a good balance between the concerns of the Court of Justice and the preservation of the main characteristics of the Convention system. This agreement is characterized by the role of the EU and its member States regarding the applicability of the Accession Agreement. The EU has the responsibility to present to the ECtHR assessments on the applicability of the Accession Agreement or on the interpretation of EU law, including:

- Assessments regarding the applicability of the co-respondent mechanism Test I and II.
- Assessments of the conditions to trigger the prior involvement mechanism.
- Assessments regarding the applicability of Article 33 of the Convention, and whether Article 344 TFEU is not circumvented.

This allows the EU and its member States to present a common position regarding the applicability of the Draft Accession Agreement to the ECtHR. This way, the ECtHR is prevented from deciding on potential contradictory interpretations of EU law or on the division of competences, between the EU and its member States. At the same time, the Agreement reflects the dialogue and developments in the case law of the two courts. This includes the dialogue on the limitations to the principle of mutual trust, and the willingness of the Court of Justice to approach its case law to that of the ECtHR.

The thesis showed that the 2023 Draft Accession Agreement protects the jurisdiction and procedural authority of the ECtHR and allows for minimum exceptions to the applicability of the Convention. This way, the effectiveness and functioning of the convention system are preserved. At the same time, the 2023 Accession Agreement strikes a good balance between upholding the

Convention standards and recognizes importance of the principle of mutual trust in the area of freedom, security and justice. The principle of mutual trust was considered the most difficult obstacle for the EU accession to the Convention, however, the two courts tried to align their positions on this issue. The area of CFSP is not addressed by the 2023 Accession Agreement. The Negotiations group allowed the EU to decide this issue internally. From the perspective of the protection of human rights, the best solution is to grant human rights jurisdiction to the ECtHR and to the Court of Justice over CFSP.

The 2023 Accession Agreement is a solid foundation on which the EU can become a party to the Convention. Considering the important role played by Opinion 2/13 in the drafting of the 2023 Accession Agreement, the chances of the Court of Justice accepting the agreement are higher than in 2013. It is likely that the 2023 Draft Accession Agreement is the beginning of the end for the saga of the EU accession to the Convention.

Word count: 15 012

Bibliography

"2013 Draft Accession Agreement of the European Union to the European Convention of Human Rights." Council of Europe, April 5, 2013. https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf.

"2023 Draft Accession Agreement of the European Union to the European Convention of Human Rights." Council of Europe, April 5, 2023.

Avotiņš v. Latvia, No. 17502/07 (ECtHR [GC] May 23, 2016).

Besselink, Leonard F. M. "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13." *Verfassungsblog*, Dezember 2014. https://doi.org/10.17176/20181005-151453-0.

Biagioni, Giacomo. "Avotinš v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights." *European Papers - A Journal on Law and Integration* 2016 1, no. 2 (August 30, 2016): 579–96. https://doi.org/10.15166/2499-8249/70.

Bivolaru and Moldovan v. France, No. 40324/16, 12623/17 (ECtHR March 25, 2021).

Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland, No. 45036/98 (ECtHR [GC] June 30, 2005).

C K and Others v Republika Slovenija, No. Case C-578/16 PPU (ECJ February 16, 2017).

Callewaert, Johan. "Do We Still Need Article 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and Its Consequences." *Common Market Law Review* 55, no. Issue 6 (December 1, 2018): 1685–1716. https://doi.org/10.54648/COLA2018142.

———. *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme*. Strasbourg: Ed. du Conseil de l'Europe, 2013.

Charter of Fundamental Rights of the European Union, 326 OJ C § (2012). http://data.europa.eu/eli/treaty/char_2012/oj/eng.

Commission of the European Communities v Ireland, No. Case C-459/03 (ECJ May 30, 2006).

Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series 005 § (1950).

Daukšienė, Inga, and Simas Grigonis. "Accession of the EU to the ECHR: Issues of the Co-Respondent Mechanism." *International Comparative Jurisprudence* 1, no. 2 (December 2015): 98–105. https://doi.org/10.1016/j.icj.2016.01.001.

European Parliament. Directorate General for Internal Policies of the Union. *What next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?* LU: Publications Office, 2016. https://data.europa.eu/doi/10.2861/07148.

"Fourth Negotiation Meeting Between The CDDH Ad Hoc Negotiation Group And The European Commission On The Accession Of The European Union To The European." Council of Europe, January 2013. https://rm.coe.int/47-1-2013-r04-en-final-/1680a3f621.

Gragl, Paul. "An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case: ECtHR 23 May 2016, Case No. 17502/07, *Avotiņš* v *Latvia*." *European Constitutional Law Review* 13, no. 3 (September 2017): 551–67. https://doi.org/10.1017/S1574019617000165.

Halberstam, Daniel. "It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward." *SSRN Electronic Journal*, 2015. https://doi.org/10.2139/ssrn.2567591.

Jörg, Polakiewicz. "EU Accession to the ECHR: How to Square the Circle? - Directorate of Legal Advice and
Public International Law - Publi.Coe.Int." Directorate of Legal Advice and
Public International Law. Accessed January 26, 2023. https://www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle-.

Kirchner, Stefan. "Reservations and the European Convention on Human Rights." SSRN Scholarly Paper. Rochester, NY, June 3, 2020. https://doi.org/10.2139/ssrn.3617901.

Korenica, Fisnik, and Dren Doli. "The CJEU Likes to Blame Loudly and to Applaud Quietly: The Co-Respondent Mechanism in the Light of Opinion 2/13." *Maastricht Journal of European and Comparative Law* 24, no. 1 (February 2017): 86–107. https://doi.org/10.1177/1023263X17693190.

Korošec, Tina. "The Co-Respondent Mechanism before the European Court of Human Rights: An Adequate Procedural Solution or a Flawed Mechanism?" In *Contemporary Issues of Human Rights Protection in International and National Settings*, edited by Stefan Lorenzmeier and Vasilka Sancin, 1st ed., 153–78. Portland: Hart/Nomos, 2018. http://www.bloomsburycollections.com/book/contemporary-issues-of-human-rights-protection-in-international-and-national-settings/the-co-respondent-mechanism-before-the-european-court-of-human-rights-an-adequate-procedural-solution-or-a-flawed-mechanism/.

Krenn, Christoph. "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13." *German Law Journal* 16, no. 1 (March 1, 2015): 147–67. https://doi.org/10.1017/S2071832200019453.

Łazowski, Adam, and Ramses A. Wessel. "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR." *German Law Journal* 16, no. 1 (March 2015): 179–212. https://doi.org/10.1017/S2071832200019477.

Lock, Tobias. “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?” *European Constitutional Law Review* 11, no. 2 (September 2015): 239–73. https://doi.org/10.1017/S1574019615000243.

M.n. and Others v. Belgium (déc.), No. 3599/18 (ECtHR [GC] May 5, 2020).

M.s.s. v. Belgium and Greece, No. 30696/09 (ECtHR [GC] January 21, 2011).

N S (C-411/10) M E and Others (C-493/10), No. Joined cases C-411/10 and C-493/10 (ECJ December 21, 2011).

N S (C-411/10) v Secretary of State for the Home Department and M E and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, No. Joined cases C-411/10 and C-493/10 (ECJ December 21, 2011).

Opinion 2/13, No. 2/13 (European Court of Justice December 18, 2013).

Opinion of the Court (Full Court) of 8 March 2011. Opinion pursuant to Article 300(6) EC. Opinion delivered pursuant to Article 218(11) TFEU - Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties. Opinion 1/09. (ECJ 2009).

Opinion of the Court of 28 March 1996. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/94. (ECJ 1994).

Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, No. Joined Cases C-404/15 and C-659/15 PPU (ECJ April 5, 2016).

Pellonpää, Matti. “Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe.” In *International Actors and the Formation of Laws*, edited by Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen, 29–64. Cham: Springer International Publishing, 2022. https://doi.org/10.1007/978-3-030-98351-2_3.

Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, (CETS No. 214) § (2018). https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=214.

Risini, Isabella. “The Accession of the European Union to the ECHR and the Inter-State Application under Article 33 ECHR.” In *Contemporary Issues of Human Rights Protection in International and National Settings*, edited by Stefan Lorenzmeier and Vasilka Sancin, 1st ed., 179–92. Portland: Hart/Nomos, 2018. http://www.bloomsburycollections.com/book/contemporary-issues-of-human-rights-protection-in-international-and-national-settings/the-accession-of-the-european-union-to-the-echr-and-the-inter-state-application-under-article-33-echr/.

Sanofi Pasteur v. France, No. 25137/16 (ECtHR February 13, 2020).

Stefano Melloni v Ministerio Fiscal, No. Case C-399/11 (ECJ February 26, 2013).

"The Place Of The European Convention On Human Rights In The European And International Legal Order." Strasbourg: Council of Europe, Steering Committee for Human Rights (CDDH), November 26, 2019. https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/-/the-place-of-the-european-convention-on-human-rights-in-the-european-and-international-legal-order.

View of Advocate General Kokott delivered on 13 June 2014. Opinion pursuant to Article 218(11) TFEU. Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties. Case Opinion 2/13. (ECJ 2013).