

# THE FRUSTRATED ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS: A BRIEF ANALYSIS OF OPINION 2/13 OF THE COURT OF JUSTICE OF EUROPEAN UNION

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## **ABBREVIATIONS**

Charter: The Charter of Fundamental Human Rights of European Union

Opinion 2/13: Opinion 2/13 of the Court (Full Court)

AG Kokott: Advocate General Juliane Kokott

EU: European Union

EC: European Community

CJEU: The Court of Justice of European Union, the Court, the Court of Justice

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

TUE: Treaty on European Union

TFEU: Treaty on Functioning of European Union

CDDH: Steering Committee for Human Rights

## **INTRODUCTION**

Nowadays in our society it is common not to stop to think for even a moment how we arrived to the situation we live today. We do not think about how we reached some aspects of the human rights that in one way or another are reflected in our daily life, simply because we take them for granted such as, human dignity, the prohibition of torture or the very essential right to life.

I could keep going and pointing out every fundamental human right declared in the Charter of Fundamental Human Rights of European Union (the Charter). However, what I want to study in this work is that the fight for the protection of human rights has not come to an end and that there are yet new paces that need to be opened to reach the aim: the full guarantee of a complete protection of fundamental human rights. The important aspect of this research is not the result but the process taken to arrive to it. During the work, it shall be exposed how the European Communities have protected fundamental human rights since the incorporation of rights within the European atmosphere until the Opinion 2/13, delivered by the Full Court of the European Court of Justice on December 18<sup>th</sup>, 2014, passing through the evolution of the guarantees of the rights, the process of strengthening them and doing a larger stop to deeply analyze the Opinion 2/13.

As far as the Opinion 2/13 delivered by the European Court of Justice concerns, we shall explain how the process developed, the different backgrounds compared with the opinion given in 1996, the accession negotiations, the application to the Court and its delivery. About this last point, we will compare the Conclusions by Advocate General Juliane Kokott (AG Kokott) and some other authors specialized in the European Law field.

In conclusion, after a brief resume of the historical overview of European Union (EU) regarding fundamental human rights, I will focus on addressing the points that the European Court of Justice (ECJ) used to determine that the accession of EU to the European Convention on Human Rights (ECHR) was not compatible with the specific characteristics and the principles of EU Law.

# **I. HISTORICAL OVERVIEW OF THE CREATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR) AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)**

The protection of fundamental rights by means of international control mechanisms is a legitimate goal of the international community.<sup>1</sup> Within the European context, there are three areas for which international respect for fundamental rights and their protection are especially important tasks: The Council of Europe, the European Union and the Organization on Security and Cooperation in Europe.

The Council of Europe was created in 1949, when the II World War came to its end. It was created encouraged by an idea of W. Churchill and a unifier movement limited to Western Europe supported by United Nations, whose Charter had foreseen in its article 52.1 the regional action to reach the aims and principles of the United Nations, including the promotion and respect of human rights and fundamental freedoms.<sup>2</sup>

Related to Human Rights and the Council of Europe, it is necessary to be said that even before the first session of the Consultative Assembly was held, there arose certain distrusts between Member States of the Council of Europe on the desirability of creating a European Court of Human Rights (ECtHR), because there was a fear that it could intrude on the sovereignty of States in this field<sup>3</sup>, but after several tries of negotiations, in 1950 a really important Treaty in this field was approved: The Convention of Rome or the European Convention on Human Rights (ECHR) which came into force in September 1953. It seems that it collected the civil and political

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<sup>1</sup> K. WOLFRAM, “Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte”, *Aktuelle Probleme des Menschenrechtsschutzes*, Berichte DGVR, n° 33, Heidelberg 1994, pages 123-125.

<sup>2</sup> J. M. MORENILLA RODRÍGUEZ, *El Convenio Europeo de Derechos Humanos: ámbito, Órganos y Procedimientos*, Ministerio de Justicia, Secretaría General Técnica. Centro de Publicaciones, Madrid, 1985, page 15.

<sup>3</sup> C. HERMIDA DE LLANO, *Los derechos fundamentales en la Unión Europea*, Anthropos, 2005, page 19’.

rights of the Universal Declaration of Human Rights due to the similarities they have with each other. But the truth is that the Convention limited itself to collect the rights that showed less difficulties to ensure an effective international Protection. However, even though the number of rights was not so large, the protection mechanism established by itself ensured its effectiveness by allowing both, States and individuals to claim the violation of the rights, which meant the end of the classic international diplomatic protection principle. This important step is explained by MORENILLA “Although this legitimation was subject to an express declaration by the Signatory State, that step was new with no precedents in international law, for which the only subject had been until then always the State, which assumed the representation and defense of the individual and by therefore, in case of being denounced, could not be applicant and respondent at the same time.”<sup>4</sup>

On the other hand, as far as concerned to the European Court of Human Rights (ECtHR), it was created a judicial body of decision under the claims of individuals and States in Strasbourg.<sup>5</sup> Later in 1998, with the additional protocol No11 to the ECHR, the Court of Strasbourg will become unique with double characteristics: first the Commission and the Court merged and secondly, it would be permanent. From then on, any claim of any individual, non-governmental organization or group of particulars considered victim of a violation— by High Contracting Parties— of the rights recognized in the ECHR or its protocols, would be examined by the judges of the Court under the Article 34 of the Convention. A Court that was composed by the same number of judges —selected by the Parliamentarian Assembly— as the High Contracting Parties.

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<sup>4</sup> J. M. MORENILLA RODRÍGUEZ, *op. cit. supra*, page 16.

<sup>5</sup> J. LÓPEZ BARJA DE QUIROGA, *El Convenio, El Tribunal Europeo y el Derecho a un Juicio Justo*, AKAL, 1991, pages 7-8.

## I.1 HISTORICAL EVOLUTION OF GUARANTEES AND PROTECTION OF HUMAN RIGHTS

It is necessary to make an overview of the evolution of guarantees and protection of Human Rights through history to completely understand the nowadays situation in Europe in this matter.

Historically, we can find universal documents asserting individual rights, such as the Magna Carta (1215), the Petition of Right (1628), the amendments introduced to the US Constitution (1791), and the French Declaration of the Rights of Man and of the Citizen (1789). These are the written cursors to many of today's human rights documents.

Regarding to a "united" Europe, already back in 1864, sixteen European countries and several American states attended to a conference in Geneva. That diplomatic conference had the purpose of adopting a convention for the treatment of wounded soldiers in combat, stablishing the obligation to extend care without discrimination to wounded and sick military personnel<sup>6</sup>.

But there was not any supranational court designed to protect the human rights, and this urgency arose after the II World War, because of the Holocaust crimes, a permanent international court was understood to be necessary, so the human rights protection was furthered by the initiative taken to create the European Court of Human Rights in 1950. However, the foundational treaties of the European Community did not include any kind of fundamental rights catalogue. The ECJ did not appreciate the need to fill that vacuum<sup>7</sup>. The main reason for this absence lies in the eminently economic philosophy of the Treaties and in the climate of political distrust because of on the one hand, the recent World Wars and on the other hand, because everyone knew

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<sup>6</sup> R. P. DHOKALIA, *The Codification of Public International Law*, Oceana Pubns, 1970 page 91 y ss.

<sup>7</sup> S. MUÑOZ MACHADO, "Los tres niveles de garantías de los derechos fundamentales en la Unión Europea: problemas de articulación", *Revista de Derecho Comunitario Europeo*, nº 50, 2015 page 197.

that the importance of the protection of fundamental rights goes beyond, and that it does fulfill a function of integration and legitimation of the system as a whole<sup>8</sup>.

Nonetheless, surrounded by this distrustful atmosphere, there had been failed projects, such as the creation of European Community for Defense and Political European Community, where fundamental rights were in one way or another mentioned.

Furthermore, PESCATORE believes that the absence in regard to fundamental rights was nothing but an appearance because “the community constitution contains, at least in germ, a complete system that can serve as guarantee of fundamental rights” upholding in this way that the Treaties have procedures that ensure protection of these<sup>9</sup>. There are even authors that state that the Treaties have created new rights that were not included in the Member States’ constitutions, especially the four rights of Common Market: freedom of movement of workers, of establishment, of movement of goods and of capital and services. Even though some of these rights do not have the fundamental right category, as some scholars say, the Treaties do protect fundamental rights.

However, the truth is that only when the first individuals asked for the application of Community Law to protect some recognized rights in their domestic law, the ECJ started to approach the problem through the jurisprudence, in cases such as *Stork vs Alta Autoridad* (1959) and *Comptoirs de vente vs Alta Autoridad* (1960). In these first cases however, position of the ECJ was that the interpretation of Community Law was not binding to the domestic dispositions regarding fundamental rights. It was in the *Stauder judgment* where the ECJ established for the first time that fundamental rights were part of the *general principles of Community Law* and later, in *Internationale Handelsgesellschaft* it concerned the question of whether Community law should have

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<sup>8</sup> M. AGUDO ZAMORA. “La protección de los derechos en la Unión Europea. Claves para entender la evolución histórica desde el tratado constitutivo de la comunidad económica europea al tratado por el que se establece una constitución para Europa”, *Revista de Derecho Constitucional Europeo*, Nº4, 2005, page 379.

<sup>9</sup> P. PESCATORE, "Les droits de l'homme et l'intégration européenne", *Cahiers de Droit Européen*, 1968, n° 6, pp. 636.

supremacy over the Constitutions of the Member States and especially if Community law takes primacy over the fundamental rights provisions in national constitutions, holding to the fact that Community law should take precedence over all provisions in national law without taking into consideration its legal status, even the constitution's one.<sup>10</sup>

That means that no matter which is the nature and status of the legal provision of the Member State, the directly applicable Community provision shall take precedence. Therefore, fundamental rights that are part of a Constitution or the constitutional structure of a Member State cannot affect the validity of Community law. Furthermore, the ruling made it clear that Community law has precedence even over national legislation that was adopted after the relevant Community provision<sup>11</sup>.

Thereby, the ECJ recognized the rights as principles of Community law, in spite of not being consigned in any document, but collected in its case law with supralegal character, i.e. with precedence over ordinary legal acts.

Later, in May 14<sup>th</sup> 1974 the ECJ stepped forward with *Nold Judgment*. It was stated that no disposition incompatible with fundamental rights recognized and protected by Common Constitutional traditions of the Member States could be accepted. Therefore, we can find in this Judgment the two criteria that the ECJ and the Treaties set out thereafter as pillars of the legal protection of fundamental rights in EU Law: the European Convention for the protection of human rights and the common constitutional traditions concerning the protection of fundamental rights.

The invocation of the European Convention for the protection of human rights by the case law of the Court gave strength to the delimitation of a standard of guarantees for fundamental rights. It was necessary a document with the precise rights that were protected and already back in the seventies the debates and studios about the adhesion

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<sup>10</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>11</sup> M. STIERNSTROM, "The Relationship Between Community Law and National Law", *Jean Monnet/Robert Schuman Paper Series*, Vol. 5, No. 33, 2005, [Working paper] page 7.

of the Community to the ECHR began. In this sense, Article F.2 of Maastricht treaty refers to the European Convention on Human Rights and the common constitutional traditions of Member States in the following terms: *“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”*.

But in 1994, The Court of Justice froze all the initiatives taken for the accession of the Community to the Human Rights Convention with its Opinion 2/1994. The Court examined whether the Article 235 of the EC Treaty<sup>12</sup> (article 352 TFEU<sup>13</sup> nowadays) could provide a legal basis for the accession, and it did so not taking into consideration its own case law over the last thirty years. It ruled that the Community had limited powers — only those which have been delegated by the Member States— so the Article 235 of the EC Treaty should not be used to expand the material content of the Treaty

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<sup>12</sup> Article 235. “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

<sup>13</sup> Article 352. “1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonization.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.”

without going through the process of reforming the treaties. Therefore, this Article 235 of the EC Treaty could not be used as the legal basis for the accession.

However, the Court insisted that the Member States and the Community institutions had stressed the importance of respecting human rights, that the treaties themselves referred to it in several sections and that fundamental rights “settled law, and they are part of the general principles of the Community and its respect is a precondition for the legality of Community acts.”<sup>14</sup> But all of this was not enough to allow the use of Article 235 of the European Community Treaty, stating that it would involve on one hand, a substantial change of the current EU system of protection of human rights and on the other hand, an insertion of the Community in a different international institutional system. In addition, all of this would mean the integration of all the provisions of the Convention in Community Law, overpassing the limits of the Article 235 of the European Community Treaty<sup>15</sup>.

## **II. STRENGTHENING FUNDAMENTAL RIGHTS PROTECTION**

### **AT THE EU LEVEL: THE EU CHARTER AND THE EU**

### **INSTITUTIONS**

#### II.1 SOME PREVIOUS REMARKS

This blockade would continue until 1999, until the new Treaty of Amsterdam —signed in 1997 but entered into force in 1999— that introduced a new provision in Article 6.1 of the EC Treaty. Thereafter, the respect and promotion of these rights would be set as a Community obligation.

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<sup>14</sup> Opinion 2/1994 of Court of Justice.

<sup>15</sup> J.M DE AREILZA CARVAJAL, “El Dictamen 2/1994 del Tribunal de Justicia o cómo no abordar el espinoso asunto de las competencias comunitarias”, *Revista Española de Derecho Constitucional*, nº 47, 1996, page 340.

Given this situation, seeing that the ECJ rejected the application of the European Community to the ECHR, the other proposal was that the Community should adopt its own Charter of Fundamental Rights, granting the ECJ the power to ensure its correct implementation.<sup>16</sup> This approach was presented during the 1999 European Council meeting in Cologne but it would be definitely proclaimed in Nice in 2000 by the European Parliament, the Council and the Commission. Later, in 2009, the Charter was eventually proclaimed as binding by the Treaty of Lisbon.

The main purpose of the Charter was to make more visible to the citizens the overriding importance and relevance of fundamental rights and the main sources of inspiration were to be the ECHR and the common constitutional traditions to the Member States, as general principles of Community law.<sup>17</sup>

Later on, in December 2007, the Treaty on European Union (TUE) and the Treaty on European Community suffered changes being henceforth denominated Treaty on the Functioning of the European Union (TFEU). In regards to the Charter, it had been readapted to the TEU, and this Treaty, in Article 6 paragraph 1 declared: “*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*”

In this way, the European Union Law opened to new standards of law already binding in Member States. In addition, it accepted also to some extent the applicability of European Convention. Hence, the three standards of protection of Fundamental Rights are regulated in Articles 51, 52 and 53 of the Charter.<sup>18</sup>

#### Article 51. *Scope*

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect

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<sup>16</sup> S. SY, 02/2016 *European Parliament at your service*.

<sup>17</sup> *Ibidem*.

<sup>18</sup> S. MUÑOZ MACHADO, *op. cit. supra*, page 205.

the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

*Article 52. Scope of guaranteed rights*

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

2. Rights recognized by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

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

*Article 53. Level of protection*

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Thus, the Charter did not limited to simply write down fundamental rights, but it established some criteria to interpret and regulate the relations with other constitutional systems to reconcile its relationship with the European Convention of 1950. Its scope of application reaches European institutions and bodies and also Member States, when they are applying EU Law. On the other hand, the Charter does not affect the order of competences established in the Treaties nor modifies the established for European institutions. Finally, the Charter will be interpreted according to the common traditions of Member States and it shall not be interpreted restrictively or adversely affecting to the rights and freedoms.<sup>19</sup>

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<sup>19</sup> S. MUÑOZ MACHADO, *op. cit. supra*, page 207.

## II.2 THE ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR) OF THE EUROPEAN UNION (UE)

Since 2009, from one side, it was established a definitive text which contains a catalogue of the rights and it is as binding as the Treaties and, from the other side, it was proclaimed that the protection of the rights is a general principle of the EU Law. Besides this, the new provisions introduced in the Treaty on the European Union, by the Treaty of Lisbon, prescribed also that the EU would be adhered to the ECHR according to article 6, paragraphs 2 and 3.<sup>20</sup>

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. 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.

These provisions were supplemented by Protocol No 8, which was the one relative to the accession of the EU. The three Articles of Protocol No 8 have preventions and limitations to the accession. In particular its Article 2 highlights that the agreement relating to the accession shall ensure that the “accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.”

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<sup>20</sup> S. MUÑOZ MACHADO, *op. cit. supra*, page 208.

### *II.2.1 Background differences to the unsuccessful accession process of 1996.*

The Council of Ministers had asked the Court in 1994, according to what is now Article 218 TFEU, whether an accession to the ECHR was compatible with the former European Community Treaty.<sup>21</sup> And as it is said before, the ECJ found that the accession required the amendment of the Treaties in order to be considered compatible with EU Law. That amendment happened with the Treaty of Lisbon in 2007. In addition, in 1996 only States could accede to the ECHR and that situation changed when the Additional protocol No 14 to the ECHR entered into force in 2010.<sup>22</sup>

Apart from this, the Charter and the fundamental changes that suffered the Treaty, brought with itself, —the Treaty of Lisbon particularly with the Article 6 paragraphs 2 and 3— the change of the legal situation. Moreover, the ECtHR adopted in *Bosphorus*<sup>23</sup> case a doctrine of so-called “equivalent protection” between EU Law and the ECHR. It was inspired by the famous case *Solange II*<sup>24</sup>. After being classically reiterated that, from one hand, the conclusion made by the Member States about EU Treaties after the entry into force of the Convention does not allow the release of their obligations and, from the other hand, that the transfer of powers to the EU does not relieve of the responsibility under the Convention because “it would be contrary to the purpose and object of the Convention”, the ECHR deployed the mechanism in three steps: Firstly, the State is presumed to meet the requirements of the Convention when it executes the legal obligations arising from its accession to the organization since it confers fundamental rights protection at least equivalent to the Convention. Secondly, that presumption of equivalent protection is not absolute and it can be reversed if in a given case appears manifestly to be deficient in protecting the rights. Lastly, the Member States, however, remain responsible under the Convention for all the acts falling outside its strict

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<sup>21</sup> J. NERGELIUS, “The accession of the EU to the European Convention on Human Rights”, SIEPS 2015, page 12.

<sup>22</sup> *Ibidem*.

<sup>23</sup> Asunto Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi vs Irlanda (Demanda num. 45036/98) Sentencia de 30 de junio de 2005.

<sup>24</sup> German Federal Constitutional Court (22 October 1986) BVerfGE, [1987].

international legal obligations, especially when they exercise the appreciation power.<sup>25</sup> The flexibility of the control of the equivalent protection by the ECJ shows a judicial policy of conciliation purported to avoid contradictions or inconsistencies related to the competition of different legal orders.<sup>26</sup> Designed as an arbitration instrument for conflicts between provisions of different judicial systems, it allows the judge not to exercise control in respect of standards, but he will be the guardian if it appears that the standards from the other legal offer equivalent protection. This principle plays as an “articulation key” of the relationships between the ECHR and the EU when the ECJ comes to rule on a claim alleging the violation of the Convention in consequence of a membership of the State to the Union.<sup>27</sup>

The exercise of equivalent protection control, in the way that the ECHR has drawn in its *Bosphorus* case, is subject to two conditions: the first place, the admissibility condition, where the competence *ratione personae* of ECHR must be established, and in the second place, the substantive condition, where the State must not have exercised the appreciation power.<sup>28</sup>

Summarizing, this doctrine is based on the presumption that the both European courts, the ECJ and ECtHR, will and sincerely wish to provide a strong protection of human rights.<sup>29</sup> Recently, Strasbourg has confirmed the *Bosphorus* doctrine in case *Avotins vs Latvia*.<sup>30-31</sup>

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<sup>25</sup> H. LABAYLE and F. SUDRE, “L’avis 2/13 de la Cour de justice sur l’adhésion de l’Union européenne à la Convention européenne des droits de l’homme: pavane pur une adhésion défunte?”, *Revue Française de Droit Administrative*, 2005, page 17.

<sup>26</sup> *Ibidem*, page 18.

<sup>27</sup> *Ibidem*.

<sup>28</sup> *Ibidem*.

<sup>29</sup> J. NERGELIUS, *op. cit. supra*, page 13.

<sup>30</sup> *Avotins vs Latvia*, Demanda num. 17502/07, Sentencia de 23 de mayo de 2016.

<sup>31</sup> S.O. JOHANSEN, EU Law and the ECHR: The Bosphorus presumption is still alive and kicking – the case of *Avotins vs Latvia* at EU Law analysis, available in <http://eulawanalysis.blogspot.com.es/2016/05/eu-law-and-echr-bosphorus-presumption.html>.

## II.2.2 The accession negotiations

On 4 June 2010, the EU Ministers of Justice gave the European Commission the mandate to conduct negotiations on its behalf. On 26 May 2010, the Committee of Ministers of the Council of Europe gave an *ad-hoc* mandate to elaborate, in co-operation with the European Commission, the necessary legal instrument for the accession. It was composed of 14 experts from the Council of Europe member states (7 from EU member states and 7 from non-EU member states). The group held 8 meetings between July 2010 and June 2011. On 14 October 2011, they transmitted a report to the Committee of Ministers regarding the work done and the draft legal instrument in appendix. Given the political implications and some of the issues that were raised, on 13 June 2012, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to pursue negotiations with the EU within the *ad hoc* group “47+1” and to finalize the legal instrument dealing with the accession modalities. The *ad hoc* group held 5 meetings in Strasbourg. The last meeting was held between 2-5 April 2013.<sup>32</sup>

During the negotiations, they had to work on the basis of mainly two provisions which allowed the accession, Article 6 paragraph 2 TEU on the accession of the EU to the ECHR and the Protocol No 8. These two provisions would allow the accession but also would bind down to some basic conditions mentioned in the three Articles of the Protocol. However, taking into consideration all the preconditions that were written in the Treaties, all the political problems that had taken place etc. it should be said that the EU institutions were happy with the result of the negotiation process, which finished successfully. Even though the response of the ECJ — as it is going to be explained below— was not going to be the expected one.<sup>33</sup>

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<sup>32</sup> [http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/default\\_EN.asp?](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/default_EN.asp?)

<sup>33</sup> J. NERGELIUS, *op. cit. supra*, page 16.

### *II.2.3 The request for an opinion regarding the Draft Agreement of Accession*

The request took place 4 July 2013. That day, the EU Commission under Article 218 paragraph 11 TFEU addressed the ECJ the following question: “Is the draft agreement providing for the accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’) compatible with the Treaties?”

During the process, apart from the EU Council and Parliament, all the EU Member States except Croatia, Luxembourg, Malta and Slovenia participated in the written procedure and/or made oral submissions.<sup>34</sup> On the other hand, Advocate General Kokott delivered her Opinion on 13 June 2014 but it would not be published until the Court’s Opinion was delivered on December 18 2014.

## **III. OPINION 2/13 OF THE EUROPEAN COURT OF JUSTICE**

### III.1 SOME INTRODUCTORY ISSUES

Finally, the Court ruled its opinion about whether the Draft Agreement of Accession of the EU to the ECHR (Draft Agreement) met all the requirements or not to be compatible with EU Law on 18 December 2014, in Opinion 2/13.

As professor MARTÍN Y PÉREZ NANCLARES states, the ECJ was called “to issue a resolution of constitutional significance capable of exercising significant influence on the future of the European integration process and in this case, also in relations with

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<sup>34</sup> [http://www.europarl.europa.eu/RegData/seance\\_pleniere/textes\\_adoptes/provisoire/0184/P7\\_TA-PROV\(2010\)0184\\_EN.pdf](http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/provisoire/0184/P7_TA-PROV(2010)0184_EN.pdf).

the sophisticated system of international human rights protection built under the frame of the Council Europe.”<sup>35</sup>

By making a preventive control of compatibility of the draft, the ECJ had all the margin of appreciation to build its reasoning. It was expected that it would accept and rule the compatibility of the Draft Agreement with the project under certain reserves, as did the AG Kokott. Therefore, the astonishment came with its refusal, because some elements of the Draft Agreement were to its liking.<sup>36</sup> The ECJ reasoning on which its Opinion was based, contains basically two grounds. According to LABAYLE and SUDRE, nothing worked and the two elements worked for the negative opinion. First, deep and structural, it reflects the desire not to see the arrangements made for the accession distort the specificity and the autonomy of the right to accession. Second but not least, it holds the technical options selected by the project, deemed to be incompatible with the Treaties.<sup>37</sup>

What we can conclude from all of this is that the Court of Justice has become a block for the preservation and conservation of the characteristics of EU Law, and it is convinced of the need of not sharing the power of interpretation.

Therefore, in order to assert what it has just been said, in the next pages a deep study of the reasons of the Court of Justice shall be carried out comparing it with the Opinion given by Advocate General Julianne Kokott with the ECJ’s ruling. We will highlight the scant effort done by the Court to make the accession compatible.

Following the structure of the analysis made by LABAYLE and SUDRE, they divide ECJ’s reasoning in two principal blocks. They see that the obstacles are on the one hand based on the constitutional argumentation, and on the other hand, the technique

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<sup>35</sup> J. MARTÍN Y PÉREZ NANCLARES, NANCLARES, J. M., “El TJUE pierde el rumbo en el dictamen 2/13: ¿Merece todavía la pena la adhesión de la UE al CEDH?”, *Revista de Derecho Comunitario Europeo*, 2015, page 829.

<sup>36</sup> H. LABAYLE et F. SUDRE, *op. cit. supra*, page 4.

<sup>37</sup> *Ibidem*.

argumentation. In this analysis, firstly it will be explained the constitutional arguments used by the Court and just then, the technical argumentation.

## III.2 THE REASONING OF THE ECJ: THE CONSTITUTIONAL ARGUMENT

### *III.2.1 The fact of the autonomy*

First of all, before any analysis is developed, it should never be forgotten while doing the analysis the fact that, from a material perspective, the rights recognized in the ECHR have already been incorporated to the legal system of the EU: first through the jurisprudential work, maintained then by Treaty of Lisbon by reasons of Article 6.3 and later through the Charter of Fundamental Rights of EU, whose Article 52.3 clearly states that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing for more extensive protection.”<sup>38</sup> What was supposed to be happening now was the final step of the formal accession of the Union to ECHR. On that way, it should have been completed the achievement of that material perspective regarding the complete incorporation of the rights of ECHR to the system of the Union.

This would mean the incorporation of the external judicial control mechanism of the ECtHR, that “like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law”<sup>39</sup> concluding that “the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR.”<sup>40</sup>

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<sup>38</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, page 834.

<sup>39</sup> Opinion 2/13, paragraph 180.

<sup>40</sup> Opinion 2/13, paragraph 181.

However, after the Opinion 2/13 was delivered, one has the feeling that the ECJ was seeking just the opposite, using all the possible and even not that possible reasons to conclude drawing away the aim set forth by Article 6.2 TUE. The point is that, as J. MARTIN Y PEREZ NANCLARES points out very well, one thing may be that the ECJ defends that “an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order”<sup>41</sup> but other thing very different is to pretend that “any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law”<sup>42</sup> Because in the end, it is obvious that the interpretation given by the ECtHR may have the effect of imposing the UE a determined interpretation of the EU law, being precisely that its function, being directly connected with the standard of protection set by the ECtHR.

But the truth is that this attitude of the ECJ is not new at all. Already in 2011 the Court was placed in the opposite site of the accession. It declared firstly saying that “the guardians of that legal order and the European Union judicial system are the Court of Justice and the courts and tribunals of the Member States.”<sup>43</sup> On the other hand, in the same opinion, he stated that the accession “would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.”<sup>44</sup> The main points of the ECJ to be capable to give this reasoning is in the Article 6.2 TUE and the Protocol No 8 attached to the Treaties, because they set forth that in the 1<sup>st</sup> Article of the agreement in regard the accession “must ensure the need to preserve the specific characteristics of the Union and the EU law” and the declaration

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<sup>41</sup> Opinion 2/13, paragraph 183.

<sup>42</sup> Opinion 2/13, paragraph 184.

<sup>43</sup> Opinion 1/09 of the Court of Justice paragraph 66. In this opinion, the Court of Justice ruled on the compatibility with Union law of a draft agreement between the Member States, the European Union and third countries which are parties to the European Patent Convention signed at Munich on 5 October 1973. This draft agreement concerned the creation of a court with jurisdiction to hear actions related to European and future Community patents.

<sup>44</sup> Opinion 1/09 of the Court of Justice paragraph 89.

No 2 of the intergovernmental conference confirms so highlighting that “the accession should be done in accordance to the modalities that allow to preserve the specificities of the EU law”.

Therefore, the chance that has the Court to specify the meaning and the scope of these specificities, ends being the perfect moment to not keep grabbed to it. And the responsible ones for this situation are the Member States and the Commission because they did not see the challenge in time. In this sense, the ECJ carves some considerations in what concerns to the EU law deserving the pedagogical citation and even the scientific approval. Since it is born from an autonomous source, the EU law, through its direct effect and primacy, “has given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’”<sup>45</sup>

Furthermore, another innovative precision enriches this affirmation of the Court. This juridical construction lays over a “fundamental premise”: each Member State “shares with all the others, and they recognize that they share it, a certain set of common values on which the Union is founded”. The irruption of the values of the Union in the debate, besides its political significance, is not legally neutral. In this way, the Autonomy of the EU law in relation to Member States law, but also in relation to the International law, in which the ECJ implicitly ranks the ECHR, establishes a decisive requirement: the interpretation of the human rights must be “provided as a part of the structure and objectives of the Union”<sup>46</sup>

### *III.2.2 The co-respondent mechanism*

One of the most controversial points in the constitutional argumentation has been the proposed co-respondent mechanism. This mechanism was introduced to avoid gaps which might result from its accession to the ECHR but also to ensure, in accordance with

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<sup>45</sup> Opinion 2/13 of the Court of Justice, paragraph 167.

<sup>46</sup> H. LABAYLE and F. SUDRE, *op. cit. supra*, page 5.

the requirements of Article 1.b of Protocol No8 EU, proceedings by non-Member States and individual applications are correctly addressed while safeguarding the specificities of the EU. According to Article 3.5 of the draft agreement, a Contracting Party would be to become a co-respondent “either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party”<sup>47</sup>. In the first case, the draft agreement already pins down that an invitation of ECtHR is not binding so the real conflict comes with the request of that Contracting Party.

When a Contracting Party makes such a request, it must give reasons and the ECtHR will decide the plausibility of those reasons. According to the Court, that review of the ECtHR, as it is said in the paragraph 224, when it states that “carrying out that review the ECtHR would be required to assess the rules of EU law” interfering in the division of powers between the EU and its Member States.

On the other hand, according to Article 3.7 of the draft agreement the ECtHR “may decide, on the basis of the reasons given by the respondent and the co-respondent, that only one of them is to be held responsible for that violation”<sup>48</sup>. Later, in the paragraph 234, it states that “to permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter’s exclusive jurisdiction”. Therefore, the ECJ leads to the incompatibility of the co-respondent mechanism proposed in the draft agreement with the specific characteristics of the EU and EU law.

For AG Kokott, there has to be some changes in the Draft Agreement. On one side, she says that she finds that the ECtHR cannot state its views on their respective competences and responsibilities as defined in EU law, but, mainly because that is not a task for the ECtHR. According to the principle of autonomy of EU law, only the ECJ can have jurisdiction to give a binding interpretation of EU law. Thus, the second part of Article 3.7 is not in accordance with the principle of the autonomy of EU law.

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<sup>47</sup> Opinion 2/13 of the Court of Justice, paragraph 218.

<sup>48</sup> Opinion 2/13 of the Court of Justice, paragraph 229.

To avoid that situation and to respect that principle of autonomy, she states in paragraph 184 that it is necessary “to ensure that, in the event of any doubt, the ECtHR will always carry out the prior involvement procedure in accordance with Article 3.6 of the draft agreement. The ECtHR may dispense with the prior involvement of the Court of Justice only when it is obvious that the Courts of EU have already dealt with the specific legal issue raised by the application pending before the ECtHR”. Thus, the principle of autonomy of EU law would be respected.

Finally, she mentions Article 1 of Protocol No 8. She states that the proposed mechanism is compatible only “if safeguards are put in place to ensure that potential co-respondents are systematically and without exception informed of the existence of all proceedings in which they might have cause to make a request to become a co-respondent pursuant to the first sentence of Article 3(5) of the draft agreement, and that any requests for leave to become a co-respondent are not subjected to a plausibility assessment by the ECtHR pursuant to the third sentence of Article 3(5) of that draft”. After these amends said above, it would be compatible with the specific characteristics of the EU and EU law.

### *III.2.3 The principle of mutual trust between Member States*

Another discrepancy that somehow appears linked to the prior involvement procedure, is the problem referred to the principle of mutual trust between Member States. The ECJ innovates by making it a true constitutional principle, which until then was reserved only to the Area of freedom, security and justice.<sup>49</sup> This new hurdle for the accession was so unexpected that neither the doctrine nor even the AG Kokott mentioned this point in their works.

However, for the Court of Justice this principle is useful to ensure that the Member States respect the EU law and especially, the fundamental rights recognized in the Union.<sup>50</sup> It is

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<sup>49</sup> H. LABAYLE and F. SUDRE, *op. cit. supra*, page 6.

<sup>50</sup> Opinion 2/13 of the Court of Justice paragraphs 168 - 191.

essential also—as it states in paragraph 192—to “presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.

It would have been good if the ECJ had stopped at that point, but instead, it extended its scope and used it as another argument to make the accession of the EU to the ECHR not possible. In this sense, the ECJ criticized the Draft Agreement because “it treats the EU as a State to give it a role identical in every respect to that of any other Contracting Party”<sup>51</sup> considering it “liable to upset the underlying balance of the EU and undermine the autonomy of EU law”<sup>52</sup>.

But as LABAYLE and SUDRE greatly illustrate, the accession to the ECHR requires another logic. The Member States are the custodians and guardians of a common heritage benefiting from a collective guarantee. The interstate use of the Article 33 spells out that choice. The accession of the Union not only allows but even would require the Member States the monitoring in relation to the protection of fundamental human rights by another Member State. The contradiction is not direct but is nevertheless problematic, given the unexpected jurisprudential promotion of mutual trust between Member States of the European Union.<sup>53</sup>

#### *III.2.4 The Article 344 TFEU*

This is the last issue studied by the Court in its Opinion 2/13. The task here concerns the basic Community principle meaning by which the conclusion of an international agreement by the Union cannot affect either the allocation of powers fixed by the Treaties nor the autonomy of the EU legal system. This principle is stated in Article 344 TFEU,

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<sup>51</sup> Opinion 2/13 of the Court of Justice, paragraph 193.

<sup>52</sup> Opinion 2/13 of the Court of Justice, paragraph 194.

<sup>53</sup> H. LABAYLE and F. SUDRE, *op. cit. supra*, page 7.

according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. Taking into consideration Article 344 TFEU, the Court of Justice considered that the mere possibility of accession provides to Member States and the Union which request the ECtHR a claim based on Article 55 ECHR and “the very existence of such a possibility undermines the requirement set out in Article 344 TFEU.”<sup>54</sup>

In what concerns to AG Kokott, she mentioned this matter in her conclusions but she did not include any point regarding the incompatibility of it with the Treaties. She thought that if the aim was to lay down an express rule on the inadmissibility of inter-State complaints before the ECtHR and on the precedence of Article 344 TFEU as a prerequisite for the compatibility of the proposed accession agreement with EU primary law, this would implicitly mean that numerous international agreements which the EU had signed in the past are flawed, because no such clauses had been included in them. She concludes stating that she is of the view that “the draft agreement does not give rise to any legal concerns with regard to Article 344 TFEU, in conjunction with Article 3 of Protocol No 8”<sup>55</sup> because the possibility of “conducting infringement proceedings (Articles 258 TFEU to 260 TFEU) against Member States that bring their disputes concerning EU law before international courts other than the ECJ, with the added possibility that interim measures may be prescribed within those proceedings if necessary (Article 279 TFEU), is sufficient to safeguard the practical effectiveness of Article 344 TFEU”<sup>56</sup>

This argument of the Court of Justice has also been criticized by JAQUÉ in its analysis.<sup>57</sup> According to him, in order to ensure the fulfillment of Article 344 TFEU by Member States, it has to be a specific matter of the Union, the Commission and the Court to

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<sup>54</sup> Opinion 2/13 of the Court of Justice, paragraph 208.

<sup>55</sup> Conclusions of AG Kokott, paragraph 119.

<sup>56</sup> Conclusions of AG Kokott, paragraph 118.

<sup>57</sup> J.-P. JAQUÉ, “L’avis 2/13 CJUE. Non à l’adhésion à la Convention européenne des Droits de l’Homme ?”, 2015, en, <https://europe-liberte-securite-justice.org/2015/02/14/adhesion-de-lunion-europeenne-a-la-convention-europeenne-de-sauvegarde-des-droits-de-lhomme-et-des-libertes-fundamentales-compatibilite-avec-les-traites-ue-et-fue-avis-de-la/>.

complete this mission. All of this will be achieved — even if this argument contains certain limitations— by the fact that, in practice, largely because of diplomatic reasons, there are not a lot of interstate recourses in the system of ECHR.

### III.3 THE REASONING OF THE ECJ: TECHNICAL ARGUMENT

#### *III.3.1 The Common Foreign and Security Policy (CFSP)*

If we read carefully both, the conclusions of AG Kokott and the ECJ’s opinion, we will notice that the most important disagreement comes with what concerns the Common Foreign and Security Policy (CFSP). The Court of Justice has a limited jurisdiction in this area (art 24.1 TEU and art.275 TFEU). Already in the accessions negotiations this point was taken in consideration and even if it was the most controversial point and difficult one to find answers for, in Article 1.4 of the Draft Agreement was mentioned the possible answer given by the Member States, stating accordingly the first sentence that the draft agreement also provides for acts, measures, and omissions of national authorities when implementing EU law attributed to the Member States.

For AG Kokott, this does not create a problem with the accession, however, the ECJ has a totally different point of view. AG Kokott says that “The individual’s path to the national courts or tribunals is then laid down in any event, if he wishes to have acts, measures or omissions in the context of the CFSP that affect him in any way subjected to judicial scrutiny”<sup>58</sup> meaning that that tribunals of the Member States of the EU will ensure effective legal protection. Consequently, in her opinion, the judgment in Foto-Frost cannot be applied to de CFSP.<sup>59</sup> Therefore, the most important point is that in this way, “Effective legal protection for individuals, as required by Articles 6 and 13 ECHR, can also be safeguarded without the Court of Justice having jurisdiction to give preliminary rulings or a monopoly on ruling on validity.”<sup>60</sup>

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<sup>58</sup> Conclusions of AG Kokott paragraph 98.

<sup>59</sup> Conclusions of AG Kokott paragraph 100.

<sup>60</sup> Conclusions of AG Kokott paragraph 102.

On the other hand, she also states that the prior involvement procedure will be applied only when the ECJ has at the same time jurisdiction to interpretate the EU law in respect of the CFSP and to review the legality of the activities of the EU institutions. Otherwise, she underlines that the powers would be extended, being contrary to the Article 4.1 TEU, Article 5.1 and 5.2 TEU and Article 6.2 TEU.<sup>61</sup> To make it possible, the EU should recognize the jurisdiction of the European Court of Human Rights (ECtHR), something that never have happened until now. AG Kokott finds that the principle of Autonomy is not an obstacle for the EU to recognize “the jurisdiction of an international court in a particular case, jurisdiction that would extend further than that of the EU institution which is the ECJ”<sup>62</sup>. She finds out that this situation has been already foreseen by the authors of the Lisbon Treaty through the Article 6 TEU, stating that those actors do not find any contradiction between the limited jurisdiction of the Courts of the EU and the recognition of the jurisdiction of the ECtHR by consequence of the EU’s accession.

The Court however, found that after the accession, “the ECtHR would be empowered 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 in the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights”<sup>63</sup>. After having said that, in paragraphs 256 and 257 it concluded with no more reasoning that “the agreement fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters”, justifying that “jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU”.

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<sup>61</sup> Conclusions of AG Kokott paragraph 188.

<sup>62</sup> Conclusions of AG Kokott, paragraph 191.

<sup>63</sup> Opinion 2/13 of the Court of Justice of EU, Paragraph 254.

### *III.3.2 The prior involvement procedure*

Furthermore, another contradiction that we can find concerns the prior involvement procedure. It can be noted that AG Kokott does not see any real problem against the prior involvement procedure. However, in paragraph 183 she claims that a decision on the necessity to use the prior involvement procedure must be made by the ECJ, because “ultimately the Court of Justice itself is the only reliable authority on whether it has previously dealt with the specific legal issue before the ECtHR regarding the compatibility of a particular provision of EU law with one or more fundamental rights protected by the ECHR”.

Contrary to AG Kokott, the ECJ is not convinced that this has been secured through the Draft Agreement. This approach by the Court of Justice was quite surprising because the mechanism was introduced in the Draft Agreement in accordance with the requirements expressed by the Court of Justice in the Discussion Document of 2010<sup>64</sup> and in the Joint communication from Presidents of the ECHR and ECJ<sup>65</sup>. The first reason that made the ECJ’s decision unexpected was the interpretation it did, pretending that the declarations just mentioned above did never exist. The Draft Agreement in its Article 3.6 collected the patterns required by the ECJ to guarantee that the Draft Agreement was compatible with the Union Treaties. Nevertheless, the Court found out that “having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the ECJ provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved”<sup>66</sup> because “limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of ECJ in that it does not allow the Court to provide a definitive interpretation of secondary law in the

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<sup>64</sup> *Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* of 5 May 2010, paragraph 9, 11, 12, en [http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf).

<sup>65</sup> *Joint communication from Presidents Costa and Skouris*, January 2011, paragraph 2 en [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjue\\_english.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf).

<sup>66</sup> Opinion 2/13 of Court of Justice, paragraph 248.

light of the rights guaranteed by the ECHR”.<sup>67</sup> The Court of Justice finds that the Draft Agreement “excludes the possibility of bringing a matter before the ECJ in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure”<sup>68</sup>, something that according to the Court, as it states in paragraphs 245-246, is not acceptable because it would suppose a “breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.” Therefore, the Court ruled that the prior involvement mechanism provided for by the Draft Agreement goes against the specific characteristics of the EU and EU law to be preserved.

Out of this line, the AG Kokott, in her opinion stated that she considered “doubtful whether the prior involvement provided for in Article 3(6) of the draft agreement does in fact constitute a new competence of the ECJ at all; it is certainly arguable that the prior involvement of the Court in proceedings pending before the ECtHR merely represents a new means of exercising the existing judicial powers of the Courts of the EU in accordance with the second sentence of Article 19(1) and Article 19(3) TEU”<sup>69</sup>

It is necessary to mention at this point that the reasoning given by the ECJ was not received very well by the doctrine. In this sense, J. MARTÍN Y PÉREZ NANCLARES mentions that if the ECJ have really had the will, it would have the juridical margin to make an interpretation in accordance with the Article 6.2 TUE and Protocol No 8 from one side and Article 19.3 and 51 TUE from the other side. Accordingly, it would have been possible to introduce the convenient reserve in what concerns to putting into practice of the Article 3.6 of the Draft Agreement. But far from this reasoning, the Court of Justice made a forced interpretation to justify the incompatibility of the Draft Agreement with the EU law, reaching the conclusion that it hinders the preservation of the specific characteristics of the EU and EU law.<sup>70</sup>

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<sup>67</sup> Opinion 2/13 of Court of Justice, paragraph 247.

<sup>68</sup> Opinion 2/13 of Court of Justice, paragraph 243.

<sup>69</sup> Conclusions of AG Kokott paragraph 66.

<sup>70</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, page 852.

### *III.3.3 The non-understandable interpretation of the Protocol N° 16*<sup>71</sup>

Last but not least, the Protocol 16, signed on October 2 2013, provided for the introduction of a voluntary preliminary ruling procedure in the ECHR system. By that procedure, certain of the highest courts and tribunals of the contracting parties to the ECHR can request the ECtHR to give an advisory opinion on the interpretation of the ECHR and its Protocols.

The Draft Agreement does not state anything about this issue and according to the Court's view, in the moment the accession had come into force, the ECHR would become an integral part of Union law and the mechanism established by the Protocol No 16 could affect the independence and effectiveness of the preliminary ruling procedure established in Article 267 of TFEU, especially when the rights guaranteed by the Charter correspond to those recognized by the ECHR.<sup>72</sup> This conclusion comes from the fact that—in accordance with the Court—“In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.”<sup>73</sup> Summarizing, once more, the ECJ does not make any effort to overcome the risks and avoid that fact without blocking the entire accession.

From the other side, AG Kokott, again, does not share the Court's view and she does not find impossibilities to make the Draft Agreement compatible with the EU law. She deals with this matter in paragraphs 136-142 and according to her, the consequences that Protocol No 16 may provoke are completely independent from the fact of the accession of UE to the ECHR. She argues that despite the fact that the accession would not be possible, “courts and tribunals of Member States which have ratified Protocol No 16 can

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<sup>71</sup> J. MARTÍN Y PÉREZ NANCLARES *op. cit. supra*, page 841.

<sup>72</sup> Opinion 2/13 of the Court of Justice, paragraphs 199-200.

<sup>73</sup> Opinion 2/13 of the Court of Justice paragraph 198.

turn to the ECtHR with questions on fundamental rights relating to the interpretation of the ECHR, instead of referring to the ECJ questions that are identical in substance but relate to the interpretation of the Charter”<sup>74</sup> But in the hypothetical case where the accession could happen, in order to solve this problem, she states that it would be enough to make a reference to the third paragraph of Article 267 TFEU, which imposes on the Member State’s courts and tribunals of last instance a duty to refer matters to the Court of Justice for a preliminary ruling.<sup>75</sup>

This has been another criticized point of the Opinion 2/13 because first of all, the Draft Agreement does not foresee the accession of EU to this Protocol. What is more, the signing of the Protocol No 16 happened on October 2, 2013, while negotiations around the Draft Agreement had already concluded by April 5, 2013. Thus, as the AG Kokott said, the undermining of autonomy would not be the consequence of the accession. In addition, it has not been convincing the fact of seeing the Protocol No 16 incompatible because even in the cases that punctual breach could happen, it already exists in the legal system of the Union enough judicial and legal mechanisms to solve the problem, including the one foreseen in Articles 258-259 TFEU.<sup>76</sup>

According to JAQUÉ, this was an internal question that could be solved by a return by the ECJ to the rule of loyal cooperation between Member States and Member States and EU institutions. He concluded regretting the image left by the Court of Justice when it used the following argument: “This attitude of the ECJ unfortunately gives the impression of an institution that does not trust the internal discipline of the Union and seeks to obtain protection in an agreement concluded by the Union whereas normally compliance with these rules should be provided by the EU institutions without the need for external protection. The distrust of Strasbourg adds to the distrust of national supreme jurisdictions.”<sup>77</sup>

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<sup>74</sup> Conclusions of AG Kokott, paragraph 140.

<sup>75</sup> Conclusions of AG Kokott, paragraph 141.

<sup>76</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, page 842.

<sup>77</sup> J.-P. JAQUÉ, *op. supra. cit.*

In the end, what it can be deduced is that the Court of Justice is afraid of the fact that through the consultation to the ECtHR, it could set the pace— in its decision— for an interpretation of one right included in the Convention, which would be liable of prejudging the interpretation that the ECJ could make about the same right. It seems to be reasonable that the duty of a correct interpretation of the rights belongs to the ECtHR, being its criteria the same for all the parties, including the Union. However, in front of this situation, the ECJ decides to carry out a standard interpretation of the human rights, the principle of mutual trust, the Protocol No 16 and even of the relation of the Articles 53 of the Charter and ECHR.<sup>78</sup>

AG Julianne Kokott has declared that the “recognition by the EU of the jurisdiction of the ECtHR should not be seen as mere submission, but as an opportunity to reinforce the ongoing dialogue between the Court of Justice and the ECtHR,”<sup>79</sup> even though, the Court of Justice holds to the Article 53 of the Charter and states that “the ECJ has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law” and “that principle (principle of mutual trust between the Member States) requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law”<sup>80</sup>. In the end, the ECJ pretends to avoid a circumvention of the principle of supremacy thanks to a neutralizing reading of Article 53 of the Charter<sup>81</sup>. The declaration that lead to declarations such as “Opinion 2/13 is based on a concept of the autonomy of EU Law which borders on Autarky”<sup>82</sup>.

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<sup>78</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, page 844.

<sup>79</sup> Conclusions of AG Kokott, paragraph 164.

<sup>80</sup> Opinion 2/13 of the Court of Justice, paragraph 191.

<sup>81</sup> H. LABAYLE and F. SUDRE, *op. cit. supra*, page 6.

<sup>82</sup> P. EECKHOUT, “Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue—Autonomy or Aurtarky?” *Jean Monnet Working Paper 1/2015*, *Jean Monnet Center for International and Regional Economic Law & Justice*, NYU, School of Law, [www.JeanMonnetProgram.org](http://www.JeanMonnetProgram.org), page 39.

## **IV. FINAL CONSIDERATIONS**

In brief, taking into consideration what it has been exposed, it can be confirmed that from the ends of the seventies the accession of the Community (later denominated the Union) to the Convention is presented as an unavoidable need, an acquired fact that only the skill of the diplomats would be capable of making it real. The Court of Justice did not accept this vision and said that all those who were neglecting the perseverance of its attachment to a “constitutional” lecture of the question were wrong, argument that was already used in Opinion 2/94. Its insistence to favor such a vocabulary in the "preliminary considerations" of the Opinion 2/13 obviously refers to paragraph 75 of the *Loizidou* Sentence that the Convention would be the "constitutional instrument of European public order".<sup>83</sup>

The Court of Justice, under the ground of refusing any conventional dilution, preferred to continue developing its own constitutional logic, indifferent to the proclamation of the judge of Strasbourg. As we can see, it denies any kind of setback of the construction built a half century before. Its reasoning had not been material but absolutely structural.

However, this position is not new. The AG Poiares Maduro in his conclusions in the case *Kadi*<sup>84</sup> had already stated it and, recently, the president of the Court of justice repeated it in the moment of the debates of the international Federation for the European right (FIDE) in Copenhagen in 2014: the Court of Justice is not a Court of the human rights but the supreme Court of the Union. In fact, its reasoning is exclusively taken with regard to internal worries, those of autonomy and specificity of the law of the Union. To the point that the latter takes precedence in its mind to those relating to the consistency of the guarantee of fundamental rights in the European Union. And, as Labayle and Sudre state, this is totally wrong because the task of a constitutional judge includes the guarantee of fundamental rights, and it realizes this function without the latter outweighs its

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<sup>83</sup> H. LABAYLE and F.SUDRE, *op. cit. supra*, page 14.

<sup>84</sup> *P. Kadi and Al Barakaat International Foundation v. Council and Commission*, demanda num. 315/01 de 21 de septiembre de 2005.

fundamental mission: to tell the law. This mission is objective, not required in almost all cases to decide an individual grievance but to make essential compromises and conciliations to control of legality incumbent on it. We are far from a Human Rights' Court.<sup>85</sup> And the thing is that most of the readers will see this as an outdated logic, mostly since the Treaty of Lisbon has been declared binding.

The debate on the paper of the mutual trust in the core of the EU law takes here all his dimension. The Court opposes to the values proclaimed by the Treaties with an exclusively praetorian principle. This instrumentalisation of mutual trust fits only if it is explained by a simple desire of opposing an advance in the Strasbourg caselaw. The "exceptional circumstances" referred by the paragraph 191 of the opinion 2/13 can be interpreted as a slope on which the right of the Union would compromise itself, to the explicit invitation of the Court. The specificity of the EU law would express in almost blind confidence that it would tie the Members States around their project of integration. This would mean the relegation of the fundamental rights to a second line in spite of the primary line that the Charter gives them.<sup>86</sup>

Undoubtedly it is in this way that the controversies in relation to the Melloni judgment<sup>87</sup> and the interpretation of the Article 53 or the Charter make sense. Just, because "the Melloni judgment appears as the refounder of the authority of the law of the Union in a context of constitutional and judicial pluralism"<sup>88</sup>, and the opinion 2/13 resumed its approach on its own. Once the lines of authority are closed, the Court argues in terms of exclusivity.

The Court of Justice could adjust its position otherwise. The "preliminary considerations" of the opinion 2/13 suffer a double silence. The first is the lack of hierarchy of arguments that were used to oppose the draft Accession. The thing is that for the accession in the

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<sup>85</sup> H. LABAYLE and F. SUDRE, *op. cit. supra*, page 15.

<sup>86</sup> H. LABAYLE and F.SUDRE, *op. cit. supra*, page 15.

<sup>87</sup> Stefano Melloni vs Ministerio Fiscal español, Asunto C-399/11, 23 de febrero de 2013.

<sup>88</sup> E. DUBOUT, "Le niveau de protection des droits fondamentaux dans l'Union européenne : unitarisme constitutif versus pluralisme constitutionnel, réflexions autour de l'arrêt Melloni" *Cahiers de droit européen* 2014, page 294.

Treaties there is a legal basis which states the urge to order and prioritize the constitutional obstacles, written and unwritten, drawn to the accomplishment of a major objective: a better guarantee of fundamental rights. And this is not that case.

#### IV.1 PARADOXES OF THE ACCESSION<sup>89</sup>

The merits of the supposed accession have been repeatedly underlined and, it has been demonstrated the coherence of the global system of guarantee of human rights which would be made across the European continent. Conferring a *rationne personae* jurisdiction to the ECHR to be able to know the complaints against the acts of the Union, would mean that we would go from an “internal control” of the fundamental rights guaranteed in the Union by the ECJ based in the principle of the Carter to an “external control” exercised by the ECtHR, which would control the interpretation of the Convention made by the ECJ when the Charter would be applicable, assuring the harmony between the Convention and the Charter, and that, in favor of the interests of both, the litigants and the Member States. We cannot however ignore the planned accession and the institutionalization that it implies. It offers a compelling articulation of the relationship between the European Union and the Convention. The accession is indeed based on a double paradox.

Paradox, in the first place, because of the will of the Union to build its own system of protection of fundamental rights, leading to an "internalization" of the Convention which is already integrated into the primary law of the Union through the Charter (art 52.3) and its protection control entrusted to the ECJ, and on the other hand, because of the "externalization" of the control of the Convention devolved by the European Union.

This contradiction is only solved through the fiction analogy of EU as a State. With the accession, the EU would find itself in a similar situation to the already existing in the legal systems of Member States, whose constitutions protect the fundamental rights and who have agreed the exercise of an external control by ECtHR to protect the human rights. But the EU is not a State – and the ECJ cannot be assimilated to a national supreme court

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<sup>89</sup> H. LABAYLE and F. SUDRE, *op. cit. supra*, page 16.

placed, more or less, under the control of the ECtHR. Moreover, in the point of view of Strasburg, it should be noted that the ECtHR is not betrayed and it recognizes the specificity of the Union calling it “a supranational organization”.

Paradox, in second place, because the accession is based almost mechanically on a vertical articulation, a hierarchical one, in the relationship between the legal order of the European Union and the Convention, a Convention that at the time did not seem to respond to a modern conception of the relationship between legal systems and, above all, is out of step with the flexible articulation mode, played by the criterion of equivalent protection of the *Bosphorus* case.

The accession places the ECtHR at the top of the building and induces the subordination of the ECJ. And in this situation, the Professor MANIN stated that "the submission of any entity to "external" control results in a certain way in a loss of autonomy."<sup>90</sup> And it is not the national supreme courts of Member States which will deny this affirmation... In addition, the uncertainty of the hierarchical rank that will hold the European Convention in the legal order of the European Union at the end of the accession of the Union can only confirm this analysis.

On the other hand, all the Opinion 2/13 is versed by the "resolutely defensive attitude" of the Court of Justice. Everything is said in paragraph 183 of the Opinion under the preservation of "specific characteristics and (of) the autonomy of Union law": the intervention of the ECHR "does not have the effect to impose the Union and its institutions in the exercise of their internal competences a particular interpretation of the rules of law of the Union "- including the Charter of fundamental rights<sup>91</sup>

And the Court of Justice will denounce everything which, in its opinion would be likely to prejudice its exclusive jurisdiction to rule on fundamental rights in the European Union.

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<sup>90</sup> P. MANIN “ L’adhesion de l’Union européenne à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales”, in L.S. ROSSI (dir) *Vers une nouvelle architecture de l’Union européenne*, Bruylant, 2014, page 261.

<sup>91</sup> Opinion 2/13 of the Court of Justice, paragraph 186.

## IV.2 IMMEDIATE REACTIONS TO THE OPINION 2/2013

Once the Opinion was delivered on 18 December, 2014, the first reactions to the ECJ's negative Opinion on the Accession Agreement arrived very quickly. The vast majority of the Doctrine resulted to be disappointed with the resolution delivered by the Court of Justice, mainly because after all the negotiation process and the will and the dedication that all the Member States put in the Draft Agreement, there was a true hope that the accession would at last be materialized and even if the Court had particular reservations or concerns about certain elements of the Agreement, it was expected that the Court would still approve it, perhaps suggesting minor modifications to address these concerns.<sup>92</sup> Indeed, this was the position of the Advocate General and the European Commission, the Parliament and the Council.

But the truth is that it is the 6<sup>th</sup> occasion where the Court of Justice delivers a negative opinion about an international agreement that EU pretends to celebrate (Opinions 1/59, 1/76, 1/91, 2/94, 1/09 and 2/13). It is curious to see how four of those agreements introduced the creation of a new international jurisdiction, and how has the ECJ never pronounced in favour of such an incorporation. Thus, taking what I have just mentioned into consideration, it may be understandable to easily find phrases of commentators like: "The match ECJ vs ECHR is winning the first one 2-0"<sup>93</sup>, "the dream of accession becomes a nightmare"<sup>94</sup> or "definitive door slam to the accession"<sup>95</sup> or "veto to the accession"<sup>96</sup>

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<sup>92</sup> J. ODERMATT, "A giant Step Backwards ? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights". Working Paper No. 150, February 2015, page 11.

<sup>93</sup> J.P. JAQUÉ "CJUE – CEDH: 2-0", *Revue Trimestrielle de Droit Européen*, 2014, pages 823-832.

<sup>94</sup> S. PEERS, "The EU accession to the ECHR: the dream becomes a nightmare", *German Law Journal*, Vol. 16. No. 01, pages 213-222.

<sup>95</sup> A. LAZOWSKI and R. WESSEL "When Caveats Turn into Locks: Opinion 2/13 on Accession of the EU to the ECHR" *German Law Journal*, 2015, num. 2.

<sup>96</sup> R. ALONSO GARCÍA, "Análisis crítico del veto judicial de la UE al CEDH en el Dictamen 2/13, de 18 de diciembre de 2014", Working papers on European Law and Regional Integration, *WP IDEIR*, 2015, n°26, pages 1-31.

However, it has not been only the doctrine that has criticized the Opinion delivered by the Court of Justice, but also the ECtHR and the National Constitutional Courts of Member States have reacted to the Opinion. After the ECJ has isolated itself with the position taken in the Opinion 2/13 it would not be surprising that the ECtHR will look over its caselaw about the “equivalent protection” when it has the chance to do so, but either that the National Constitutional Courts of Member States would toughen up their scope of acceptance of the primacy principle of the EU.<sup>97</sup>

In what concerns to the ECtHR, the president of the Court valued the Opinion as “a great disappointment”<sup>98</sup> stating that the victims of this situation were the citizens that cannot see the Acts of the EU subjected to the same external control of the Member States. He stated this more clearly in his inaugural speech of the juridical year of ECtHR:

“For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention’s territory, wherer the violation can be imputed to a State or to a supranational institution. Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations”

In addition, the responsible of the direction of Legal Advice and International Public Law in the Council of Europe, Mr Jörg POLAKIEWICZ, has given clues of how the Opinion has been received in Strasbourg stating from one side that “the opinion gives the impression to be more concerned about the autonomy and primacy of EU law than about substantive rights” and on the other side that “it would be an illusion to think that fundamental rights protection by the Luxembourg courts can be a substitute for accession”<sup>99</sup>.

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<sup>97</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, page 862.

<sup>98</sup> D. SPIELMANN, “Foreword”, *Annual Raport 2014*, Strasbourg, 2015, page 6.

<sup>99</sup> Available in <http://www.coe.int>

In this situation, the ECtHR might reread the dissenting opinions of *Bosphorus*<sup>100</sup> case, just because after the Opinion 2/13 it is possible to be taken that position of those opinions by the ECtHR. What is more, it should be important for the ECtHR that in any moment of the Opinion there is a reference about how would the accession of the UE to the ECHR affect to the reinforce of the protection of the fundamental human rights.

As far as national Constitutional Courts of Member States refer, they could articulate an answer either in the concrete area of limiting the attribution of competences to the EU or even in the area of fundamental rights itself. The German Constitutional Court, was based on the caselaw settled in Kadi case, in what concerns to the pre-eminence of the autonomy of EU law in front of the International Law to try to justify the identical requirement of the autonomy of German constitutional law in front of the EU law. In this sense, Ferdinand Kirchhof has questioned why there is not any similar mechanism to prior consultation to the ECJ between ECJ and Constitutional Courts of Member States for the cases that it would have to pronounce about cases affecting domestic Constitutions.<sup>101</sup>

All in all, the ECJ has chosen a “stark reading of the sui generis nature of the community construction and of the monopoly granted to it.”<sup>102</sup> The number of obstacles that have settled down, besides not being *numerous clausus*, blocks any chance of judicial dialogue between ECJ and ECtHR, forbidding the last one to have the natural position it should have the major interpreter of ECHR. And this cannot be appropriate for the required judicial dialogue in the EU. It might lead into an era of judicial disputes in regard to the acceptance of legal consequences that the specificities of EU law causes in the judicial control exercised by the ECtHR and the Constitutional national courts.<sup>103</sup>

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<sup>100</sup> Although it has not done it yet, see *supra* Avotnis case in note 30.

<sup>101</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, pages 864-865.

<sup>102</sup> P. EECKHOUT, “Opinion 2/13 on EU accession to the ECHR and judicial dialogue: autonomy or autarky?”, *Fordham international Law Journal*, vol 38, pages 955-992.

<sup>103</sup> J. MARTÍN Y PÉREZ NANCLARES, *op. cit. supra*, page 866.

## **V. CONCLUSIONS**

These conclusions are going to be exposed from my personal point of view after what I have read from a lot of commentators' works.

What I clearly set from all of this situation is that the Accession Agreement represents a carefully negotiated compromise, the culmination of over three years of negotiations between representatives of the EU and 47 Council of Europe members.<sup>104</sup> The negotiation sought to have the EU acceded as far as possible under the same conditions as the other contracting Parties taking into consideration the specific characteristics of the EU. The Court of justice however, tried its best to protect the supremacy even if that meant to refuse the Draft Agreement and declare it non-compatible with the EU law and despite the fact that AG Kokott, Member States and President's joint communication had supported the Draft Agreement.

I firmly believe that the Court had already decided to reject the accession, and found as many possible ways to prevent this from happening. I guess that because of the declaration the ECJ made in paragraphs 162-164. Firstly the Court recognised the duty of the accession of the EU to the Convention – First sentence of Article 6(2) TEU – but it does not pay attention to that sentence. On the other hand, it highlights in the second one, i.e. in the second sentence of the same article which states that “the accession must not affect the Union's competences as defined in the Treaties” nor “must it interfere with the specific characteristics of the EU” – Protocol No 8 – .

I mean, the Court states in paragraph 164:

“For the purposes of that review, it must be noted that, as is apparent from paragraphs 160 to 162 above, the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law.”

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<sup>104</sup> J. ODERMATT, *op. cit. supra*, page 13.

Taking what I have just mentioned above into consideration, it looks clear to me that the Court pretends to empathize that the accession of the EU to the Convention is not an absolute obligation but a conditional one, which means that the EU will accede to the accession if all the conditions are met. With this point of view, maybe we can better understand Opinion 2/13.

Once the premise of the Court is settled down and based on that premise it develops a number of grounds which let it not to concede the position of supremacy. With this “selfishness” and self-interest of the Court of Justice, in the end, as SPIELMANN stated, results that the most affected ones are the citizens because they are not going to be able to see subjected the acts of the EU.

This makes me think that, one more time in history, the power is above everything and everyone and that there is no one who accepts, and if it accepts, it is willing to pass up the position of supremacy so that it can have a higher court in this case, whose task would be the common good, by protecting the fundamental human rights.

The European Court of Justice wasted a really great opportunity to carry this situation in a complete different way and with that it made a setback in regard to judicial dialogue between the different legal systems. It makes the impression that the ECJ is willing to maintain a dialogue only when its decision will be irrevocable, but not when there is an external Court which is capable of disagreeing and taking down its actions.

And that is the core of the matter because in the end, all that the accession of the EU is about, is the ability of the ECtHR would have to protect the fundamental human rights in front of the acts of EU. In that sense, whilst the EU keeps making resistance to an external control in respect of fundamental rights, the ECJ will maintain the defensive and closed attitude demonstrated in opinions such as the one we have studied, and that will be the one predominating in the European Union.

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