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The co-respondent mechanism: an analysis of the 2023 Final consolidated version of the draft accession instruments of the EU to the ECHR

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INTRODUCTION

The protection of fundamental rights is vital to protect the dignity, freedom and equality of every human being. The European Convention on Human Rights (ECHR) is an international agreement ratified within the Council of Europe, to ensure to every individual a life of dignity, and to establish a supranational court to protect such rights. The history of accession of the European Communities, and later of the European Union (EU), to the ECHR started in the last decades of the 20th century. The Member States of the European Communities were all parties to the ECHR, thus bound by two supranational legal orders and their respective courts. The accession of the EU to the ECHR is fundamental to strengthen the safeguarding of fundamental rights. Moreover, an accession agreement could improve the coordination between the two courts.

Through the years, both the EU and the ECHR have passed several amendments to introduce the provisions to allow the accession. The 2023 is extremely important as it represents the result of decades of work from both sides. The pathway to arrive to the Final consolidated version was complicated and faced two major failures, opinion 2/94 and opinion 2/13 issued by the European Court of Justice (ECJ). The complexity derives primarily from the nature of the EU. In fact, the Union is a non-State entity, with a supranational legal order and its own Court of justice. Moreover, acceding to the Convention, the EU would be a member along its own Member States. To address this unique situation, the negotiators of the 2013 accession agreement developed a system called co-respondent mechanism. The instrument is designed to be triggered where an alleged violation of an ECHR provision results from the application of EU law, or when its interpretation is required, and the application is directed against the EU, one or more of its Member States, or both. In such cases, it has been made possible for EU or one or more Member States to become a second respondent. Despite the system has been changed following the concerns raised by the ECJ in its 2014 opinion, the mechanism still presents some ambiguities and problems.

This research aims to assess whether the recently released Final consolidated version and the new structure of the co-respondent mechanism represent a reasonable and achievable accession instrument. This thesis is structured into three chapters. The first chapter analyses the legal framework of the EU and the protection of human rights within the EU, outlining their evolution from the birth of the first Community, to the present day. The second chapter starts off with an overview of the ECHR and its history followed by the examination of the key historical developments concerning the EU accession from the first proposals. It provides an analysis of opinion 2/94, the first failure of the project due to the lack of a legal basis, of the 2013 Draft accession agreement (DAA), and of opinion 2/13, the second rejection. The last chapter delves into the 2023 Final consolidated version with a focus on the co-respondent mechanism, its changes from the DAA and its ongoing challenges. Ultimately this chapter evaluates to what extent these issues hinder the achievability of the accession.

CHAPTER I

HUMAN RIGHTS IN THE EUROPEAN UNION FRAMEWORK

The respect of human rights represents a fundamental pillar upon which the European Union is built. The building of a juridical framework that guarantees the respect and safeguarding of human rights has always been a priority for the European Union given the shared view of the Member States on the topic. In this chapter I will explore the historical evolution of the human rights as they pertain to the European Union, analyzing the normative context that led to the current framework and the limits determined to counterbalance human rights and other demands, such as national security.

The chapter is divided in two sections. The first section examines the legal framework of the European Union analyzing the principal legal sources of the European Union, the landmark events that shaped the development, and the challenges encountered during the process that led to the formation of the EU. Section two will focus to delve into the idea that the European Union has of fundamental rights, the three legal sources that protect them, and a brief explanation of the applicable limits.

Through this deep comprehension of the dynamics regarding human rights within the Union's legal framework, it is possible to analyze the meaning and the consequences of a potential accession to the European Convention of Human Rights.

i. Legal framework of the European Union

The sources of law of the European Union can be classified as[1]:

(1) primary law: Treaty of the European Union (TEU), Treaty on the Functioning of the European Union (TFEU), annexed protocols, and revision and accession treaties. Moreover, according to the TEU and the TFEU, the Charter of the Fundamental Rights of the European Union (CFR) [2], the Euratom [3], and the European Convention on Human Rights are to be considered of the same importance of the Treaties.
(2) International agreements[4].
(3) Secondary law
    a. binding: regulations, decisions and directives,
    b. non-binding: opinions and recommendations.
(4) Delegated and implementing acts.

Additionally, the general principles of Union's law, the fundamental rights, and the better law-making and independent expertise, must be included in the

[1] Sources and scope of European Union law | Fact Sheets on the European Union | European Parliament.

[2] Since the 2007 Lisbon Treaty, according to Article 6(1) TFEU: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. […]".

[3] For matters of nuclear energy. Signed in March 25th, 1957, with the other Treaties, and kept its original value in the legal order since then.

[4] International agreements concluded by the EU under Articles 216 and 217 TFEU.

hierarchy. The former[5] hold a particular position in said hierarchy given their importance as primary law, but they lack explicit mentions in the Treaties. These are represented by the constitutional traditions of the EU Member States, and their legal value can be implicitly recognized by Article 6(3) TEU:

"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Similarly, better law-making and independent expertise are not part of the traditional legal sources, in fact they both are not explicitly mentioned. They set the guidelines for the normative and juridical development, furthermore they are able to provide reliable answers in a context of increasing complexities[6].

As mentioned above, the primary law of the European Union includes the Treaty of the European Union, the Treaty on the Functioning of the European Union, 37 protocols (plus 2 annexes and 65 declarations, both attached to the Treaties but whose full legal text is not incorporated), accession and revision treaties, the supplementary agreements amending specific sections of the founding treaties, and, since 2007, the Charter of Fundamental Rights. They, together, set the general principles of the European Union, the institutional structure, the distribution of competences between the European Union and its Member States, and regulate the external relations. The TFEU, originally the Treaty establishing the European Economic Community (TEEC), entered into force on January 1st, 1958, with the signing of the Treaty of Rome[7] on March 25th, 1957, establishing the European Economic Community (EEC). The name has been amended twice and became the current, *Treaty on the Functioning of the European Union*[8] with the 2007 Lisbon Treaty.

The TEU's path was accomplished in much of the same fashion. The TEU is the result of the evolution of the original Treaty on European Union signed[9] in Maastricht on February 7th, 1992, into force from November 1st, 1993. The TEU started a new era enlarging the scope of the Community, from the original economic purpose to a new common market opening the way to a new political integration from the former EEC to the current EU. The Treaty of Maastricht is notable, mainly, for the new three pillar structure: the already existing European Communities[10], and the Common Foreign and Security Policy (CFSP), and the justice and home affairs. Other relevant features introduced by the Maastricht Treaty are the introduction of the European Union citizenship, the establishment of the principles of proportionality and subsidiarity, and the implementation of the economic and monetary union[11]. The Treaty has been subsequently amended three times. In 1997, the signing of the Treaty of Amsterdam led to: the extension of the co-decision procedure for the European Parliament and the Council to more areas, the enhanced cooperation that enables a group of Member States to proceed with the

[5] General principles of Union's law.

[6] KORKEA-AHO & LEINO-SANBERG (2022: 1-16).

[7] The signatories at the time were: Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany.

[8] Emphasis added.

[9] The signatories – members of the European community – at the time were: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

[10] European Economic Community, Euratom, and European Coal and Steel Community.

[11] Treaty on European Union.

integration of some areas despite the lack of unanimity for participation, the relocation of competences regarding the third pillar[12] to the first pillar[13], and the creation of the role of Secretary-General of the Council – the High Representative for the Common Foreign and Security Policy. In 2001, the Treaty of Nice introduced the qualified majority voting system, the new composition of the European Commission with one commissioner per Member State and a rotation system of their seats, and the extension of the use of the qualified majority to several new areas such as industrial, social, commercial policies, and justice and internal affairs. In addition, the signing of the Treaty of Nice gave life to the Charter of Fundamental Rights of the European Union, however, it was external to the Union's legal framework. Lastly, in 2007 the Treaty of the European Union reached its current structure with the signing of the Treaty of Lisbon. The Lisbon Treaty has also introduced Article 50 TEU, the formal procedure to withdraw from the European Union[14]. Other important changes have been the inclusion within the Union's legal order of the Charter of Fundamental Rights [15]– previously external – conferring it the same legal value as the Treaties, and the amendment of Article 6(2) TEU changing "Declared that the Union respects fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) and as they result from the constitutional traditions common to the Member States" to "Reaffirms the Union's intention to accede to the European Convention on Human Rights (ECHR), a commitment to align with broader human rights standards", formally introducing the possibility of an accession to the ECHR.

In the European Union's legal order, between the primary law and the secondary law, there are the international agreements concluded by the Union under Articles 216 TFEU[16] and 218 TFEU[17]. The position of international agreements within legal framework is particularly significant for this thesis as it provides the procedural basis for the Union's potential accession to the ECHR that will be discussed in the next chapters.

According to Article 288 TFEU, secondary law can be binding and non-binding. The former category includes regulations, decisions, and directives. Regulations and decisions are binding in their entirety and directly applicable. They differ in their targets, regulations are of general applications, decisions are specifically addressed. On the other hands, directives are addressed to specific Member States, only the result is binding, they are not directly applicable. Thus, the national parliaments must enact pieces of legislation to make said directive into national law, and they are not horizontally applicable, so they cannot be used in cases concerning the relationship between individuals. Non-binding secondary law are opinions and recommendations. Although opinions fall under non-binding secondary law, they hold

[12] Immigration, asylum and judiciary cooperation.

[13] Communitarian pillar.

[14] Today (2024) it has been activated only by the United Kingdom in 2017 and concluded in January 2020 with the formal withdrawal from the European Union.

[15] Article 6(1) TEU "Declares that the Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties. This made the Charter legally binding".

[16] Part five: External action by the Union – Title VI: Restrictive measures – Article 216 TFEU, Official Journal 115 952008 p.0144. It allows the EU to conclude international agreements that are binding on its institutions and Member States.

[17] Part five: External action by the Union – Title VI: Restrictive measures – Article 218 TFEU, Official Journal 115 952008 p.0144 - p.0146. It outlines the procedure for negotiating and concluding international agreements by the EU.

interpretative significance and often provide guidance on the application and development of EU law. Opinions from the Court of Justice of the European Union play a critical role: they clarify legal principles, address compatibility issues with EU Treaties, and influence future legislative or procedural actions. For instance, an opinion can require amendments to proposed agreements if the Court finds them to be incompatible with EU law, as in Opinion 2/13. While they lack binding legal effect, they carry are fundamental in shaping the trajectory of many choices taken by the Union's institutions.

ii. Fundamental rights within the European Union framework

In the European Union, fundamental rights are legally protected through three key sources: the constitutional traditions of Member States and the Charter of Fundamental Rights (CFR) are directly binding. Additionally, the European Convention on Human Rights (ECHR) serves as a point of reference and interpretative guide to the protection of human right. While it is binding on the EU Member States (as they are all members of the Council of Europe), it is not binding directly on the EU.

However, for decades since the birth of the Community, fundamental rights have not been protected by any source explicitly[18]. In the original texts of the Treaties, human rights and fundamental rights have not been included and therefore have not been defined. The reason behind this absence may have been that the scope of the Community at its birth in the 1950s was narrower than today. In fact, both the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) had mainly an economic focus: the creation of a common market[19]. Other reasons may have been the prudent behaviors of States regarding infringements of national sovereignties[20], especially on sensitive topics such as human rights. Through the decades, the protection of human rights has become of increasing significance for most countries and international organizations.

In the context of the European Union, fundamental rights today are those rights that reflect the fundamental values on which the Union is based, human dignity, freedom, democracy, equality, the rule of law, and the respect for human rights. Those rights have been codified in Article 2 TEU in 2007 by the Lisbon Treaty. However, this recognition of fundamental rights in Article 2 TEU was not immediate. In the 1992 Maastricht Treaty, Article 2 outlined the Union's objectives emphasizing economy and political integration, with no explicit mention of fundamental values. A turning point for the explicit citation of human rights within the legal framework of the Union, arrived in 1997 with the ratification of the Amsterdam Treaty. For the first time, an article[21] in the Treaties explicitly stated that the Community was founded on principles such as liberty, democracy, respect for human rights, fundamental freedoms, and the rule of law. Moreover, Article 6 TEU referenced the European Convention on Human Rights (ECHR) and the constitutional traditions of Member States. It was only with the Lisbon Treaty in 2007 that

[18] DE WITTE (1999: 860).
[19] Ibid., 861.
[20] PINO (2016: 15-18).
[21] Article 6 already existed since the Treaty of Maastricht, but the Treaty of Amsterdam amended it.

the current Article 2 TEU has been introduced giving fundamental rights a central and binding role in the Union's legal framework.

Article 2 TEU – the Union is Founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. […]

Despite the presence of a human rights reservation clause in Article 3(1) of the draft[22] of the EEC Treaty[23][24], the history of human rights starts in 1959[25] with the judgment of the case 1/58, *Friedrich Stork* & Cie v High Authority of the European Coal and Steel Community[26] – commonly known as the Stork case. In 1957 the ECJ had been invited to judicially review the appeal against a decision of the German constitutional court in light of fundamental rights. The applicant, Stork, had challenged said decision for its alleged violation of the free economic initiative and the property rights in the German fundamental rights. Given the absence of a bill of rights, the applicant relied on the so-called "mortgage theory"[27]. However, the ECJ rejected the argument claiming that fundamental rights from the constitutional tradition of Member States could not be a direct source of the Community's law, and at the time, within the ECSC and EEC's Treaties, there was not any mention of protection of said rights. A significant turning point occurred a decade later, in 1970, when a German judge[28] referred a case to the ECJ for a preliminary ruling. This case, known as Case 11-70 *Internationale Handelsgesselschaft*, concerned a setting that was similar to the *Stork* case, where the regulation at stake allegedly violated the principle of free economic initiative. In this instance, the ECJ declared to have jurisdiction over the regulation, explicitly declaring that the respect for fundamental rights was an integral part of the general principle of law protected by the ECJ[29]. The divergence between the two judgments reflected an *obiter dictum*[30] issued by the Italian Constitutional Court in 1965 with judgment no. 98, also referred as *Acciaierie San Michele*[31]. It was important to consider that if a human rights' matter were left to national courts then each court would have adopted a different approach that would have allowed different laws and would have interpreted norms with different meanings, annulling uniformity within the Union. After *Internationale Handelsgesellschaft*, the protection of fundamental rights inspired by the constitutional traditions common to the Member States could have been considered an integral part of the Community, legally justified by stating that when the Member States founded the ECSC and the EEC, they transferred

[22] The clause had been presented by Germany, but it had been rejected by other delegations because perceived as risk that Member States might had misused.

[23] The verfassungvorbehalt.

[24] The express language of Article 3(1) of the EEC Treaty states "the Community shall accomplish the goals assigned to it by employing the least burdensome and most efficient methods. It shall intervene only to the extent necessary for the fulfillment of its mission and with due respect to public liberties and the fundamental rights of the individual.".

[25] Conventional date.

[26] A coal merchant had claimed that the decision of the High Authority of the ECSC (the Luxembourg Court) was not considering on purpose that the decision breached German fundamental rights that were protected under German law.

[27] The power transferred to the European Union by the member states was tied to a human rights mortgage.

[28] Hermann Louis Grewe, judge of the German Federal Court.

[29] Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11-70, Judgment of 17 December 1970, ECLI:EU:C:1970:114, para. 3.

[30] A non-binding comment that a Court can issue.

[31] Italian Constitutional Court, Judgment No. 98 of 1965, *Acciaierie San Michele*, December 27, 1965.

their basic value to the Communities. In 1973[32], the ECJ stated "Fundamental rights form an integral part of the general principle of law"[33] and

"In safeguarding these rights, the Court is bound to draw inspiration from constitutional tradition common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States […]"[34].

This confirming the inclusion of the protection of human rights within the Union's framework. Furthermore, *Nold* judgment is of special significance since it introduced an explicit mention to the ECHR for the first time[35].

Nowadays human rights are formally mentioned within the EU Treaties[36] multiple times. Notably, Article 2 TEU identifies respect for human rights as one of the fundamental values of the Union. Article 6(1) TEU reinforces the latter by recognizing the rights set out in the CFR, and Article 21(1) TEU identifies human rights as one of the principles which inspired the creation of the Union itself, and a standard precedent to adhere to. Similarly, Article 21(2)(b) TEU recognizes human rights as one of the fields in which the Union should pursue common policies, action, and work with high degree of cooperation. Protection of human rights is also implicitly one of the criteria to be respected by candidate countries while applying for membership in the EU. Within the TFEU fundamental rights are referenced several times[37].

As aforementioned, the three main legal sources that safeguarding human rights in the European Union are: (a) the constitutional traditions of Member States, (b) the CFR, and, non-directly binding, (c) the ECHR[38].

(a) The constitutional traditions of Member States, also referred as the *unwritten*[39] Bill of Rights[40]. As explained in the previous paragraph, these have been formally recognized as a source of inspiration for the Court in matters of human rights through Nold Judgment. In the Union's legal hierarchy, the constitutional traditions of Member States hold the same value as primary law[41].
(b) The Charter of Fundamental Rights of the European Union, also referred as the *written*[42] Bill of Rights[43]. It emerged as a consequence of a debate on whether the Communities should create their own Bill of Rights or accede to the ECHR. The path to the ratification of the CFR began in the 1990s following decades of needs to codify fundamental rights specific to the Union's legal order. The absence of an explicit codification of fundamental rights became pressing as the

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[32] Court of Justice of the European Communities, *K. Nold und Baustoffgrosshandlung v Commission of the European Communities*, Case 4/73, 14 May 1974. The Commission of the Communities issued a decision authorizing new terms for trades and supply in the coal sector. Nold, contested the Court's decision to overturn the Commission's decision claiming that such restriction violated its right to free pursuit of business activity which was protected by the German Constitution.

[33] Ibid., para. 13(1).

[34] Ibid., para. 13(2).

[35] Ibid., para. 13(3).

[36] TEU and TFEU, OJ C202, 7/6/2016.

[37] Article 67(1) TFEU, article 83(1) TFEU, article 157(4) TFEU, and article 352 TFEU.

[38] DE WITTE (1999: 860).

[39] Emphasis added

[40] SCHÜTZE (2021: 453).

[41] Article 6(3) TEU.

[42] Emphasis added

[43] SCHÜTZE (2021: 454).

Court had been expanding its jurisdiction over rights and freedoms through case law, using general principles derived from the constitutional traditions of Member States[44]. In 1999, at the Cologne European Council, the EU[45] led by Germany's initiative decided to draft a Charter[46]. In December 2000, Member States approved the latter at the Nice European Council Summit[47]. However, though it had been implemented as having full legal effect, the debate about how to incorporate it into the Treaties was postponed until 2001 when the Laeken Declaration on the future of the European Union put the matter on the agenda as to be decided at the 2004 intergovernmental conference:

> "Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights" [48].

The CFR has been formally integrated into the Treaties with the ratification of the Treaty of Lisbon in 2007. Article 6(1) TEU confers the CFR the same legal value as the Treaties. Article 6(1) TEU:

> "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental rights of the Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. […]".

(c) The European Convention on Human Rights, also referred as the *external*[49] Bill of Rights. It is the last of the three sources of protection of human rights within the EU legal framework. It has been drafted by the Council of Europe in 1950 and entered into force in 1953. The legal position of the ECHR with respect to the EU is extremely complex due to the relation between the two distinct juridical orders – the ECJ and the ECtHR. Even though the Member States of the EU are signatories of the ECHR, the EU never acceded the ECHR, keeping the ECHR formally external to the Union's legal framework. Nevertheless, some cases in the history of the ECJ involved the reliance of some provisions of the ECHR[50]. The history of the ECHR, the opinions of the ECJ[51], the current draft regarding the formal accession of the EU to the ECHR[52], and the ongoing challenges will be discussed in greater detail in the following chapters.

Notwithstanding the fact that human rights are perceived as absolute and illimitable, the limitation to some of them is possible, if necessary, in some exceptional cases. In the previously mentioned *Internationale Handelsgesselschaft* judgment, the ECJ not only integrated fundamental rights

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[44] Consequence of cases as Stauder v. City of Ulm (1969), Internationale Handelsgesellschaft (1970), and Nold v. Commission of the European Communities (1974).

[45] The Charter was drafted by the Parliament, the Council and the Commission.

[46] Jean Monnet Program, "The Cologne European Council and the Charter of Fundamental Rights," April 2001.

[47] European Union. *Charter of Fundamental Rights of the European Union*. Official Journal of the European Communities (OJ), C 364/1, December 18, 2000.

[48] Laeken Declaration on the Future of the European Union of 15 December 2001. para. 2(4).

[49] Emphasis added.

[50] For instance: CJUE, *ERT v. DEP*, Case C-260/89 for freedom of expression, and CJUE, *Digital Rights Ireland v. Minister for Communications*, Joined Cases C-293/12 and C-594/12 for protection of privacy.

[51] Opinion 2/94 and Opinion 2/13.

[52] Council of Europe. *Final Consolidated Version of the Draft Accession Instruments*. Strasbourg: Council of Europe, March 2023.

of the constitutional traditions of Member States to the sources of EU law, it also posed a limitation on said provisions that protect them. More specifically, the ECJ asserted that

"The protection of fundamental rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community"[53].

This underscores that, although fundamental rights are safeguarded within EU law, they might be subject to limitations when required to achieve the objective of the Community. In June 2003, the ECJ defined the right to life and the prohibition of torture and inhumane or degrading treatment or punishment as absolute and unretractable[54]. In the same paragraph, the ECJ has added that the freedom of expression and the freedom of assembly, both protected by the ECHR, are not absolute and are required to be viewed in relation to the social purpose. Thus, limitations are "laid down in accordance with the general interests" [55] of the Union. That being so, public interests of the EU cannot be a ground for restriction of fundamental rights unconditionally. The restriction can be claimed if, and only if, it protects the "general interest and that do not constitute, with regards to the objective pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed"[56]. This implies that the restriction must be proportionate to the interest being protected by it[57]. Moreover, the principle of proportionality and limitations on fundamental rights "should apply only in so far as is strictly necessary" [58]. This is known as the counter-limits doctrine. Examples of public general interest that may be a justification for restricting fundamental rights include protection of public health and human life[59].

[53] CJEC, *Internationale Handelsgesellschaft*, para. 4, "Grounds of judgment".

[54] Court of Justice of the European Union (CJEU), *Schmidberger v. Austria*, Case C-112/00. 2003. para. 80.

[55] Case 4/73 , Nold v Commission, para.14.

[56] Court of Justice of the European Communities (CJEC), *Commission v.* Germany, [1991] ECR I-2575. para.23.

[57] Court of Justice of the European Communities (CJEC), *PX v Commission*, [1994] ECR I-4737. para.18.

[58] Court of Justice of the European Communities (CJEC), *Case Tele2 Sverige AB v. Postoch telestyrelsen and Others*. para. 96

[59]CJEC, Commission v Germany. para.24.

CHAPTER II

EUROPEAN CONVENTION ON HUMAN RIGHTS, FROM OPINION 2/94 TO OPINION 2/13

This chapter delves into the European Union's evolving and extremely complex, relationship with the ECHR. It begins outlining the origins, principles, and objectives of the Convention emphasizing its role in the safeguarding of human rights all over Europe. Subsequently, it examines the historical development and milestones, from Opinion 2/94 to the most recently published draft accession instrument, in particular, analyzing early unsuccessful efforts to integrate the ECHR into the EU framework. Later developments including the adoption of Article 59(2) ECHR and Article 6(2) TEU, and the CETS no.194[60] which resulted in 2009 Madrid Agreement. The chapter also examines the changes adopted between the two landmark opinions of the Court (Opinion 2/94 and Opinion 2/13).

i. European Convention on Human Rights: when, why, and on which values it has been ratified

The Convention for the Protection of Human Rights and Fundamental Freedom, also referred to as the European Convention on Human Rights, is an international treaty to protect human rights and freedoms[61]. The ECHR sets a minimum standard allowing every member State to reinforce fundamental rights protection within its national territory. The first proposal for the creation of a list of rights to be protected was advanced by the International Committee of Movements for European Unity during the Congress of Europe held in The Hague in 1948:

"The major points of the final resolution of the Congress were: […] 5. a charter of human rights, considering 'that the resultant union should be open to all European nations democratically governed and undertaking to respect a charter of human rights'. The Cultural Resolution developed this subject at greater length, affirming that the defense of human rights constituted the cornerstone of a united Europe but would not be adequately protected by a charter and needed to be made legally binding; it would therefore be necessary to back up the charter with a Convention between the Union's member states"[62].

The ECHR was formally drafted in 1949 in Strasbourg by the Council of Europe, drawing inspiration from the Universal Declaration of Human Rights and can be seen as a response to the tensions occurring in the 1950s, as well as a guarantee against a repetition of the brutalities committed during the Second World War[63]. The Convention has been effective since September 3rd, 1953. To ensure the observance of the treaty by the Member States, the establishment of the ECHR set up a European Court of Human Rights (ECtHR or "the Court")[64] with jurisdiction on "all matters concerning the interpretation and application of the Convention and the Protocols thereto"[65].

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[60] Council of Europe Treaty Series no.195 referred to Protocol no. 14 to the ECHR.

[61] Article 1 ECHR.

[62] Council of Europe, *Congress of Europe: The Hague, 7-11 May 1948*. European Union Publications Office. pp.XII.

[63] OVEY – WHITE (2002: 2,3).

[64] Council of Europe, *European Convention on Human Rights*, Section II, "European Court of Human Rights," as amended by Protocols Nos. 11 and 14, November 4, 1950

[65] Article 32 ECHR.

The ECHR was drafted to be flexible so that it could grow and be adapted to changes in society over the years. It has been amended and supplemented by 16 protocols in the past decades, but its general structure has remained mostly unchanged[66]. As of today, the Convention has a preamble and three sections: Section I lists the principal rights and freedoms, Section II established the ECtHR and sets its functioning, and Section III contains the concluding provisions. There are additional rights and prohibitions that are not present in the original text but present in the protocols, thereby possessing the same legal value as the Convention.

ii. From CETS no.194 to Madrid Agreement: Opinion 2/94 and the initial lack of legal ground

Member States of both the Council of Europe and the European Union are bound by both the ECHR and EU law[67]. The EU is not part of the ECHR, therefore Member States[68] are bound by two separate supranational sources of law above which are their national laws, and by two separate courts – the CJEU and the ECtHR. The accession of the EU to the ECHR has always been a complex matter due to several reasons: the lack of provisions to do so in the original texts, the monist approach of both the EU law and the ECHR[69], the lack of coordination between the two courts, and other factors that will be discussed in this chapter as well as the following one.

The path for a potential accession of the EU to the ECHR started in the 1970s. In 1979, the Commission of European Communities suggested the accession of the European Communities in a memorandum[70]:

"[…] the Commission now recommends the formal accession of the Community to the ECHR. The decisive factor in its view is that the ECHR and the protection of fundamental rights ensured by the Court of Justice of the European Communities essentially have the same aim, namely the protection of a heritage of fundamental and human rights considered inalienable by those European States organized on a democratic basis. […] The Commission is aware that the accession of the European Communities to the ECHR will give rise to not inconsiderable difficulties on account of the Communities' particular structure. […]"[71].

The memorandum highlighted the need to strengthen the safeguarding of human rights at the European level, acknowledging both the benefits and the challenges of accession, and opened discussions on the matter across Europe. However, it was not a legal proposal, nor did it lead to immediate actions by Member States or the rest of the Communities. Reasons behind this reaction to the proposal stem from in the lack of a legal basis to make the accession possible, and Member States hesitation to give up sovereignty to another supranational entity. In 1990 the proposal has been reiterated informally by a

[66] Few protocols have changed significantly the structure: protocol 11 (1998), 14 (2010), 15 (2021), and 16 (2018).

[67] All the members of the EU are also members of the Council of Europe.

[68] Of the EU.

[69] According to Pieter Kooijimans, in the monist system international law is directly applicable at national level without translating it into national law first.

[70] European Commission. *Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms*. Supplement 2/79 to the Bulletin of the European Communities. Brussels: European Commission, April 4, 1979.

[71] Ibid., section II. sec.7.

position paper issued by the International Commission of Jurists[72]. While this did not lead to any action, it significantly contributed to an increased political pressure and kept the discussion on the matter open. In the early 1990s, during the drafting of the Maastricht Treaty, the proposal started to take form with the ratification of Article F(2) TEU, including the ECHR in the Treaty text for the first time.

"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law"[73].

ii.i. Opinion 2/94 of the Court

In April 1994, the Council of European Union made a request to the ECJ to give an opinion on whether the accession of the Community to the ECHR was compatible with the Treaties. On March 28th, 1996, the ECJ delivered Opinion 2/94 declaring that the Union did not have the competences[74] to adhere to the ECHR.

The actual path towards the final opinion was tough and included concerns on several important topics, starting from the admissibility of the request for an opinion itself. In fact, the Council asked for an opinion before the beginning of the actual negotiations, to avoid realizing the incompatibility only after the ratification of a draft[75]. The request was submitted pursuant to Article 228(6) TEC according to which, an opinion can be obtained "as to whether an agreement envisaged is compatible with the provisions of this Treaty". As of that time, the Court had always been asked for opinions only regarding ongoing negotiations, except for one instance in 1978. In opinion 1/78, the Court stated that the request was "not premature simply because […] there are […] a number of alternatives still open and differences of opinion on the drafting of given clauses"[76]. Additionally it specified that since the "subject-matter of the agreement is known"[77], the Court was able to make a ruling regarding to its compatibility with the Treaties. The request for opinion 2/94, however, was different due to the complete lack of an initial project or draft to analyze in order to conclude their judgment. The uncertainty and vagueness of the scope of the agreement and the modalities of a potential accession constituted a matter of concern for certain Member States[78], leading them to contest the admissibility of the request for the opinion. Despite this, the Court admitted it considering:

(i) The request demanded, not how, whether the Community could adhere to the ECHR, and the effect to the community of the accession were predictable[79].

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[72] Formally reiterated in 1990 in a position paper (International Commission of Jurists (ICJ), *The Accession of the European Communities to the European Convention on Human Rights: Position Paper*, November 1993).

[73] European Union. *Treaty on European Union (Maastricht Treaty)*. February 7, 1992. Official Journal of the European Communities C 191, July 29, 1992.

[74] According to Community law at the time.

[75] ROSSI (1996), para. 2.

[76] Opinion 1/78, para. 3.

[77] Ibid.

[78] Denmark, Finland, Ireland, Sweden, and United Kingdom.

[79] BULTRINI (1997), para. 3.

(ii) Although the text of the accession instrument was unknown, the text of the ECHR was clear. Hence, it was possible to determine whether it was compatible with the Treaties[80].
(iii) The existence of previous studies and proposals by the European Commission[81].
(iv) Regardless of the content of the draft, the Court could still rule regarding the existence of a competence of the Community to adhere[82].

Once they overcame the question of the admissibility of the request, the Court focused on the admissibility of the use of Article 235 TEC as legal ground for the conclusion on an international agreement on human rights matters. Article 235 TEC was a provision used when a new legislation was needed to achieve the objectives of the Treaty.

"If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions".

The clause was considered very flexible since it was used when there was not a specific legal ground to adopt said measures. The Commission, the Parliament, Austria, Belgium, Denmark, Germany, Greece, Italy, Finland, and Sweden were in favor of using Article 235 as a legal ground. They considered the safeguarding of fundamental rights among the objectives of the Treaty. Additionally, they believed that the separation between the Community framework and the ECHR framework would have persisted after the accession through the introduction of control mechanisms between the two courts. France, Ireland, Portugal, Spain, and the United Kingdom supported the inexistence of a provision that conferred the Community the competence to legislate on human rights matters[83]. Article 235 could not represent a lawful basis to enlarge the scope of competences beyond the Treaties[84]. This stance considered that Article 2 and 3 TEC did not refer to fundamental rights as aim or as activities of the Community. In opinion 2/94, the Court did not consider this interpretation of Article 235 and the lack of the protection of human rights among the objectives, but still rejected the admissibility of the provision as a legal ground. Article 235 TEC was accepted as a legal basis for minor adjustments to the Treaty but not for amendments to its core. The accession would have modified the system for safeguarding human rights in the Community with "equally fundamental institutional implication for the Community and for the Member States"[85]. Thus, it would have modified the Treaty's substance as an amendment of a constitutional essence, and therefore "beyond the scope of Article 235"[86].

After the matter of admissibility, the Court addressed the compatibility with the Treaty and the coexistence of the two judicial systems. The question dealt primarily with the influence that Strasbourg would have had on Luxembourg. Only five years before, in opinion 1/91, the Court remarked its jurisdiction denying the possibility of an external control[87]. Once again, the Court

[80] ROSSI (1996: 850).
[81] TIBERI (1997), para. 3.
[82] ROSSI (1996), para. 2.
[83] Ibid., para. 3.
[84] BULTRINI (1997), para. 4.
[85] CJEU, *Opinion 2/94*, para. 6.
[86] CJEU, *Opinion 2/94*, para. 6.
[87] Opinion 1/91 on the creation of the Community to the European Economic Area.

highlighted the importance of its autonomy asserting that the subordination to an external court would have constituted a violation of Article 164 TEC, according to which "The Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty"[88], including the right of having the final decision. Furthermore, the existence of a court legally able to solve disputes, submitted by the Community's Member States, and so interpret the Treaties, constituted a further violation. In fact, Article 219 TEC states "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for in this Treaty"[89] preventing any institution different than the Court from interpreting Community's law. However, while ruling on the compatibility, the Court remained vague and more neutral. In fact, it declared that the insufficiency of the available information regarding the modalities for the accession, in particular "as to the solutions envisaged to give effect to submission by the Community to the judicial control machinery established by the Convention" [90], unable it to "give an Opinion on the compatibility of accession to that Convention with the rules of the Treaty"[91].

The ambiguity of the position held on the compatibility led to the impression that the Court limited its own control excluding the protection of fundamental rights from its own jurisprudence. Some scholars also suggested to call this consequence *boomerang effect*[92]: while trying to protect its authority, it might have weakened reducing its own scope[93].

ii.ii. CETS no. 194: Protocol No. 14 amending Article 59(2) ECHR

It is important to note that while opinion 2/94 pointed out how the EU lacked legal grounds to accede the ECHR, also the ECHR lacked a provision to let a non-state entity, such as the EU, join. The path towards the solution to this dual gap started in 2004 with the Council of European Treaties Series no.194[94]. The CETS 194 is also referred to as the "Protocol No.14 to the Convention for the protection of human rights and freedom, amending the control system of the convention" because it outlines Protocol No. 14 to the ECHR. Among the main changes implemented, Article 17 CETS 194 amends Article 59 ECHR to "provide in a new paragraph 2 that the European Union may accede to the Convention"[95]. Article 17 Protocol No.14 proceeds as follows:

"Article 59 of the Convention shall be amended as follows:
1 A new paragraph 2 shall be inserted which shall read as follows:
" '2 The European Union may accede to this Convention'"
2 Paragraphs 2, 3 and 4 shall become paragraphs 3, 4 and 5 respectively".

The reason behind this historically important amendment lies in the "presumption that a State would not depart from the requirements of the Convention when it was merely implementing legal obligations flowing from

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[88] Article 164 TEC (today's Article 19 TEU).
[89] Article 219 TEC (today's Article 292 TFEU).
[90] Opinion 2/94, para. 2.
[91] Ibid.
[92] Emphasis added.
[93] ROSSI (1996), para. 5.
[94] From now on "CETS".
[95] European Court of Human Rights. *Annual Report 2005: Historical Background, Organization and Procedure*. Strasbourg: Council of Europe, 2006, sec. "Procedure of the Court," subsec. 4, "Protocol 14," para. 33, pp. 13.

its membership of the European Union"[96]. In May 2004, the text of the amending protocol was opened for signature by Council of Europe Member States. The protocol was originally supposed to enter into force in December 2006, but its ratification remained open and incomplete for five years due to the refusal of signing by the Russian State Duma. At the time, all the other 46 Member States had already signed, but given that Protocol No. 14 was an amending protocol, it needed unanimity by all of the Council of Europe's members[97]. For this reason, during the Committee of Ministers' Liaison Committee in October 2008, Member States[98] thought about an *interim* solution: Protocol No. 14 *bis*[99]. In March 2009 the protocol was ratified by the Rapporteur Group on Human Rights and subsequently approved by a Parliamentary Assembly's opinion. The protocol was adopted in May 2009 during the 199th Session of the Committee of Ministers in Madrid, allowing the provisional implementation of some disposition of Protocol No.14 – the newly amended Articles 25, 27, and 28. Article 9 of Protocol No.14 *bis*, assess the secession of said protocol "from the date of entry into force of Protocol No.14 to the Convention"[100]. In February 2010 the Russian Federation signed Protocol No.14 allowing the latter to enter into force on June 1st of the same year. Since June 2010, the ECHR was in possession of a provision that allowed the formal accession of the EU to the ECHR: Article 59(2) "2. The European Union may accede to this Convention".

ii.iii. The 2007 Lisbon Treaty: Article 6 TEU

As of 2010, the EU also possessed a legal ground to allow the accession. The reason lies in the 2007 Lisbon Treaty and, consequently, the amendment of Article 6 TEU. After the 1994 opinion of the Court, the Union focused on the ratification of the CFR as a written source of safeguarding for fundamental rights. Between 2002 and 2003, the EU institution started a new massive project: the drafting of a European constitution titled, Treaty establishing a Constitution for Europe (or Constitutional Treaty). The Constitutional Treaty aimed at: incorporate all the existing treaties, attribute legal value to the CFR, and divide, as well as define, better competences in the EU towards a more democratic, transparent, and efficient Union. The project repealed all previous treaties and merged the pillar structure of the *old*[101] EU to form a *new*[102] EU, to create one European Union with one legal personality based on one treaty. The Constitutional Treaty was adopted in 2004 by the European Council, in the same year the European Parliament President[103] signed it in Rome. The Constitutional Treaty was then approved by the European Parliament in a non-binding resolution, stating that "taken as a whole, the Constitution is a good compromise and a vast improvement on the existing treaties". To enter into force, the treaty needed to be ratified by all Member States. This process is carried out differently for each State, some follow parliamentary vote, while others hold national referendum. In 2005, national referenda in France and the

[96] Ibid., pp.23. "Speech given by Mr Luzius Wildhaber, President of the ECtHR, on the occasion of the opening of the judicial year".
[97] Article 19 Protocol No.14 ECHR.
[98] But Russia.
[99] MÜLLER (2009: 399).
[100] Article 9 119th Session of the Committee of Ministers (Madrid, 12 May 2009).
[101] Emphasis added.
[102] Emphasis added.
[103] Josep Borrell Frontelles.

Netherlands rejected the Constitutional Treaty, irrevocably blocking the creation of a European Union constitution.

After the rejection of the Constitutional Treaty, the EU organized a group of 16 consisting of two European commissioners and members from 14 member states. The group was given the title Action Committee for European Democracy or Amato group – named after the leading Italian former prime minister Giuliano Amato. The committee met for the first time in Rome in September 2006 with the purpose of reflecting on the failure of the TCE and planning the next steps to be taken by the EU. According to the 2007 Amato Group's report, the group scheduled an Inter-Governmental Conference (IGC) in Brussels for the European Council to draft a reform treaty. This new project resulted in one of the milestones in the history of the European Union: the Lisbon Treaty. The main goal of this new version was to preserve the substance of the previously failed Constitutional Treaty but on a dual treaty base. The new Treaty on European Union (TEU) enclosed the general provisions defining the EU, meanwhile, another treaty, Treaty on Functioning of the European Union, set out the specific provisions pertaining to the institutions and policies. With this structure, though the CFR was recognized as having the same legal value as the Treaties, it was external to said Treaties as its text was not incorporated into them. By the end of 2007, the ratification of the Lisbon Treaty concluded. On December 13th, 2007, it had been signed by all the Member States, and it entered into force two years later in December 2009. The main reform brought by the Lisbon Treaty, in the field of protection of human rights within the EU legal framework, was the amendment of Article 6 TEU (ex-Article 6 TEU). The new text was particularly important for three major reasons:

(1) Article 6(1) TEU made the CFR legally binding[104].
(2) Article 6(2) TEU propelled the development of the relationship between the ECHR and the EU, opening an avenue to a possible accession by creating a legal ground that was previously lacking:

"2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

(3) Article 6(3) TEU elevated the legal value of ECHR to primary EU law:

"3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

ii.iv. The 2013 Draft Accession Agreement

As of 2010, both the EU and the ECHR held the necessary provisions to allow the accession rejected in 1994 by the Luxembourg Court due to lack of legal

[104] "1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

ground. This paved the way to three years of negotiations for the 2013 Draft Accession Agreement (DAA). As set out in, Article 218 TFEU, the proposal was presented by the European Commission through a recommendation[105], followed by a Council decision[106] in June 2010 that authorized the process. The negotiations were held in Strasbourg and were conducted between the Council of Europe's Steering Committee for Human Rights (CDDH), an ad hod group, and the European Commission, designated as the negotiator by the Council according to Article 218(3) TFEU. During the discussions, the parties had to attentively respect Protocol No. 8 to Article 6(2) TEU[107], which entered into force with the Treaty of Lisbon in 2009, with the purpose of establishing the legal and procedural safeguards necessary to ensure that a possible accession would have been aligned with the EU law and the Union's unique order. Article 1 of Protocol No.8 stated the necessity for the accession agreement to "preserve the specific characteristics of the Union and Union law", in particular,

> "specific arrangements for the Union's possible participation in the control bodies of the European Convention" and "the mechanisms necessary to ensure that proceedings by non-Member States and individuals' applications are correctly addressed to Member States and/or the Union as appropriate".

The rationale at its base was the necessity to preserve the EU's autonomy and avoid any type of compromise in the EU internal order. Therefore, the requirement for an institutional mechanism that would allow the EU to be involved in proceedings before the ECtHR, without involving the ECtHR in the interpretation of the EU law, emerged. This mechanism was subsequently addressed in the Final draft accession instrument through the "co-respondent mechanism". Article 2 ensures that a possible accession of the Union does not affect neither "the competences of the Union or the power of the institutions", nor "the situation of Member States in relation to the European Convention". Lastly, Article 3 aims to preserve the EU's autonomy and prevent a bypass of the EU judicial system by addressing the ECtHR directly with proceedings involving the interpretation of the EU law, which is jurisdiction of the ECJ, as stated in Article 344 TFEU. This last article was particularly hard for the parties to overcome due to the lack of coordination between the two courts. A crucial feature of this protocol is its undefined scope. In fact, it does not explain what are "the specific characteristics of the Union and Union law", leaving its scope wide and subject to different interpretations. After three years of drafting, the ratification of the Draft Accession Agreement ended in April of 2013. In July of the same year, the European Commission asked the ECJ for an opinion regarding the compatibility of the draft with the Treaties[108]. However, according to Article 218(11) TFEU, "where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised". Indeed, this is what happened.

i. Rejection of the Draft Accession Agreement: Opinion 2/13

[105] Article 218(3) TFEU.
[106] Article 218(2) TFEU.
[107] Protocol No.8 relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.
[108] Last step of the process set down by Article 218 TFEU.

On December 18th, 2014, the Court of Justice of the EU, reunited as a Full Court, issued Opinion 2/13 rejecting the Draft Accession Agreement.

In June 2014, a few months before the Court's negative opinion, the Advocate General at the CJEU, Juliane Kakott delivered her positive opinion [109] following a request made by the European Commission. The Advocate General had a favorable view regarding the conclusion of the agreement, in which she outlined a few points to be respected:

"A. Maintaining the competences of the EU. […] B. Maintaining the powers of the EU's institutions. […] C. Preservation of the specific characteristics of the EU and EU law. […] D. The requisite arrangements for the EU's participation in the control bodies of the ECHR. […] E. Taking into account the situation of Member States in relation to the ECHR. […]"

While the Advocate General Kakott held a positive and pragmatic approach, suggesting adjustments to be made to the DAA with the purpose of making it compatible with the EU law, the CJEU held a strict and inflexible point of view. This view stated that the draft, as it was presented, was incompatible with the Treaties. It also highlighted architectural issues, irreparable through simple adjustments.

In Opinion 2/13, the ECJ brought up specific reasons to support its stance regarding the incompatibility of the DAA with EU primary law.

i.i. The DAA affected the specific characteristics and the autonomy of the EU law

Although Protocol No. 8 to Article 6(2) TEU did not specify explicitly what the "specific characteristics" of the EU law were, some of these can be inferred. The principle of autonomy of EU law, the primacy of EU law, direct effect, and principle of mutual trust between Member States under EU law, are characteristics outlined in the protocol. One of the first points the Court delved into, was the lack of any coordination between Article 53 ECHR and Article 53 CFR. While Article 53 ECHR was in the process of being binding to the EU, Article 53 CFR already had a binding effect on the EU.

"Article 53 ECHR essentially reserves the power of the High Contracting Parties to law down higher standards of protection of fundamental rights than those guaranteed in by the ECHR , that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised"[110].

Subsequently, the Court emphasized that the "principle of mutual trust between Member States is of fundamental importance"[111], and it was essential for the internal cohesion since Member States are required to "presume that fundamental rights have been observed by other Member States"[112]. This entailed that Member States trusted each other without demanding "higher level of national protection of rights […] than provided by EU law"[113], without needing to verify if the fundamental rights guaranteed by EU law were actually observed. In paragraph 194, the Court displayed concern regarding the extent to which the DAA was respecting said principle since it would "require a Member State to check that another Member State has observed

[109] Opinion procedure 2/13 of the Advocate General, of June 13th, 2014.
[110] Opinion 2/13 of the Court, of December 18th, 2014. para. 189.
[111] Ibid., para. 191.
[112] Ibid., para. 192.
[113] Ibid..

fundamental rights, even though EU law imposes an obligation of mutual trust"[114]. The accession of the EU to the ECHR following the DAA would, then, "upset the underlying balance of the EU and undermine the autonomy of the EU"[115].

Another reason the DAA affected the EU's specific characteristics and autonomy, was the conflict between Protocol No.16 to the ECHR and Article 267 TFEU. The issue was that the mechanism that Protocol No. 16 would have introduced[116], would have interfered with the ECJ's preliminary ruling procedure, thus interpretation of the EU law. Protocol No. 16 was designed by the Council of Europe to allow courts of Member States to ask the ECtHR for opinions on interpretations of the ECHR, or its application[117] – the scope included all the protocols attached to the ECHR. The opinions delivered by the ECtHR were to be applied to all the contracting parties, as well as the EU, in case of accession, but were not binding[118]. Similarly, Article 267 TFEU set out the jurisdiction for the ECJ to give preliminary rulings, in case of "the interpretation of the Treaties" or to verify "the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union"[119]. Preliminary rulings of the ECJ are exclusive to the EU Member States and their national courts, to which they hold a binding nature[120]. Considering the likeliness of the two provisions, in the ECJ's Opinion 2/13, concerns were expressed regarding the risk of a parallelism of the two jurisdictions. The DAA could incite national courts to seek advisory opinion from the ECtHR, "even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU"[121]. Moreover, although the opinions of ECtHR were not binding, they would still have enough influence on national courts' judgments. Thus, the DAA without any major amendment could allow the ECtHR to interpret EU law, representing a threat to the "autonomy and effectiveness"[122] of EU law.

i.ii. The DAA affected Article 344 TFEU

Article 3 of Protocol No. 8 to Article 6(2) TEU explicitly states that the accession treaty must not affect Article 344 TFEU. The latter asserts that Member States are not meant to "submit disputes concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein". The accession of the EU to the ECHR would make the ECHR become an integral part of the EU law. This should allow exclusive jurisdiction to the ECJ. According to Article 33 ECHR, any Member State of the Council of Europe can refer to the ECtHR regarding any presumed violation of the ECHR, or of its protocols, committed by any other Member State. However, in case of accession, this would allow Member States of the EU to submit disputes between each other, or with the EU, to the ECtHR,

[114] Ibid., para. 194.
[115] Ibid..
[116] As of 2013 still not active. Protocol No.16 entered into force in August 2018.
[117] Article 1 Protocol No.16 to the ECHR.
[118] Article 5 Protocol No.16 to the ECHR.
[119] Article 267 TFEU.
[120] The binding nature is not explicitly stated in Article 267 TFEU, but the EU case law has established so through the decades. See *Da Costa en Schaake NV and* Others *v. Nederlandse Belastingadministratie*, 1963; *CILFIT and Lanificio di Gavardo SpA* v. Ministry of Health, 1982; and *Kühne & Heitz NV v. Productschap voor Pluimvee en Eieren*, 2004.
[121] Opinion 2/13 of the Court, of December 18th, 2014, para. 196.
[122] Ibid., para. 198.

"even though it is EU law that it is in issue"[123]. The scope of this problem is enlarged by Article 55 ECHR, according to which Member States agree to consider the ECtHR as the only court to submit disputes to, whenever these concern the interpretation of the ECHR. In response to this matter, the DAA introduced Article 5, Interpretation of Articles 35 and 55 of the Convention:

"Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention".

This article was developed as a countermeasure to Article 55 ECHR, and it was meant to ensure that if Member States, or the EU, settled disputes under the jurisdiction of the ECJ, it would have not constituted a violation of the ECHR nor a way to bypass Article 55 ECHR. Nevertheless, the Court held that Article 5 DAA "merely reduced the scope of the obligation laid down by Article 55 ECHR". Furthermore, Member States could still sumbit applications to the ECtHR under Article 33 ECHR, and "the very existence of such a possibility undermined the requirement set out in Article 344 TFEU"[124].

i.iii. The DAA did not lay down a mechanism concerning judicial review for matters regarding the Common Foreign and Security Policy (CFSP)

Another reason why the ECJ sustained the incompatibility of the DAA with EU law, was the lack of a mechanism for judicial review for matters regarding the CFSP within the DAA text. Within the EU legal order, the CFSP holds a particular position and deals exclusively with a specific part of the EU's external relations. This distinctive treatment also extends to the ECJ's authority over the CFSP. In fact, the Court has jurisdiction only on disputes that involve Article 40 TEU, or "review the legality of certain decisions as provided for by Article 275 (2) TFEU"[125][126]. The Court justified its stance on the matter, explaining that,

"[251.] the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.

[252.] However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice".

The accession of the EU to the ECHR through the DAA, would empower

"[the ECtHR] to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.

[255.] Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR".

Therefore, the DAA would allow an external institution to rule on a matter of the EU, to which even the ECJ does not have jurisdiction.

i.iv. The DAA did not laid down a feasible mechanism for the co-respondent mechanism

[123] Ibid., para. 205.
[124] Ibid., para. 208.
[125] Ibid., para. 249.
[126] Defined by the second paragraph of Article 24(1) TEU: CFSP rules and procedures.

Lastly, the Court rejected the DAA considering the impracticability of the co-respondent mechanism. The idea behind this tool was to manage the partition of responsibilities between Member States and the EU, and to leave the exclusive right to interpret the EU law to the ECJ. Basically, where there are hints of the involvement of the EU or its Member States in a probable violation of the ECHR, either party could join the other and become a co-respondent. In the case of a confirmed violation, both the respondents were found to be liable by the ECtHR. However, the actual division of responsibilities was left to the EU and the Member States, and so who would have executed the ECtHR final judgment[127].

The first paragraph of Article 3 DAA (the one that regulated the co-respondent mechanism) mentioned an amendment to Article 36 ECHR to add a fourth paragraph to introduce the mechanism in the Convention.

"4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings".

The rest of the Article set out the rules and procedures to be followed to trigger said mechanism and defined the criteria to become a co-respondent. The ECJ's concerns regarding the mechanism were: the threat to the autonomy of EU law due to the interference with the allocation of responsibilities within the EU, the lack of clarity in the procedures, and the lack of coordination between the courts. According to Article 3(2) and 3(3) DAA, Member States and the EU could become a co-respondent when they were found to violate a provision of the ECHR, but said alleged violation was a consequence of the application of EU law. Thus, only disregarding the Treaties, or any provision having the same legal value, the respondent could have avoided that violation. To become a co-respondent, the DAA set two procedures – explained by Article 3(5). The involvement could happen either accepting an invitation by the ECtHR, or by submitting a request, that still should have been accepted by the ECtHR "in light of the reasons given by the High Contracting Party. In brief, the mechanism was designed in a way that the final decision was always at the ECtHR's discretion. To this regard, the ECJ expressed concerns that this exclusivity (that the ECtHR hold) could allow the ECtHR to assess whether an EU provision is compatible with the ECHR, thus interpreting the EU law[128].

"[…] In carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU"[129].

Another problem found by the ECJ was contained in Article 3(7) DAA. Despite the mechanism was drafted to leave the EU and Member State the possibility to choose how to divide the responsibility if held guilty, Article 3(7) DAA leaves the ECtHR the right to decide "that only one of them [is] held responsible"[130]. This provision would have interfered with the division of

[127] CHERUBINI (2015: 254).

[128] An exclusive competence of the ECJ. It would constitute a violation of Article 19(1) TEU, Article 267 TFEU, and Article 344 TFEU.

[129] Opinion 2/13, para. 224.

[130] Article 3(7) DAA.

responsibilities between the EU and its Member States, considered to be exclusive to the EU.

The procedure as set out in the DAA, was not only insufficiently defined, involving the ECtHR and conferring its decision-making authority, even over EU law matters, but it also interfered with the division of responsibilities between the Member States and the EU. Moreover, the DAA did not establish any provision ensuring an effective coordination between the ECJ and the ECtHR. This coordination would be essential especially when conferring judicial power and decision-making authority to a court external to the EU legal order.

Final opinion of the Court of Justice.

"The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms."[131].

[131] Final opinion of the Court in Opinion 2/13.

CHAPTER III

THE 2023 CONSOLIDATED VERSION OF THE DRAFT ACCESSION INSTRUMENT: THE CO-RESPONDENT MECHANISM

As explained in the previous chapter, the European accession to the ECHR has been a complex and prolonged journey, punctuated by several legal challenges. The path from the 2014 Opinion 2/13 to the 2023 Final consolidated draft accession instrument shows the legal and political complications of the coexistence of two supranational legal orders, and the institutional dynamics between the EU and the Council of Europe.

This chapter analyzes first the process that led to the reopening of the negotiations in 2020 after the 2014 Opinion 2/13, and the evolution of those meetings between the CDDH ad hoc negotiation group (46+1) and the EU, until the current Consolidated version of the draft accession instrument. Then, it analyzes the final draft explaining its structure and key changes from the preceding DAA. The second part explores the persistent challenges found in the final draft. Particular attention is given to the co-respondent mechanism, how it evolved from the previous DAA, and which issues are still present.

i. The reopening of the negotiations after Opinion 2/13

Following the ECJ, in December 2014, Opinion 2/13 that declared the incompatibility of the DAA with the EU Treaties, negotiations fell in a six-year stalemate. The points raised by the EU regarded substantial aspects of the EU legal order making it extremely complicated to find immediate solutions. In June 2019, the European Commission submitted to the FREMP a Staff Working Document [132] to communicate the willingness to reopen the negotiations towards a new agreement. The document was a grouping of research and written records made through the years by the Commission[133]. In September 2018, during the Meeting No. 271499, the FREMP defined the essential elements to consider in order to modify the draft agreement into a new one[134]. Following the Council's approval, on October 31st, 2019, the President and the First Vice-President of the European Commission sent a letter to the Secretary General of the Council of Europe[135] to inform the Union's intentions to reopen the dialogues[136]. The Committee of Ministers replied issuing a decision[137] on January 15th, 2020, renewing the negotiation mandate of the ad hoc negotiation group CDDH[138], emphasizing that the matter was to be treated as a priority.

"The Deputies approved the continuation of the ad hoc terms of reference of the Steering Committee for Human Rights (CDDH) to finalise as a matter of priority, in co-operation with the representatives of the European Union, in an ad hoc group 47+1, and on the basis of the work already conducted, the legal instruments setting out the modalities of accession of the

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[132] WK 6866/2019 INIT of June 5th, 2019.

[133] WK 249/2016: co-respondent mechanism, prior involvement of the CJEU, Article 344 TFEU, Protocol No. 16 ECHR, and Article 53 ECHR; WK 764/2016 INIT: principle of mutual trust; WK 12044/2018 INIT: judicial review on matters regarding the CFSP.

[134] Included in the September 2019 note of the Presidency of the Council to the COREPER.

[135] As of December 2019, Thorbjørn Jagland.

[136] The original text of the letter is not public but the existence of it was mentioned on the Council of Europe's website. The reference for the document is DD(2019)1301.

[137] CM/Del/Dec (2020) 1364/4.3 of January 15th, 2020.

[138] Steering Committee for Human Rights.

European Union to the European Convention on Human Rights (ETS No. 5), including its participation in the Convention system and, in this context, to examine any related issue"[139].

In March 2020, the Council of Europe published a position paper[140] drafted by the European Commission. The document was categorized with the "6th negotiation meeting between the CDDH ad hoc negotiation group and the European Commission", though its substance presented the EU position. The position paper stated the suggested amendments sought to the 2013 DAA proposed by the EU and was meant to be an outline for the 6th meeting planned for 24-26 March 2020 in Strasbourg. However, due to the outbreak of the COVID-19 pandemic, the meeting was postponed. In the meanwhile, on June 6th, 2020, the group "47+1" met virtually in an informal meeting and the European Commission presented the Union's stance as agreed in the position paper, reaffirming the EU's commitment and willingness to accede to the ECHR. The Commission highlighted that Opinion 2/13 of the CJEU would have defined the parameters in which the EU would have operated and reasoned. With that, the Commission presented the four key areas to revise:

"Firstly, the EU specific mechanisms of the procedure before the European Court of Human Rights,
Secondly, the operation of inter-party applications (Art. 33 ECHR) and of references for an advisory opinion (Protocol 16) in relation to EU Member States,
Thirdly, the principle of mutual trust between the EU Member States,
And fourthly, EU acts in the area of the Common foreign and security policy ("CFSP") that are excluded from the CJEU's jurisdiction"[141].

The actual 6th meeting, and first official one after the reopening of the negotiations, was held in Strasbourg on September 29th to October 1st, 2020. The meeting established the mechanisms for the renewed negotiation and discussed about the topics that have been brought up during the virtual assembly. Furthermore, Non-European Union Member States (NEUMS)[142] reiterated their support towards the accession. At the same time, they highlighted several fundamental considerations that must be addressed to preserve the system and effectiveness of the ECHR. In particular, the NEUMS stated that "existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession"[143], and, if needed, the CDDH should have revised the draft as a whole and not only what mentioned by the ECJ. Items 6 to 11 of the meeting report focused on specific mechanisms like the prior involvement procedure, the operation of inter-party applications with Article 33 ECHR, the request for an advisory opinion on Protocol No. 16 to ECHR, the principle of mutual trust between the EU member states, how to manage the jurisdiction over matters regarding the CFSP, the relationship between Article 53 ECHR and Article 53 CFR, and the co-respondent mechanism. All these listed topics have been revised but, as of 2025, after the publication of the Final consolidated version

[139] Decision of the committee of ministers.

[140] Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms.

[141] Meeting report: virtual meeting (KUDO) with remote simultaneous interpretation Council of Europe. Appendix VI.

[142] Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Norway, Russian Federation (before March 2022), San Marino, Serbia, Switzerland, Turkey, Ukraine and United Kingdom.

[143] Appendix III to 6th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights.

of the draft accession instruments, these still represents concrete concerns to the accession of the EU to the ECHR[144].

The negotiator's path has been particularly complex because Opinion 2/13 contested many features and mechanisms of the DAA, and, additionally, it negated the compatibility of the DAA with the Union's legal framework. Between October 2020 and March 2023, the CDDH ad hoc negotiation group ("46+1"[145]) met formally twelve times[146]. On 14th – 17th March 2023, the group attended its last meeting and issued a document entitled "Final consolidated version of the draft accession instruments". The draft represents an important phase towards the accession, though it still needs further steps to be effective. On April 18th, 2023, the European Parliament issued a resolution[147] that welcomed the agreement reached by the "46+1" group and invited the Council and Member States to proceed with the subsequent stages to conclude the negotiations. Firstly, in order for the draft to become effective, the Council has to adopt a decision concluding the agreement[148]. Since said agreement falls into a special category, the Council is required to act unanimously rather than by a qualified majority. Secondly, the decision will be able to enter into force "after it has been approved by the Member States in accordance with their respective constitutional requirements"[149]. Lastly, any Member State, the European Parliament, the Council or the Commission can request for an opinion to the ECJ about the compatibility of the agreement with the Treaties. Notwithstanding the step isn't mandatory, "where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised"[150].

ii. The Final consolidated version of the draft accession instruments

On March 17th, 2023, the Final consolidated version of the draft accession instruments was issued during the 18th meeting of the CDDH ad hoc negotiation group ("46+1"). The document represents the final consolidated version of the Consolidated version released in February of the same year – used primary by the delegations as a working document.

The 2023 Final consolidated draft kept the structure of the 2013 DAA with several amendments on the points brought up by the ECJ in its opinion. The document consists of 5 parts[151]. Firstly, the "Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms". It includes a preamble and 13 articles. Secondly, Appendix 2, the "Draft declaration by the European Union to be made at the time of signature of the Accession Agreement". Here, the Union guarantees that in case of a proceeding before the ECtHR, if Article 3(2)

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[144] 6th meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights.

[145] Change of name.

[146] 7th meeting in November 2020; 8th meeting in February 2021; 9th meeting in March 2021; 10th meeting in June 2021; 11th meeting in October 2021; 12th meeting in December 2021; 13th meeting in May 2022; 14th meeting in July 2022; 15th meeting in October 2022; 16th meeting in November 2022; 17th meeting in January 2023; 18th meeting in March 2023.

[147] Resolution (C/2023/442).

[148] Article 218 (6) TFEU.

[149] Article 218 (8) TFEU.

[150] Article 218 (11) TFEU.

[151] The sections are numbered according to the 2013 CDDH Interim Report to the Committee of Ministers.

is met, the EU will request to become a co-respondent or will accept an invitation by the ECtHR to become so. Additionally, it entitles non-EU members of the ECHR to submit statements of case or written observations to the ECJ (the equivalent of Article 267 TFEU for the EU members), in procedures in which the ECJ assesses the compatibility with the ECHR with an EU law provision – in accordance with Article 3(7). Thirdly, Appendix 3, the "Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party". Fourthly, Appendix 4, the "Draft model of memorandum of understanding between the European Union and [non-EU members]". Lastly, Appendix 5, the "Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for Protection of Human Rights and Fundamental Freedoms".

The new agreement brought changes in different areas. First, the scope of the accession. The negotiators had to consider the several protocols attached to the ECHR and their effect on the EU in case of accession. According to Article 1 of the Accession Agreement, the EU will accede to the ECHR, to the Protocol to the Convention (Protocol No.1) on basic civil rights, and Protocol No.6 on the prohibition of death penalty in peacetime. Second, the co-respondent mechanism. In particular, the group "46+1" had to preserve the EU legal autonomy and keep exclusive to the ECJ the interpretation of EU law. Moreover, a prior-involvement procedure was introduced in cases in which the EU is one of the co-respondents. Third, inter-party cases and their threat to the exclusive jurisdiction of the ECJ on controversies between Member States or between the EU and a Member State. Fourth, the matter of Protocol No.16. The latter allowed members of the ECHR to request opinions on proceedings to the ECtHR. This mechanism could have become a way to bypass Article 267 TFEU which confers the ECJ the exclusive jurisdiction to give preliminary rulings. Last, the principle of mutual trust under European Union law. The negotiators added an article[152] to ensure that the principle would have been unaffected by the accession. However, the only provision in protection of mutual trust does not specify how it would be performed leaving ambiguity on its effectiveness.

Although all the listed areas are all recognized to be of the utmost importance, the chapter primarily deals with the co-respondent mechanism, its evolution since the DAA and the ongoing challenges.

iii. Co-respondent mechanism: definition and functioning

The co-respondent mechanism was introduced formally for the first time in the DAA. The tool was considered necessary due to the unique character of the EU as a non-state entity, with its own legal system, that would have come a party alongside its own members[153]. The mechanism is not meant to be a procedural advantage for the EU over the other members, but a way to help the ECJ to protect its authority over the interpretation of EU law, and to side Member States before the ECtHR in specific instances. The mechanism is triggered in case of an alleged violation of an ECHR provision by either the

[152] Article 6 of the Accession Agreement.

[153] Final consolidated version of the draft accession instrument, Appendix IV, explanatory report, para.46.

EU or a Member State and said violation could not have been avoided without disregarding an EU law. Basically, the violation of the ECHR comes as a consequence of the application of EU law.

Before the introduction of the co-respondent mechanism, the only way for the EU to be involved in a proceeding in front of the ECtHR was becoming a third-party. The third-party intervention and the co-respondent mechanism could be confused due to the similarity of the overall situation. In the former, the third party can "be a High Contracting Party to the Convention or another subject of international law or a non-governmental organization". It means that the tool is directed to a broader public that the co-respondent, which is exclusively for the EU or its Member States. Then, the third-party in question does not become an actual party of the proceeding. It is only allowed to submit "written comments and participate in the hearing in a case before the Court", thus, it will not be bound by the final judgment. In contrast, the co-respondent is a party in the case, and when held liable, it will be bound by the ECtHR judgment. Whether the conditions set in Article 3(2) are not met, the EU still has the possibility to participate and intervene in the proceeding as a third-party intervener[154]. It is possible, in some instances, that the third-party intervention is the only way to involve the EU. "If an application is directed against a State associated to parts of the EU legal order through separate international agreements concerning obligations arising from [them]", then the only mean for the EU to participate would be to join as a third-party[155].

Originally, to become co-respondent, the EU or its Member States had to be invited or to submit a request, that was later examined by the ECtHR and then accepted or rejected. Doing so, the ultimate decision lied with the ECtHR rather than being a right of the EU or its Member State. As explained in the previous chapter, the Court reported this last problem, along with the risk of interpretation of EU law. In fact, despite the division of responsibilities was supposed to be left exclusively (and ideally) to the main respondent and the co-respondent, according to the DAA[156], the ECtHR was free to decide whether one of the two was fully responsible. Considering all those issues pointed out by the Court in its opinion, the negotiators had to change the modalities of activation and functioning of the mechanism. Additionally, they had to focus on the relationship between the two courts and the exclusiveness of the division of the responsibilities between the EU and its Member States. Despite all the concerns brought up by the ECJ, the mechanism still presents some uncertainties and collateral (and unacceptable) consequences that threatens the autonomy of the EU.

To draft the Final consolidated version of the agreement, the negotiating group kept the main structure of the DAA. In the document, the co-respondent mechanism is regulated by Article 3 and its 9 paragraphs:

- Article 3(1) – DAA text: amends Article 36 ECHR's title to "Third party intervention and co-respondent", and to its content introducing a fourth paragraph.
- Article 3(2) – modified: sets the conditions for the EU to become a co-respondent in a proceeding.

[154] Final consolidated version of the draft accession instrument, Appendix IV, explanatory report, para.53.

[155] Ibid., para.54.

[156] Article 3(7) DAA.

- Article 3(3) – modified: sets the conditions for a Member State to become a co-respondent in a proceeding.
- Article 3(4) – DAA text: "where an application is directed against" both the EU and one or more of its Member States, if the conditions set in paragraphs 2 and 3 are met, the two can become co-respondents.
- Article 3(5) – entirely rewritten: sets the mechanism to become a co-respondent.
- Article 3(6) – newly introduced: sets the conditions and the steps to terminate the mechanism.
- Article 3(7) – ex-Article 6 modified: give time to the ECJ to make observations before the other parties.
- Article 3(8) – ex-Article 7 modified: the ECrHR can judge both the main respondent and the co-respondent jointly responsible.
- Article 3(9) – ex-Article 8 DAA text: establishes that Article 3 does not have a retractive effect, so it will be applied only from the day of entry into force of the Agreement. If a Member State had violated an ECHR provision while applying a norm of the EU, the EU cannot become a co-respondent even meeting all the conditions set in Article 3(2). However, if the violation occurred after the entry into force of the agreement, then the EU can be invited or request to become a co-respondent.

iv. Amendments to Article 3 and persistent challenges

iv.i. Article 3(2) and Article 3(3): conditions to become a co-respondent

The two articles set the conditions to be eligible to become a co-respondent. Paragraph 2 states that "where an application is directed against one or more Member States [of the EU]" due to an alleged violation of the Convention, the EU can become a co-respondent "if it appears that such allegation calls into question the compatibility" with a provision of the EU law "including decisions taken *under the* [TEU] and under the [TFEU]". "Notably, where that violation could have been avoided only by disregarding an obligation under *European Union law*[157][158]". Paragraph 3 is the almost a specular version of paragraph 2 in which it is described a situation where an application is directed against the European Union due to an alleged violation of the Convention. In this case, "the European Union Member States may become co-respondents in the proceeding "if it appears that such allegation calls into question the compatibility" with a provision of "the [TEU], the [TFEU] or any other provision having the same legal value pursuant to those instruments". "Notably, where that violation could have been avoided only by disregarding an obligation under *those instruments*"[159]. In the new version, a new sentence has been added at the end of both paragraphs. The two additions are specular to each other: "The Court shall make available to the European Union information concerning all such application that are communicated to its Member States" and "The Court shall make available to the Member States of the European Union information concerning all such applications that are communicated to the European Union".

[157] Emphasis added.

[158] Primary or secondary EU law as mentioned in paragraph 56 of the draft explanatory report.

[159] Emphasis added.

The rationale behind paragraph 2 is clear. Whenever a Member States finds itself in the position of being forced to violate an ECHR provision due to the obligations set by the EU, the EU becomes a co-respondent assuming part of the responsibility. Then, after the judgment, if they are held liable, the two respondents can decide to what extent the Member State is responsible, depending on the situation. In a different way, it is not self-evident the logic behind the existence paragraph 3. If the alleged violation of the ECHR provision derives from the application of EU law, why should a Member State request to become a co-respondent or accept the invitation by the ECtHR to become so? The answer lies in the wording of the Accession Agreement text. In fact, paragraph 3 is almost specular to the previous one, but includes in the obligations that the respondent was following at the time of the violation, also "any other provision having the same legal value pursuant to those instruments". "Those instruments" is referred to primary law, including the constitutional traditions of the Member States. So, where an application is directed against the EU due to an alleged violation of a provision of the ECHR, but said violation happened while the EU was applying a norm deriving from primary law, specifically from the constitutional tradition of a Member State, then the State in question can request to become a co-respondent or accept an invitation by the ECtHR to become so.

iv.i.i. The problem of reservations

The 2013 DAA did not mention how to proceed if a High Contracting Party had made a reservation with the respect to an article involved in the proceeding. In the new 2023 Accession Agreement, the group "46+1" introduced a new paragraph to article 2 "Reservation to the Convention and its Protocols". Article 2(3) explicates that all the reservations previously made by High Contracting Parties to the ECHR, keep their effect when the High Contracting Party in question becomes a co-respondent in a proceeding. If an application concerns a provision of the ECHR in respect of which the High Contracting Party made a reservation, when said Party is a co-respondent, it cannot be held jointly responsible for the violation of that norm. However, if the main respondent did not make a reservation, the responsibility again it remains unaffected and the application proceeds against it. Moreover, reservations limit also the effectiveness of the ECtHR impeding it to attribute responsibility equally to the respondents. The very existence of those exemptions weakens the mechanism and undermines the effectiveness of it. When a co-respondent is precluded from being responsible by reason of a reservation, the main respondent may be left to take the full accountability, creating unevenness in the share of the responsibilities. Hence, the principle of joint responsibility, between the EU and its Member States, fails. In these cases, the fact that reservations keep their effect, represent almost an intentional loophole to the co-respondent mechanism[160]. The primary risk that emerges is the strategic deployment of reservations, by both the EU and Member States, as a mean to bypass the jurisdiction of the ECtHR and avoid accountability for unlawful behaviors.

iv.ii. The new text of Article 3(5): procedures to become a co-respondent

[160] FRANKLIN – TZEVELEKOS (2024:19).

Article 3(5) sets the procedure to become a co-respondent. The preceding version of the article left full decision-making authority to the ECtHR. According to it, there were two ways for a High Contracting Party to become a co-respondent: by request or by invitation. Though, the request had to be sent by the High Contracting Party itself and then accepted by the ECtHR, and the invitation had to be directly from the ECtHR. In the paragraph, the DAA mentioned also "when deciding upon a request to that effect, the Court shall seek the view of all parties to the proceeding". This was meant to give the main respondent and the other parties the opportunity to explain their view on the matter. Nevertheless, the passage would have not had any influence on the decision of the court. Essentially, neither way was automatic, leaving the final decision on whether the conditions set out in Articles 3(2) and 3(3) were met, exclusively to the ECtHR.

During the negotiations, the text was entirely rewritten. In opinion 2/13, the ECJ expressed willingness to be able to declare whether the EU was responsible and so eligible to be a co-respondent. In the new version, the group kept the idea of the invitation from the ECtHR and the initiative of the EU or a Member State, but it changed the modalities. The new text, involved the Union to review the requests made by the High Contracting Parties, leaving the EU all the decision-making power: "The Court shall admit a co-respondent by decision if a reasoned assessment by the European Union sets out that the conditions in paragraph 2 or 3 of this article are met". Even in the case of invitation from the ECtHR, the acceptance of the EU or the Member State(s) comes after the EU has concluded in an assessment, in the form of a reasoned declaration, that the conditions (in paragraphs 2 or 3) are met[161]. "In the event of an invitation, [said assessment] should be provided regardless of whether that invitation is accepted or rejected" [162].

Where the application is directed only against one or more Member States, if the conditions set out in Article 3(2) are met, the EU can request to join the proceeding as a co-respondent. Analogously, if the application is directed only against the EU, when the conditions set out in Article 3(3) are met, the EU Member States can request to join the proceeding as co-respondents. Different is where an application is directed against both the EU and one (or more) its Member States. In this case, "the status of any respondent may be changes to that of a co-respondent if the conditions are met". The requests to become co-respondents can be made without the agreement of the other, unless any rule internal to the EU forbids it[163].

iv.ii.i. Unclear time-limit to accept the invitation from the ECtHR or to submit the request

The DAA lacked a crucial information about the procedure: the timing. The 2023 Accession Agreement added to paragraph 2 and 3 a clause to make available to, respectively, the EU and the Member States, information that have been communicated to each other. Despite the inclusion of these clauses ensuring that the EU and its Member States are informed, the new draft still fails to specify the timeframe for submitting the request to become a co-respondent. While it is implied that a party should make the request as soon

[161] Gragl (2024: 7).
[162] Draft explanatory report, para. 62.
[163] Draft explanatory report, para. 72.

as in possession of the necessary information[164], the exact submission period remains unclear. The draft explanatory report mentions explicitly a time-limit only with the regards to the invitation from the ECtHR to become a co-respondent. Whether it is "when notifying an alleged violation or at a later stage of the proceeding"[165], the court can include a time-limit when necessary.

iv.iii. The new Article 3(6): termination

During the 10th meeting in June 2021, the "47+1 Group" considered proposals for specific issues contained in Basket 1 "The EU's specific mechanisms of the procedure before the [ECHR]". Among those subjects, there was the amendment of Article 3(5) and the addition of a paragraph 5a on the termination of the co-respondent mechanism. The text proposed by the Secretariat stated that the ECtHR could terminate the co-respondent mechanism at any stage if the EU found that the conditions set in paragraphs 2 or 3 were no longer met, based on an assessment of the applicable EU law. In practice, the EU could send the ECtHR a written reasoned declaration explaining that the material conditions for applying the co-respondent mechanism no longer applied. Before the actual conclusion, the court should ensure that all the parties expressed their view[166].

As of October 2021, in the 11th meeting, the group proposed to change the language from "The Court may terminate the co-respondent mechanism […]" to "The co-respondent mechanism shall be terminated […]". The amendment annulled the decision-making margin of the ECtHR, making the termination completely automatic. Following revisions to paragraph 5, in order to align the language, the group tentatively agreed to keep the original text, and final text presented in the 2023 Accession Agreement states "The Court shall terminate the co-respondent mechanism". The margin of free will of the ECtHR was limited in the second part. The original text stated that the termination procedure was activated "if the conditions in paragraphs 2 or 3 are no longer met". During the meeting, the wording was changed to "only if the conditions in the paragraphs 2 or 3 are no longer met", reducing notably the scope of the termination's conditions[167] – giving the EU the power to be the only one in the position of activating the process. The group tentatively agreed on the proposal, and it remained unaffected through the following meetings.

During the 18th meeting, the group decided to change the numbering of the paragraphs. Paragraph 5a discussed until then, is presented in the 2023 Accession Agreement as paragraph 6. All the following paragraphs shifted and the total number of paragraphs in Article 3 increased from 8, in the DAA, to 9.

iv.iv. Article 3(7): prior involvement of the ECJ

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[164] Also mentioned in paragraph 60 of the draft explanatory report in Appendix V: "[the request] should happen in a timely matter once the EU had received the relevant information".

[165] Draft explanatory report, para. 62.

[166] 47+1(2021)12. Revised proposals by the Secretariat on certain issues contained in Basket 1, appendix III.

[167] 47+1(2022)18. Revised proposals by the Secretariat for the termination of the co-respondent mechanism (Article 3, paragraph 5a. of the draft Accession Agreement and other remaining issues in Basket 1, appendix II, III, IV, and V.

Paragraph 7 of the Accession Agreement, previously paragraph 6 in the DAA, is about the prior involvement of the ECJ in cases in which the EU becomes a co-respondent. The main change between the 2013 DAA and the 2023 final draft regards the role of the ECJ and the safeguarding of its exclusive competence on the interpretation of EU law. In the original text, the ECtHR could autonomously decide whether the ECJ had already examined the matter or not. In opinion 2/13, the ECJ expressed its concerns declaring that the decision on whether "[the Court] has already given a ruling on the same question of law as that at issue in the proceedings"[168] should be made exclusively by the ECJ. In addition, the procedure set out in the DAA enabled the ECtHR "to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded"[169]. This gave the ECtHR the option to interpret EU law, a competence that should be exclusive to the ECJ. The most recent text of paragraph 7 states that, where the EU is a co-respondent, the ECJ is given sufficient time to assess the compatibility of the EU law in question with the ECHR – unless it has already delivered a ruling on the matter. According to the Draft explanatory report attached to the agreement, the EU is expected to deliver this assessment within a short timeframe. The text also annuls the ECtHR decision-making margin, as "determining whether it is necessary to initiate the prior involvement of the CJEU, depends upon a finding by the EU of whether the CJEU has already undertaken the assessment"[170]. The draft does not determine which EU institution has the task to make such assessment leaving a procedural gap that the Union will need to address by establishing internal rules on the matter[171].

Despite one the main issue highlighted by the ECJ has been solved, the new draft still presents three important problems: unclear time-limits, a possible bypass of Article 267 TFEU, and the incompatibility with the Bosphorus Doctrine.

iv.iv.i. Ambiguity in the time-limits

First, the paragraph states, "sufficient time shall be afforded by the Court for the [ECJ]" and "the European Union shall ensure that such assessment is made quickly so that the proceeding before the Court are not unduly delayed". The paragraph mentions twice the concept of time, firstly as a timeframe and then as a speed. However, the agreement fails in giving clarity regarding the limits of the timeframe or setting a deadline by which the assessment must be made. The draft explanatory report cites that the proceeding shall not resume before the parties (and third-party interveners) assessed properly the consequences of the ECJ's suling. It also acknowledges the existence of an accelerated procedure before the ECJ, and that precedents demonstrated that the ECJ was able to give said rulings under that procedure within 6 to 8 months[172]. Still, it does not denote a binding condition. The lack of clarity on the prior involvement's timings might delay the delivery of the judgment in the proceeding violating Article 6 ECHR: "everyone is entitled to a fair and public hearing within a reasonable time"[173]. Moreover, the unclearness of the timing

[168] Opinion 2/13, para. 238.
[169] Opinion 2/13, para. 242.
[170] Draft explanatory report, para. 76.
[171] GRAGL (2024: 9).
[172] Draft explanatory report, para. 79.
[173] FRANKLIN – TZEVELEKOS (2024).

increases the risk of the activation of the prior involvement for strategic delays to the proceeding by a party[174].

iv.iv.ii. Protocol No. 16 to the ECHR and the dangerous loophole to bypass Article 267 TFEU

Second, the draft explanatory report adds that, before asking the ECtHR for a ruling, Member States will first have to exhaust domestic remedies available, in national courts. The main critic to the procedure is that the prior involvement risks to represent a loophole to bypass Article 267 TFEU. In fact, such a loophole would not only make one of the ECJ's fundamental tasks ineffective, but it would also confer the ECtHR the authority to interpret EU law in ECHR cases. This would mean that the ECJ waves its exclusive jurisdiction over EU law to another court. A further complication arises from Protocol No.16 of the ECHR that allows national courts of High Contracting Parties to seek advisory opinions from the ECtHR. This mechanism could enable national courts to sidestep both the preliminary ruling procedure and the prior involvement mechanism. To leave intact the preliminary ruling system, it should be established a strict chronological order between the procedure before ECtHR and Article 267 TFEU[175]. To address this, the group included (since the DAA) an article about advisory opinions under protocol No.16 to the ECHR[176]. It determines that when a national court of a Member State, that has ratified protocol No. 16, if the matter regards the application of EU law, then the question will not be revised by the ECtHR. Doing so, the exclusivity of the interpretation of the EU law should remain intact. However, the problem is not completely solved.

The prior involvement still presents structural weaknesses that could allow national courts to bypass the preliminary ruling mechanism. In fact, despite Article 5 established an order to follow between Article 267 TFEU and the procedure before ECtHR, no provision explicitly references an order for the prior involvement. As a result, cases involving EU law can arrive before the ECtHR without a previous assessment of the ECJ through a preliminary ruling.

iv.iv.iii.Lack of coordination between the two courts

Third, the paragraph concludes stating that "[the ECJ assessment] shall not affect the powers of the Court, including to make a final determination of whether there has been a violation of the Convention". In fact, the ECtHR is not bound by the ECJ's assessment in any way. The ECtHR has full discretion over the final ruling. Hence, even with a correct application of the prior involvement followed by an EU assessment stating the incompatibility of the right at issue with the Treaties, the ECtHR is still free to reach a different conclusion and legally rule contrasting the ECJ's declaration. This means that the ECtHR has the option to make a legal interpretation of EU law. It might also represent the creation of a system in which the EU law is lawfully interpreted by an external organ and the ECJ does not have the last (and exclusive) word on it.

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[174] GRAGL (2024: 9).
[175] GRAGL (2024: 14).
[176] Article 5 of the Accession Agreement.

iv.v. Article 3(8): joint responsibility

The eight paragraph of Article 3, seventh in the DAA, regards the division of responsibilities where the ECtHR rules that the main respondent and the co-respondent are held jointly responsible. The 2013 DAA conferred the ECtHR the option to decide if only one of the respondents is fully responsible. The existence of this clause concerned the ECJ due to its interreference with the division of responsibilities, that should be internal to the EU. To address this problem, the 2023 draft deleted entirely the sentence that conferred the ECtHR this power. The new text states that when the alleged violation is confirmed, the ECtHR hold both the main respondent and the co-respondent jointly responsible. Subsequently, both respondents are expected to agree to make a unilateral declaration of the violation[177].

iv.v.i. The conflict with the Bosphorus doctrine of equivalent protection

The Bosphorus doctrine of equivalent protection derives from the 2005 case *Hava Turizm ve Ticaret Anonim Sirketi* (Bosphorus Airways) v. Ireland. In its judgment, the ECtHR held that its role is limited to verify whether the effects of national courts' judgments are compatible with the ECHR. The doctrine of presumed equivalent protection derives from the idea that where an organization (in this case, the EU) is capable of offering an equivalent level of protection for fundamental rights as the ECHR, then it is presumed that said organization is in compliance with the Convention – Bosphorus presumption. Therefore, where a Member State implements an EU law, the ECtHR assumes that such measure conforms with the ECHR, and it refrains from judging the case unless the protection is evidently insufficient.

While paragraph 8 assigns a joint responsibility to both the respondent and the co-respondent, the Bosphorus doctrine could lead to the exclusion of the EU from the judgment assuming an equivalent level of protection. Activating the co-respondent mechanism, the EU and the Member States are held responsible jointly without distinguishing who actually made the violation at issue. However, applying the doctrine, the Member State which implemented the EU law, could be exonerated by the responsibility presuming that the EU respected the Convention. Although, paragraph 8 assumes that the ECtHR judged the question, due to Bosphorus doctrine, the ECtHR might not examine the case with the same attentiveness.

[177] Draft explanatory report, para. 70.

FINAL CONSIDERATIONS ON THE FUTURE OF THE ACCESSION OF THE EU TO THE ECHR

The aim of this thesis was to analyze the achievability of the 2023 draft, considering the 1994 and 2014 ECJ opinions, and the current scenario of the European Union. The chapters explored the importance of the safeguarding of human rights within the Union, and the legal mechanism to ensure the coexistence and cooperation of two massive supranational systems and their respective courts. More specifically, it analyzed one of the newest and most innovative instruments created ad hoc for the non-state nature of the EU: the co-respondent mechanism. The issue was investigated through analyzation of the paragraphs of the article in question regarding their functioning, the reasons behind the drafting, their amendments, and (if present) the problems arising from them. Hence, a question that this thesis attempts to answer is: are the issues found in the latest version of Article 3 challenging enough to make this draft a third failed attempt? Now considering the co-respondent mechanism, as covered in chapter III, while some concerns can be overlooked, it must be recognized that the draft still presents several problems that must be addressed. Among these are three with the potential of causing serious concern in case of a successful accession. These concerns are the lack of coordination between the courts, the indefinite time-limits, and the existence of a bypass to Article 267 TFEU – the preliminary ruling, fundamental task exclusive to the ECJ. Once analyzed, the extent of those issues and their consequence to the Union, it must be acknowledged that the implementation of the 2023 draft, in some specific scenario, would be able to put the EU and its system in an unpleasant position. The very existence of these possibilities might represent a threat to the EU, and a reason for the Court to invalidate the latest draft. At the same time, a third failed attempt could discourage the cooperation between the negotiators, and significantly slow down the EU accession to the ECHR.

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