Sieps

Swedish Institute for European Policy Studies

2015:3

The accession of the EU to the European Convention on Human Rights

A critical analysis of the Opinion of the European Court of Justice

Joakim Nergelius

THE EU'S POLITICAL AND CONSTITUTIONAL SYSTEM

Joakim Nergelius

The accession of the EU to the European Convention on Human Rights

A critical analysis of the Opinion of the European Court of Justice

– SIEPS 2015:3 –

Report No.3
June 2015

Published by the Swedish Institute for European Policy Studies

This publication is available at www.sieps.se
The opinions expressed in the publication are those of the author.

Cover design by LuxLucid
Printed by EO Grafiska AB

Stockholm, June 2015

ISSN 1651-8942
ISBN 978-91-86107-54-3

Preface

The European Court of Justice (ECJ) has a reputation of being a court which adopts activist rulings for the purpose of enhancing European integration. This reputation may be bolstered by the Opinion by the Court from last year, which responded to the question whether or not the EU could accede to the European Convention on Human Rights (ECHR) on the conditions laid down in the draft accession agreement proposed jointly by the Council of Europe and the EU. By providing a negative answer to this question, the ECJ clearly expresses that it wishes to protect the autonomy of the European Union by attempting to exclude the Strasbourg Court from as many EU related matters as possible.

While the author of this report indeed indicates that the ECJ has gradually paid more and more attention to the respect for human rights he also points to the fact that there are still situations when it is particularly difficult to balance the EU's protection for fundamental rights on the one hand with economic freedoms on the other. The ECJ seems to fear that in particularly difficult situations the EU legal system could be challenged if the Strasbourg Court were allowed to rule on matters which relate to the EU legal order.

This timely report provides a critical analysis of the Court's Opinion from a legal point of view. As an example, it reflects the Opinion in the Court's own case law and discusses whether the Court maintains a consistent approach towards the balancing between the EU's protection for fundamental rights and the protection for the economic freedoms.

Arguably, the debate on the EU's protection for human rights has gained even added recency since the UK government declared its intention to amend the Human Rights Act, which implements the ECHR into British law, only a couple of weeks ago. By issuing this report, SIEPS hopes to contribute to the further debate on the European protection for fundamental rights and its balancing against the European economic freedoms.

Eva Sjögren
Director, SIEPS

About the author

Joakim Nergelius has been Professor of Law at the University of Örebro since 2003. He previously worked at the European Court of Justice and the EU Committee of Regions. Among his publications in recent years are *The Constitutional Dilemma of the European Union* (2009) and *Svensk statsrätt* (3rd edition, 2014). For SIEPS, he has written *The Hungarian Constitution of 2012 and its Protection of Fundamental Rights* (2012:3epa).

Table of contents

List of abbreviations

CfR	EU Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CRM	Co-respondent Mechanism
DAA	Draft Accession Agreement for EU accession to the ECHR
ECHR	European Convention on Human Rights
ECJ	European Court of Justice, Luxembourg
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights, Strasbourg
EEC	Treaty establishing the European Economic Community
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union

Executive summary

Towards the end of 2014, the European Court of Justice (ECJ) delivered its Opinion (2/13) on whether the EU might accede to the European Convention on Human Rights (ECHR) in the (near) future. In very clear words and using a number of different arguments, the Court rejected this accession, at least under the conditions laid down in the so-called Draft Accession Agreement (DAA) that was concluded in 2013.

This was not the first time that the ECJ had dealt with this question and not the first time that the Court had argued against such an accession, since this also happened in 1996 in Opinion 2/94.[1] However, this time, both the background and the circumstances were very different, compared to the situation in 1996. The negative opinion of the ECJ was much more surprising this time, when the negotiations necessary to enable the EU to accede, which had gone on since 2010, had advanced much further, and when the political expectations for an accession were, in most European states (including both EU Member States and others), much greater. This new situation is most clearly expressed in art. 6 sect. 2 in the Treaty on European Union (TEU), which has, since the Lisbon Treaty entered into force in 2009, stated that the EU "shall" accede to the ECHR. Also, the Additional Protocol 14 to the ECHR makes accession easier for the EU than it was twenty years ago.

The legal significance of art. 6 (2) TEU may, of course, now be questioned in view of the very clear, precise arguments against such an accession recently presented by the ECJ. But the provision still exists, which may even cause Opinion 2/13 to seem like a living contradiction to the Treaty. It is thus logical that this opinion has now, in a few months' time, caused a huge legal debate throughout Europe.

In this report, the Opinion and its legal, as well as some of its possible political, consequences for Europe will be analysed and discussed at some length. It is clear that the issue of human rights protection within the EU has gradually become more important, in particular, in the last twenty years, and it is now more important than ever. Having that in mind, the legal background of the Opinion is presented here. After that, the Opinion itself is dealt with and analysed. Finally, its legal and political consequences are discussed. Thus, the content, as well as the consequences, of the somewhat surprising Opinion are here in focus.

Concerning the Opinion itself, it is clear that, out of the total of seven reasons that the Court of Justice has found for rejecting the accession, five are legally more important and interesting than the others. Those five range from the

[1] Opinion 2/94, ECR 1996 I p. 1759.

Common Foreign and Security Policy (CFSP) to procedural issues, such as the so-called co-respondent mechanism (CRM), whereby the EU would be able to act before the European Court of Human Rights (ECtHR) alongside an EU Member State. All five of those issues are analysed critically and in some detail. Above all, a legal problem may be that the ECJ has now repeated or maintained a controversial line of reasoning that was originally laid down in the Melloni case from 2013[2], by requiring not only a so-called mutual trust between the Member States in human rights matters – in relation to the human rights standards in these different states – but also stating that this excludes the jurisdiction of the ECtHR in many cases, at least in the manner stipulated by the Draft Accession Agreement.

The implications of this position of the ECJ for the human rights situation in Europe is here analysed in some detail, from legal and various constitutional perspectives (including how it will affect the future dialogue and relationship between the ECJ and national supreme or constitutional courts). The ECJ seems to be very worried about sharing jurisdiction with the ECtHR for many issues for which it has, so far, been the sole or main interpreter of the legal situation. Such concerns may sometimes, but not always, be justified. In the report, the arguments used by the ECJ are discussed with respect to the different areas in which they are put forward.

However, according to the EU Treaties, the ECJ has a kind of veto power in relation to international agreements that are to be signed by the EU (art. 218 (11) in the Treaty on the Functioning of the EU). Thus, the EU, as well as the Council of Europe, must take Opinion 2/13 into account and base any future action on the critical remarks made by the Court. What will this mean in reality?

Both the current Latvian Presidency of the EU and the EU Commission have assured that the negotiations aimed at an EU accession will continue, though now based on the Court's criticism. The issue will be discussed at the EU General Affairs Council meeting in June 2015. Also, the Council of Europe has shown an interest in continued discussions. For political reasons, it is perhaps difficult to say anything else, since much prestige has already been invested in those negotiations and many European governments probably wish the accession to take place. Nevertheless, from a strictly legal point of view, it seems to be a very difficult task to adjust the DAA to the many hurdles now imposed by the ECJ. A new revision of the EU Treaties, where the whole issue of human rights protection in Europe is seen as one of a number of important political and constitutional issues requiring a treaty change – together, e.g., with issues related to the financial crisis – may, in fact, be a more realistic scenario.

[2] Melloni, C-399/11, ECLI:EU:C:2013:107.

Regardless of what happens in that respect, Opinion 2/13 also poses some urgent issues concerning the future of European human rights protection in a wider sense. Given the many obstacles that the ECJ has found to an accession and the changes that the Court wishes in order for it to happen, is it even clear that the accession would be beneficial for human rights? And, also having the Melloni judgement in mind, what will be the future relationship, not only between the two mighty European courts, but also between those two and the highest courts of the EU Member States?

1 Introduction

Just before Christmas 2014, the EU Court, officially the European Court of Justice (ECJ), delivered its Opinion (no. 2/2013) on whether the EU might accede to the European Convention on Human Rights (ECHR) in the (near) future. In very clear words and using a number of different arguments, the Court rejected this accession. This was not the first time that the ECJ had dealt with this question and not the first time that the Court argued against accession, since exactly the same thing happened in 1996, in Opinion 2/94.[3] However, this time both the background and the circumstances were very different from 1996. Generally speaking, it must be said that the negative opinion of the ECJ was much more surprising this time, when the negotiations necessary for enabling the EU to accede had advanced much further and when the political expectations for an accession were, in most European states (including both EU Member States and others), much greater. This new situation is most clearly expressed in art. 6 sect. 2 of the Treaty of European Union (TEU), which has since 1 December 2009, when the Lisbon Treaty entered into force, stated that the EU "shall" accede to the ECHR. The legal significance of this important Treaty provision may of course now be questioned, in view of the harsh language, determined attitude and very clear, precise arguments against such an accession recently presented by the ECJ. Nevertheless, it still exists, which may even make Opinion 2/13 seem somewhat of a living contradiction. It is thus logical that this opinion has, within a few months, caused a huge legal debate throughout Europe.

In this report, the Opinion and its legal as well as some of its possible political consequences for Europe will be analysed and discussed at some length. It is clear that the issue of human rights protection within the EU has gradually become more important, in particular in the last twenty years, and is now more important than ever. First, however, the legal background to the opinion will be presented.

[3] Opinion 2/1994, ECR 1996 I p. 1759. Here, the issue was whether the former EC, European Community, could accede to ECHR.

2 Legal and political background to the Opinion

2.1 Historical background

The question of the role and the legal status of human rights within EU law is far from new. In fact, already in 1953, in its draft Treaty establishing the European Community, the ad hoc assembly of the European Coal and Steel Community (ECSC) argued, without success, for the integration of crucial provisions of the ECHR into the EEC Treaty. The reason why this did not happen was mainly that the EEC and ECSC treaties were seen as mainly economic treaties, with no place for human rights and other "soft values".[4] The ECJ confirmed and even stressed this view in 1959[5], but this was soon going to change.

In the 1960s it gradually became evident that as EU law was constantly growing in its scope and importance, the need to protect human rights within this new legal order grew simultaneously. The ECJ then started to develop a new jurisprudence in human rights issues, starting with the Stauder case in 1969.[6] In a number of cases in the following decade, the Court stated that the human rights that were to be found in the general principles of (EC) law[7], in international conventions in general[8], in the common constitutional traditions of the Member States[9] and, finally and with more precision, in the ECHR[10] were also a part of EC law. The result was a rather high degree of human rights protection. This has nevertheless been criticized as being merely an aspect of excessive "judicial activism" from the Court[11], as weak since it found its legal base entirely in case law and as applicable only when EU law as such is applicable from a material point of view.[12]

---

4 See Jean Paul Jacqué, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, Common Market Law Review (CMLR) 2011 p. 995-1023.

5 Stork, Case 1/58, ECLI:EU:C:1959:4.

6 Stauder, Case 26/69, ECLI:EU:C:1969:57.

7 Ibidem.

8 Internationale Handelsgesellschaft, Case 11-70, ECLI:EU:C:1970:114.

9 Nold, Case 4/73, ECLI:EU:C:1974:51.

10 Hauer, Case 44/79, ECLI:EU:C:1979:290.

11 See notably Hjalte Rasmussen, On Law and Policy in the European Court of Justice, Dordrecht/ Boston/Lancaster 1986.

12 See e.g. A.G. Toth, The European Union and Human Rights: The Way Forward, Common Market Law Review (CMLR) 1997 p. 492 ss: "First, it is by no means clear what is the legal basis for the Court's case law and, therefore, for the protection of human rights in the Community … by its very nature, the Court's case law suffers from the inherent weaknesses of any uncodified legal system: it develops in a piece-meal and haphazard manner, with the Court having no control over the types of cases that come before it. Thus, important issues may remain unclarified for long periods of time."

This latter point was perhaps shown most clearly in the so-called Irish Abortion case[13], where a group of Irish students had been sentenced to harsh penalties for distributing information among other students on the possibilities for pregnant Irish women to have abortions in medical clinics in the UK (abortion being illegal on Ireland). The students invoked freedom of speech, art. 10 ECHR, as a justification for their actions and the High Court in Dublin requested a preliminary ruling from the ECJ, who found that the whole matter fell outside the scope of EU law. (The situation would obviously have been different should the students have had an agreement with the British doctors, in which case the free movement of services would have applied.) Luckily for the students, they later "won" against Ireland before the ECtHR.[14]

As mentioned above, the ECJ rejected an EC accession to the ECHR in 1996.[15] The Council of Ministers had asked the Court in 1994, according to what is now art. 218 of the Treaty on the Functioning of the EU (TFEU), whether an accession to the ECHR was compatible with the former EC Treaty. The ECJ found that such an accession would require a treaty amendment, since the EU could then not accede to treaties on its own. With the Lisbon Treaty, the legal basis was established in art. 218 and the EU acquired a legal personality (art. 47 TEU), which ought to change this whole situation (cfr art. 216 and 218 TFEU). It should also be noted that in 1996 only states could accede to the ECHR, a situation that changed when the Additional Protocol 14 to the ECHR entered into force in 2010.[16]

This was, then, in short the legal situation before the drafting of the EU Charter of Fundamental Rights (CfR) in 2000 (CfR and Charter are used interchangeably in this report). This new legal instrument and subsequent treaty changes, in particular the Lisbon Treaty that entered into force on 1 December 2009, changed the legal situation quite dramatically, notably in the two following ways.

First of all, the CfR – which has the same legal status as the Treaties, according to art. 6 sect. 1 of the TEU – has, after a somewhat slow start, been applied by the ECJ in a number of cases and may now even be seen as a rather regular feature of the Court's human rights-related jurisprudence. The implications of this jurisprudence and its relation to the content of Opinion 2/13 will be discussed in the next as well as the final section, but its existence must be mentioned here.

---

[13] SPUC v. Grogan, C-159/90, ECLI:EU:C:1991:378 (where it may be noted that AG van Gerven had a totally different view on the applicability of fundamental rights). See also Toth, op.cit. p. 495 ss for further comments on the relevant case law.

[14] Open Door and Dublin Well Woman Center v. Ireland, Judgment 29 October 1992, Series A No. 246.

[15] See fn. 1 above.

[16] See also art. 59(2) ECHR.

Secondly, art. 6 sect. 2 TEU stipulates, since 1 December 2009, that the EU shall accede to the ECHR, without changing the powers of the Union as these are defined in the Treaties.[17] The significance of this noteworthy provision may of course be discussed now that the ECJ has rejected this accession in unconditional and categorical terms, but as mentioned above, the introduction of this new provision laid the ground for the negotiations that finally led to the Draft Accession Agreement (DAA) between the EU and the Council of Europe in April 2013.[18]

Finally and quite simultaneously, the ECtHR adopted in its well-known Bosphorus case in 2005[19] a doctrine of so-called *equivalent protection* between EU law and the ECHR. Since no direct review of EU legal acts before the ECtHR will take place before the EU has acceded to ECHR, this doctrine is based on the presumption that both European courts, the ECJ and ECtHR, will and sincerely wish to provide a strong protection of human rights. An accession of the EU to the ECHR may make this doctrine obsolete or superficial, since it would make it possible for the ECtHR to review EU acts, but since such an accession now seems unlikely in the near future, the existence and future prospects for this presumption – which is in many ways very favourable for the EU, not least since it shelters secondary EU law from a thorough review by the ECtHR – may now also be subject to renewed discussion.

2.2 The accession negotiations

How, then, were the accession negotiations conducted once the Lisbon Treaty had entered into force in late 2009? The DAA was published in April 2013, as mentioned above. Before that, Additional Protocol 14 to the ECHR, which enabled the EU to accede to the Convention, had entered into force on 1 June 2010. It may also be noted that the presidents of the two courts, Mr Costa and Mr Skouris, issued a joint statement, signalling the start of the EU accession negotiations, in January 2011 (although negotiations between the EU and the Council of Europe had formally started already in July 2010 and then took place within the institutional framework of the latter, in two successive working groups mandated by its Committee of Ministers).[20] Here, the willingness and

---

[17] See also art. 6(3), which states that the rights and freedoms in the ECHR shall be seen as general principles of EU law. – Concerning the practical modalities and specific legal conditions for the accession to take place, also the importance of Protocol 8 to the Lisbon Treaty, which will be further discussed below, should be strongly underlined.

[18] Doc 47 + 1 (2013)008rev2.

[19] Bosphorus v. Ireland, 45036/98, Judgment 30 June 2005, 42 EHRR 1. Concerning recent tendencies of the ECtHR to enlarge the Bosphorus doctrine also to membership of states in other international organizations than the EU, see Cedric Ryngaert, Oscillating between Embracing and Avoiding *Bosphorus*: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the European Union, ELR 2014 p. 176-92.

[20] See http://hub.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention and http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp (with documentation).

ability of the two courts to cooperate in a new landscape of legal control of human rights obligations in Europe was underlined.[21]

It is now time for a closer look at the content of the DAA and some related documents, as well as some of the practical and political problems that emerged during the negotiations. First, then, the important Protocol 8 to the Lisbon Treaty, relating to art. 6(2) TEU on the accession of the EU to ECHR must be mentioned. According to art. 1 of this protocol, an accession agreement must preserve the so-called *specific characteristics* of EU law or, in other words, the autonomy of the EU legal order. Whether this was really the case came to be one of the key issues before and also after Opinion 2/13 was published.

Protocol 8 also underlines that the Accession Agreement should not affect the relationship of EU Member States with the ECHR. Furthermore, in its art. 1 some more concrete examples of the specific characteristics of EU law that need to be preserved are given, namely rules on the participation of the EU in various ECHR/ECtHR bodies and the possibility of a so-called co-defendant or co-respondent mechanism, which came to be much discussed in the accession negotiations between the Council of Europe and the EU.

The idea of the co-respondent mechanism (CRM) is to give the EU the right and possibility to enter proceedings before the ECtHR when an EU Member State is responsible for the alleged violation of ECHR, in particular in cases where an individual has brought an action before the ECtHR against an EU Member State, claiming that the state has violated the ECHR when implementing EU legislation (that Member States have to implement if they do not wish to violate the important so-called principle of loyalty in art. 4, sect. 3 TEU) that legally binds the national authorities at the time of implementation. The CRM would then enable the EU to intervene in support and on the side of the Member State. Should a violation be established, the EU would then share responsibility with the Member State, both as far as damages are concerned and by subsequent regulatory corrective measures. Likewise, Member States may become co-respondents or co-defendants in cases where an applicant has only turned against the EU and one Member State could do the same on the side of another, provided that the defending Member State could not have avoided the violation of the ECHR without violating its obligation of loyalty under EU law.[22] This

[21] Joint Communication from Presidents Costa and Skouris of 17 January 2011, www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pf

[22] It may be mentioned that during the negotiation process, a working group identified three cases that might have triggered CRM, had they happened after EU accession, namely the well-known Bosphorus and Matthews cases, as well as a less known case, Nederlandse Kokkelvisserij v. the Netherlands (13645/05).

mechanism has been subject to a lot of criticism, but it eventually found its way into art. 3 DAA, proposing changes to art. 36 ECHR.[23]

By and large, then, the DAA must be said to respect the special characteristics of the EU legal order, even at the cost of equality between all the 47 – or in the future possibly 48 – contracting parties to the ECHR.[24] This is the case not only due to the fact that the DAA contains modifications of the ECHR, in a way that is normally regulated in an amending protocol to an international convention.[25] It is also shown by the introduction of the so-called *prior involvement procedure* (art. 3(6) DAA), a new procedural mechanism that would guarantee the possibility for the ECJ to review the compatibility of an EU act or of fundamental rights in EU law in cases where the EU is a co-respondent. According to the rules on preliminary rulings in art. 267 TFEU, there is no guarantee that the ECJ will have had such an opportunity before a complaint based on EU law allegedly violating the ECHR is brought to the ECtHR, since a request for a preliminary ruling to the ECJ – which is in any case not in the hands of the applicant since it is always decided by national courts – is not one of the domestic remedies which the applicant must according to art. 35 (1) ECHR exhaust before the case may be brought before the ECtHR. Given that the ECJ alone may apply and interpret the Treaties[26] and that no other court may declare an EU legal act invalid[27], it is evident that the ECJ might fear a situation where the ECtHR may rule on the compatibility of EU legal acts with the ECHR, should the ECJ not have had the right to present its view before such a ruling.[28]

These points are some of the main exceptions or exemptions for the EU and the ECJ contained in the DAA. It seems fair to say that through these arrangements, the EU had allayed all or most of the fears that were raised during the negotiations. Still, it may of course be questioned whether an accession to the ECHR would strengthen the protection of human rights within the EU and in Europe as a whole, but that normative question will be dealt with towards the end of this

---

[23] See X. Groussot/E. Stavefeldt, Accession of the EU to the ECHR: A Legally Complex Situation, in J. Nergelius/E. Kristoffersson (eds.), Human Rights in Contemporary European Law, Swedish Studies in European Law vol. 6, Oxford 2014 p. 21 ss.

[24] Ibidem. However, for a different view see the Opinion of AG Kokott, p. 25.

[25] E.g. art. 1 DAA contains a modification of art. 59(2) ECHR and also creates a so-called *passerelle*, through which the DAA is lifted into and thus would become a part of the ECHR in case of EU accession. For some details, see Erik Wennerström, EU Accession to the European Convention on Human Rights – the Creation of a European Legal Space for Human Rights, in J. Nergelius/E. Kristoffersson (eds.), Human Rights in Contemporary European Law, Swedish Studies in European Law vol. 6 p. 96 ss.

[26] Cfr art. 19 TEU.

[27] Foto-Frost, Case 314/85, ECLI:EU:C:1987:452.

[28] See in this respect Discussion document of the Court of Justice of the EU on certain aspects of the accession of the EU to the ECHR, 5 May 2010.

report. Suffice it here to say that the EU had every reason to be happy with the result of the negotiation process, which finished successfully.[29]

Concerning the political problems during the negotiations, it may be mentioned that not only the EU Member States have an interest in whether accession will take place or not. For instance, it seems quite clear that Russia does not wish the accession to happen, for fear that it could make the EU as a whole more eager and willing to use human rights-based arguments to apply political pressure.[30] However, this and other political aspects of the situation will not be further dealt with here.

[29] Concerning the problems during the final stage of the negotiation, see Wennerström in Europarättslig Tidskrift 2013 p. 383 s.

[30] At the same time, this issue is slightly more complicated than it may appear at first sight. For instance, in case the EU should accede to the ECHR, Russia would wish to see the area of the CFSP included, in order to be able to invoke these rules against the EU before the ECtHR. For a current political analysis, taking Opinion 2/13 into account, see Andrew Duff, EU accession to the ECHR: What to do next, at http://www.verfassungsblog.de/en/eu-accession-to-the-echr-what-to-do-next

3 Opinion 2/13 – a closer analysis

3.1 An overview of the Opinion

Before presenting Opinion 2/13 as such, it may be mentioned that, for the second time in any opinion on an international agreement given by the ECJ[31], the Opinion of the Advocate General (AG) was also given and presented separately (in fact this happened the same day, 18 December 2014, that the Opinion itself was given, though the Opinion of AG Kokott was written in June, six months previously).

Formally, the EU Commission under art. 218 (11) TFEU asked the ECJ this 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?" The application was dated 4 July 2013. An oral hearing took place on 5 and 6 May 2014.[32] As mentioned above, AG Kokott delivered her Opinion on 13 June 2014, though it was not published until the Court's Opinion was delivered on 18 December 2014. Concerning both the opinions, of the AG and of the Court itself, the focus presented here will be on the issues that appear to be of most importance from the legal and political points of view. Pure institutional arrangements like the number of judges expected to sit in the ECtHR and representation for the EU in other bodies of the Council of Europe will be left aside.

3.2 The view of Advocate General Kokott

It may be interesting from many points of view to compare the view of AG Kokott with the Court's Opinion. Some such observations will follow here, though space does not allow for a detailed analysis.

The AG starts by clarifying somewhat the aims of the proposed accession, namely that it might lead to greater effectiveness and homogeneity in the observance of fundamental rights in Europe, by submitting the EU "to a form of external control as regards compliance with basic standards of fundamental rights that has long been widely called for" (p. 1). By and large, then, AG Kokott is more positive towards the possibilities for the EU to accede to the ECHR, while

[31] The first time this happened was in Opinion 1/13, delivered on 14 October 2014 (though the view of the AG was dated 13 May that year).

[32] 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. – It may also be mentioned that the EU Parliament had made clear in a resolution in 2010 that it wished to see a quick accession (P7_TA_PROV(2010)0184).

maintaining the specific features or characteristics of EU law, the competences of the EU and the powers of its institutions, than is the Court. She underlines the unique nature of the accession, which would create a special constellation "in which an international, supranational organization – the EU – submits to the control of another international organization – the Council of Europe – as regards compliance with basic standards of fundamental rights" (p. 25). She then goes on to analyse above all the DAA in relation to art. 6(2) TEU and Protocol No. 8.

Given that the differences between the view of AG Kokott and the Opinion of the Court are in fact quite huge, it would perhaps be interesting to analyse the view of the AG in detail, in order to find out exactly where the differences are to be found. However, at the same time it is clear that only the Opinion of the Court gives rise to real, legal consequences. The legal situation that Europe is now facing depends on what the plenary Court has written. Thus, only the Opinion itself will be subject to a detailed scrutiny here. Nevertheless, some further observations on the view(s) of the AG seem to be justified.

First, it may be noted that AG Kokott makes a – perhaps not entirely natural – distinction between the existing competences of the EU, which are said not to be curtailed by an EU accession to the ECHR, and on the other hand *the exercise* of these competences, which will by necessity be somewhat restricted (p. 39-43). However, this is not seen as a threat or obstacle for the proposed accession. Neither does she see any real problems nor have any clear objections against the prior involvement procedure (pp. 63-66 and 126-29).[33] While acknowledging that after accession the EU will be subject to the jurisdiction of the ECtHR, this is also seen as basically unproblematic (cfr p. 164).

The main problem with accession, according to AG Kokott, is instead related to the so-called co-respondent mechanism (CRM). This is basically or at least mainly due to the fact that, as Kokott puts it, when applying these new rules "in a way that is binding on the institutions and Member States of the EU, the ECtHR is stating its views on their respective competences and responsibilities as defined in EU law", which is, in her view, not the task of the ECtHR (not even if EU institutions or Member States should in a specific case approve of its views), since "it follows from the principle of the autonomy of EU law that only the Court of Justice of the EU can have jurisdiction to give a binding interpretation of EU law" (p. 179).[34] She also regrets the "lack of any systematic communication to the EU and its Member States of applications notified by the

[33] It should be noted, however, that she claims that a decision on the necessity to use the prior involvement procedure must be made by the ECJ, since it is "the only reliable authority on whether it has previously dealt with the specific legal issue before the ECtHR" (p. 183).

[34] See also pp. 233 and 235, where specific criteria are laid down in this respect, in order for an accession lawfully to take place. Concerning the situation in relation to possible reservations to certain articles or protocols of the ECHR dealt with in art. 57 ECHR, see ibidem, p. 265.

ECtHR to the main respondent in a given case" (p. 228) and, in particular, that according to art. 3(7) DAA the ECtHR may, when a violation of the ECHR is established, decide whether the EU and the Member State concerned shall have a shared responsibility or that only one of them shall be held responsible. Here, major changes would, in her view, be necessary before accession may be legally possible.

Finally, an issue the AG addresses and which was later thoroughly but unfortunately not quite convincingly dealt with by the ECJ is the situation when Member States of the EU may bring cases against each other, which is actually possible within EU law (arts. 258-259 TFEU) as well as under the ECHR (art. 33[35]). This matter was also dealt with at some length by AG Kokott. As she stresses (p. 107 ss), these rules should be read in connection with art. 344 TFEU, which states that the Member States are obliged not to settle any disputes concerning the interpretation or application of the EU Treaties in any other way than these treaties stipulate. In a similar way, under art. 55 ECHR the parties to the Convention agree not to submit disputes arising from the application or interpretation of the ECHR to any other means of settlement than those provided for in the ECHR itself. At least theoretically, she argues, those rules may come into conflict with each other. Art. 5 DAA tries to solve this potential conflict by stating that the EU and its Member States may only bring such cases to the ECJ.[36] As AG Kokott correctly observes, however, nothing in the DAA "effectively precludes Member States of the EU from … bringing before the ECtHR, as an inter-state case, a dispute concerning EU law arising out of the interpretation and application of the ECHR" (p. 114). In order to achieve this, she claims, it must be declared in the DAA that art. 344 TFEU takes precedence over art. 33 ECHR (p. 115).[37] This interesting and perhaps generally somewhat underestimated matter will be dealt with further below.

3.3 The Opinion of the European Court of Justice

Initially in Opinion 2/13 the ECJ presents a lot of facts concerning the legal and factual background to the Opinion, most of which have already been mentioned above. The Court then takes notice of the fact that the EU Commission found the DAA and all its conditions to be compatible with the Treaties, a view that was also shared by all of the Member States, as far as has been established. Finally, after a very long "introduction" to the Opinion as such, comes the "Position of the Court of Justice" (as section VIII of the Opinion).

The substantial legal analysis is presented in the final pages of the Opinion (pp. 155-259). One of the issues discussed here, which has not been dealt with above,

---

[35] For an example, see Ireland v. UK (both then EU Member States), Judgment 18 January 1978, Series A No 25.

[36] See also art. 4 DAA, which suggests further changes to art. 33 ECHR, which would definitely benefit the interests of the EU and the ECJ.

[37] Ibidem; this problem appears in fact to have been solved through the DAA.

concerns the Common Foreign and Security Policy (CFSP), which must be seen as a rather technical issue. The CRM and the prior involvement procedure are also dealt with in a rather technical way in the Opinion, indicating that they are in the eyes of the ECJ to be seen as legal technicalities or at least merely procedural arrangements, while the question of inter-state complaints (before either of the two courts) and what we may, for lack of a better term, call EU human rights law in the aftermath of the Melloni case 2013[38] are dealt with much more profoundly, openly and perhaps seriously by the Court (but at the same time in a slightly confusing way).

The ECJ here starts by noticing the importance of art. 6 TEU, which creates a legal basis for an accession to the ECHR, which did not exist in 1996 when Opinion 2/94 was delivered. The same is true for some important recent changes to the ECHR, in art. 59 and through Additional Protocol 14, which enable the EU and not only states to accede, as mentioned above. The ECJ here underlines, perhaps for the very first time, that "the EU is, under international law, precluded by its very nature from being considered a state" (p. 158).[39] Then, the "constitutional framework" of EU law is dealt with. The ECJ stresses the "particularly sophisticated institutional structure" of the EU, which has "consequences as regards the procedure for and conditions of accession to the ECHR" (p. 158). An initial reference is made to the statement in art. 6(2) TEU that an accession shall not affect the Union's competences as defined in the Treaties, as well as to Protocol 8 (which has the same legal value as the Treaties) and to the special Declaration on Art. 6(2), aimed at clarifying its meaning and significance even further. Referring also to previous case law, the ECJ concludes that the EU legal structure "is based on the fundamental premise that each Member State shares with all the other Member States … a set of common values on which the EU is founded". This "implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the EU that implements them will be respected" (p. 168). Here, it may be argued that the Court takes a step from a general description of the nature of EU law to at least an indirect defence of the controversial and somewhat new position that it held in the Melloni case, which will be further described below. This position is here seen as a part of the EU constitutional framework and the conclusion (p. 177) is, hardly surprisingly, that fundamental rights must "be interpreted and applied within the EU in accordance" with this constitutional framework.

This part of the Opinion, which is perhaps the most controversial one, will be dealt with below. First, however, the more technical aspects of CFSP-related issues will be discussed and then the more procedural matters of the CRM and the prior involvement procedure.

---

[38] Melloni, C-399/11, ECLI:EU:C:2013:107.

[39] See also p. 193.

Concerning the CFSP, it is interesting to see how the views of the AG and the Court differ sharply. The point of departure is that the ECJ here has a very limited jurisdiction, as follows from art. 24(1) TEU and art. 275 TFEU (see also art. 263(4)). For AG Kokott, however, this is not a problem in view of accession[40] – not even given that it will at least partly render the prior involvement procedure futile or even impossible, due to the fact that this process will only apply where the ECJ has jurisdiction, as she correctly points out[41] – since the situation must have been foreseen by the authors of the current Treaties, who deliberately limited the jurisdiction of the ECJ in this field while at the same time requiring an accession to the ECHR (through art. 6(2) TEU).

Here, however, the Court has a totally different view. It doubts the standpoint of the Commission that its jurisdiction in this field is "sufficiently broad to encompass any situation that could be covered" by accession (p. 251), since there has not yet been any opportunity to define the extent to which its jurisdiction in CFSP matters is limited. Still, since it is clear that certain acts adopted in the area of CFSP fall outside the ambit or scope of its judicial review and that, after 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 the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights" (p. 254), and it is also clear that such jurisdiction "cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU" (p. 256), this is one of the reasons why the ECJ rejects the EU's accession to the ECHR.

However, as mentioned above, there are also other reasons for this. One such reason concerns the CRM, the co-respondent mechanism. Here, the problem for the ECJ has to do with the division of powers between the EU and its Member States. The ECJ holds that the decision of the ECtHR to invite a Member State as co-respondent in a case (either upon the request of that state or by the latter court's own decision) "necessarily presupposes an assessment of EU law" (p. 221). Since an invitation on the initiative of the ECtHR is not binding, the real problem seems to occur when a Member State requests to be a co-respondent:

> However, the fact remains that, 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 the EU. Such a review would be liable to interfere with the division of powers between the EU and its Member States. (p. 224-225).

[40] See p. 183 ss.
[41] See p. 186.

Furthermore, the ECJ does not like the fact that, according to art. 3(7) DAA, the ECtHR would be able to decide on exceptions from the general rule that the respondent and co-respondent are to be jointly responsible for established violations of the ECHR:

> A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributiality of that act or omission. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States. That conclusion is not affected by the fact that [the] ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent … it is not clear … that the reasons to be given by the respondent and co-respondent must be given by them jointly. (pp. 230-233).

Consequently, the conclusion of the ECJ is clear, namely that "it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific characteristics of the EU and EU law are preserved" (p. 235).

Interestingly enough, the question of either joint or "individual" responsibility for EU legal acts and possible violations of the ECHR reoccurs also in other parts of the Opinion devoted to what we may here call mainly procedural issues. Not least, this is the case concerning inter-state proceedings, a topic that almost seems to haunt the ECJ, which also manages to find a connection between this kind of case and the prior involvement procedure.

Here, some of the main themes of the Court's objection to the accession as such – and of the analysis below – are intertwined. This concerns in particular the relationship between the prior involvement procedure, inter-state cases and the "legacy" of the Melloni judgment of February 2013, including the interpretation, there and elsewhere, of the CfR. These issues and their internal relationship will be dealt with in a critical way in the following section, but first they need to be introduced and presented here.

Concerning the Melloni judgment, it may briefly be said that it is based on the assumption that there should be *mutual trust* concerning the standard of protection of fundamental rights between the EU Member States. This means that, for example, a court in one EU Member State should trust that a decision adopted by, for example, an authority in another Member State pays the necessary respect to fundamental rights, thus giving the court no other choice than to execute the decision. In a way, this is similar to the Bosphorus criteria on equivalent protection laid down by the ECtHR in 2005, but as the Melloni case reveals and as shown below, the consequences within EU law may be difficult and far reaching.

In Opinion 2/13, it is clear, as shown above, that the ECJ fears the involvement of the ECtHR in its internal decision-making and in the internal powers of the EU in general:

> In particular, 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. (p. 184).

From this general remark, then, the ECJ advances to a rather sharp and detailed criticism of the accession, based on the Melloni doctrine:

> It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognized by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR … (p. 185).

Thus, this situation as such seems to be acceptable for the ECJ, but it then continues:

> The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU. (p. 186).

With reference to art. 53 CfR, the ECJ then goes on by stating, with a direct reference to Melloni:

> The Court of Justice 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. (p. 188).[42]

Now, it may be argued that one of the real problems with the Melloni judgment, as seen below, is that it places the "primacy, unity and effectiveness of EU law" above human rights as such, an issue that has been vividly debated throughout Europe ever since the judgment was published.[43] This did however not restrain the ECJ judges, who went on to state that

---

[42] See here also p. 191 of the Opinion: "In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle 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."

[43] See e.g. Leonard Besselink, The Parameters of Constitutional Conflict after Melloni, European Law Review 2014 p. 531-52.

> Article 53 of the ECHR … should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to the Member States by Article 53 of the ECHR is limited – with respect to the rights recognized 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. However, there is no provision in the agreement envisaged to ensure such coordination. (p. 189-90, italics added here).

Here, it may be added that arts. 53 of ECHR and CfR are in a way reflections of each other, since they both make it possible, in short, for Member States to maintain a higher human rights standard than what follows from the two documents or texts (themselves).[44] However, in the light of the Melloni doctrine, this came to be seen as a big problem for the ECJ, with a view to a possible EU accession to the ECHR:

> Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of 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. (p. 192)

Then, through another very long sentence, a connection or a leap is made from the Melloni doctrine to the – alleged – problem concerning inter-state cases, which seems to be of great concern to and importance for the ECJ.

> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law. However, the agreement envisaged contains no provision to prevent such a development. (pp. 194-95).

Obviously, the criterion of "mutual trust" continues to pose problems for the ECJ, which is partly due to "the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law" (p. 193). This is, as such, logical in the light of both the principle of loyalty and solidarity (art. 4(3) TEU) and the Melloni doctrine. The connection between those concepts is evident. As will be further analysed below, it is however more

[44] In this respect, also art. 52 sect. 3 CfR, that allows EU law to have a stronger human rights protection than ECHR merits some attention.

surprising that the possibility of inter-state complaints is seen as such a huge problem here, in view of accession to the ECHR, since this possibility does in fact already exist before both courts (art. 33 ECHR and art. 258-59 TFEU).

It is more logical, then, that the ECJ opposes the new Protocol 16 ECHR, which would enable the highest courts of the Member States to request the ECtHR to give advisory opinions on questions of principle concerning the application and interpretation of the ECHR and its protocols, while art. 267 TFEU requires those same courts to ask the ECJ for a preliminary ruling.[45] Protocol 16 was signed in October 2013 and has not yet entered into force. It is thus not necessary for the EU to accede to Protocol 16 in order to accede to the ECHR as such. Nevertheless, this objection from the ECJ is relatively easy to understand, since it is likely that this new protocol – which aims mainly at reducing the workload of the ECtHR – may sooner or later come into conflict with art. 267 TFEU, one of the true pillars or cornerstones of EU law.

This leads us to the issue of the prior involvement procedure. Here, the ECJ initially seems rather positive and open-minded, but then becomes more critical. This is due both to the question who may decide whether the ECJ *has* actually ruled on a certain question and, secondly, the review that is supposed to take place concerning secondary EU law.[46]

> [I]t is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice. (p. 238-39)

The ECJ is not convinced that this guarantee has been secured through the DAA. And as for the supervision of EU secondary law, the ECJ found, perhaps rather surprisingly since it is nowhere clearly stated, that DAA "excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure" (p. 243). This was seen as unacceptable, since

> The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is inconsistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law. (P. 245-46)

---

[45] Pp. 196-97.

[46] For the purposes of this study, secondary law may simply be seen as containing regulations, directives, recommendations, decisions and opinions (cfr art. 288 TFEU).

Thus, according to the ECJ, "it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved" (p. 248). Accession was thus, logically enough, rejected outright.

4 A critical analysis of the Opinion

Of the five crucial points mentioned above, where the ECJ has found real obstacles to accession to exist, the field of CFSP (1) is perhaps the least controversial from a legal point of view. Here, it is enough to say that the jurisdiction of the ECJ is limited and that, in relation to a possible accession, this may be interpreted either in the way suggested by AG Kokott or in the more harsh way chosen by the Court. Both lines of reasoning are as such fairly logical and convincing. The issue, which is politically very important and something of a "hot potato" but does still not concern the real material core of EU law, will not be further commented upon here.[47]

The other four aspects discussed above – in a slightly different order than here - are however more complicated and partly also worrying. To start with the *prior involvement procedure* (2) it is clear, as discussed above, that the sheer existence of the potentially somewhat troublesome Protocol 16 to the ECHR will not be an obstacle to accession (and that the EU is not and will never be required to ratify it). Instead, the real problem seems to be the exclusion in the DAA and in its attached Draft Explanatory Report of an explicit permission to interpret *secondary* EU law. The ECJ puts it in this way:

> [I]t should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice 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. Paragraph 66 of the draft explanatory report explains that the words '(a)ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question *of interpretation of secondary law* by means of the prior involvement procedure. (pp. 242-43, italics added)

Here, I think that the Opinion must be read with very sharp and critical eyes. It is in fact hard to understand how the ECJ arrives at the conclusion that the prior involvement procedure "excludes" interpretation of secondary law simply because the DAA and the Draft Explanatory Report make use of other legal terms. This is in fact one of the parts of the Opinion where, in my view, it is possible to suspect that the ECJ above all wishes to reject the accession and

[47] Politically, this is perhaps one of the most "attractive" parts of EU law to be able to use, in case of accession, for non-EU Member States, such as Ukraine, before the ECtHR. At the same time, should the EU accede, Russia or Turkey may want to use CFSP rules against alleged political or military campaigns from the EU.

then, once that decision was made, has gone looking for possible arguments that might support and justify its position.

Concerning the CRM (3), on the other hand, the AG was perhaps even more critical than the Court itself. However, as mentioned above, the ECJ also reacts against the possibility or even right for the ECtHR to decide who shall be responsible for an established violation of the ECHR – the EU or a Member State – that seems to follow from art. 3(7) DAA:

> In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. 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. (p. 234)

This is, in my view, one of the areas where the ECJ's fear of threats to the autonomy and the specific characteristics of EU law in case of accession is relatively easy to understand. Throughout the whole Opinion, the ECJ acts as a watchdog against the perceived threats that an accession to the ECHR may pose, protecting its own position as the sole interpreter of and judge over any part of EU law (albeit sometimes in cooperation with national courts in the Member States, according to art. 267 TFEU). Sometimes the results of this cautious attitude seem to be somewhat exaggerated and even hard to understand, but here it is quite clear that the model suggested in the DAA would indeed give the ECtHR decision-making powers in an issue, namely the sharing of responsibilities for violations of the ECHR between EU and its Member States, that belongs in the field of EU law and is thus under the exclusive jurisdiction of the ECJ. Thus, the anxiety of the ECJ here does not seem to be entirely unjustified, to put it mildly. In other words, the solution here envisaged by the DAA is somewhat surprising.

Let us now turn to the implications of the Melloni judgment (4), which at least partly inspired Opinion 2/13, in particular as far as "mutual trust" between EU Member States and the consequences of supervision of EU law by the ECtHR is concerned. As already indicated, the judgment in Melloni raises some fundamental issues that are likely to cause more confusion in the field of EU constitutional law, for many reasons and perhaps for a long time to come. This is true not least in the field of fundamental rights, where it may even be said that it collides with the important Åkerberg Fransson case delivered on the same day, which will also be discussed further below.

In the case, Mr Melloni had been sentenced in Italy to ten years in prison for fraud related to a bankruptcy. This was established in a trial in which he had not himself been present. The sentence was finally handed down in 2004 and the Italian authorities then wanted him extradited from Spain where he resided, invoking the European Arrest Warrant. In fact, Melloni had then been in Spain for a long time and Italian authorities wanted him extradited since 1993. In 1996, Spain accepted this request, but Melloni disappeared and was not caught until 2008. After he had been arrested, a Spanish lower court, the *Audiencia Nacional*, decided that he should be extradited, but Melloni then appealed to the Spanish Constitutional Court, the *Tribunal Constitucional*, arguing that the Spanish Constitution (art. 24(2)) strongly protects the right to a fair trial, which includes the defendant's right not to be sentenced to prison – at least not for long – *in absentia*. After fairly long proceedings, the Constitutional Court decided in June 2011 to ask three crucial questions of the ECJ.

Those three questions all concerned the relationship between three central rules in EU law, namely the European Arrest Warrant (secondary law), the Charter of Fundamental Rights (primary law) and the Spanish Constitution, though they were phrased in different terms. One of the reasons for the somewhat – in my view – odd outcome of the case and one of the main difficulties for the ECJ seems to have been the interpretation of the Arrest Warrant, which in its original 2002 version prescribed that all Member States are to execute extraditions from other Member States according to the well-known principle of mutual recognition. At the same time, however, art. 5 of the text of the Framework Decision contained certain guarantees, clarifying that if extradition was requested for a person who had been sentenced in his absence, there should be a possibility to have the sentence and judgment reviewed. Still, in the new framework decision of 2009, which should have been implemented in the Member States by March 2011 or at the very latest 1 January 2014, it is stated that these guarantees do not apply when the person for whom extradition was requested had been represented by a lawyer and when he had known about the procedure against him and the fact that he might be sentenced in his absence.

Despite the fact that there may be reasons for these harsh rules – such as the interest in making the Arrest Warrant work smoothly and, as far as Italy is concerned, the combatting of organized crime – the situation here was complicated, even more so since the ECJ actually neglected to inform the readers of its judgment about the knowledge of such facts that Mr Melloni might have had during the lengthy procedures. Furthermore, the possibilities for extradition were increased in 2009, as explained above, while the Spanish Constitutional Court ought to base its judgment on the situation in 2008 (cfr art. 7 ECHR and art. 49 (1) CfR)).

Anyway, against this background the Spanish Constitutional Court sent three questions to the ECJ, which were formulated as follows:

1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European Arrest Warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter…, and from the rights of defence guaranteed under Article 48(2) of the Charter?
3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognized under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognized by the constitution of the first-mentioned Member State?

Thus, though all three questions raise very important issues concerning the status of the Arrest Warrant, the third and last question is in a sense wider, since they add the huge constitutional issue, of general interest for the EU as whole, of the relationship between the Arrest Warrant (secondary EU law), the Charter (primary EU law, cfr art. 6 of the EU Treaty) and a national constitution.

Having this very interesting background in mind, the judgment as such is regrettably short. The ECJ applied the Arrest Warrant in its new version; the fact that this in reality made the penalty or at least the application of the relevant penal rules harder was seen as a mere procedural issue and thus obviously unproblematical, which is somewhat surprising.

Concerning the first question, the ECJ referred to the principle of mutual recognition and stated that extradition must take place in a case such as this, at least when the convicted person was aware of the trial against him and had the possibility to be represented by a lawyer (or was aware of the fact that a judgment against him may be given in his absence). Once again, it is not quite clear from the judgment what Melloni really knew, though the judgment is obviously based on the supposition that he was fully aware of all these facts.

In relation to question 2, then, the ECJ argued, invoking its own previous jurisprudence as well as case law from the Strasbourg Court, that the right to be present at a trial may be limited, thus arriving, in a not very convincing or persuasive line of reasoning, at the conclusion that the Arrest Warrant (in

particular art. 4a(1)) does not violate arts. 47-48 of the CfR. This argumentation is not convincing and may definitely be criticized, but the answer to the third question is nevertheless the most crucial part of the judgment, in my view.

As is well known, art. 53 of the Charter states that none of its rules may limit or infringe upon the fundamental rights that are acknowledged by EU law, international law, international conventions to which the Member States are parties or the Constitutions of the Member States. The possibility for national courts to maintain a higher standard for individuals in this respect than that provided by the Arrest Warrant (as interpreted by the ECJ) was however simply dismissed by the ECJ, since that would "undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply the legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution" (p. 58 of Melloni). But isn't that exactly what national courts ought to do, when taking art. 53 of the Charter seriously?

This particular line of reasoning of the ECJ is not new. On the contrary, it is well-known from classical cases such as Costa v. Enel[48] and Simmenthal.[49] It basically means that any kind of EU law, primary as well as secondary, is superior to any kind of national law of a Member State, including the national constitution. This latter part of this constitutional jurisprudence is not accepted by very many Member States or their highest courts, as is also well known.

However, in this case the ECJ first, before maintaining its jurisprudence on this last point, on dubious grounds managed to find that the secondary EU law in question was compatible with the applicable primary EU law, which in itself in art. 53 CfR states that it is inferior in relation to any more far-reaching protection of human rights that may be found in a national constitution. Thus, the ECJ has managed a double operation, both steps of which are most doubtful, in order to "save the life" of the European Arrest Warrant, which has obviously been seen as very crucial. But while saving this patient, the "life" or at least the legal status of the considerably more important Charter, that is primary EU law as follows from art. 6(1) TEU, may have been sacrificed instead, given that its art. 53 has so clearly been applied and interpreted *e contrario,* thus in reality losing its significance.

At least in my view that is what follows from a close reading of the judgment. Arguably, the Court's interpretation of art. 53 CfR, stating that a Member State may not apply the standard of human rights protection guaranteed by its constitution when it is higher than that deriving from the CfR (despite the clear wording of art. 53), applies only in areas where EU law has been completely

[48] Costa v. E.N.E.L., Case 6/64, ECLI:EU:C:1964:66.
[49] Simmenthal, Case 106/77, ECLI:EU:C:1978:49.

harmonized. Thus, if this view is accepted, allowing a Member State to invoke art. 53 CfR in order to disregard the Framework Decision on the European Arrest Warrant would undermine the principle of supremacy as well as the mutual trust between the Member States.[50] But the consequences of such a line of reasoning are of course far reaching. Basically, it means that human rights will not apply, or will in reality not matter, when they are in conflict with material EU law, in its harmonized areas – i.e. in very great fields of EU law.

This is, unfortunately, the only possible conclusion concerning the general implications of Melloni for human rights within EU law. The ECJ there states that the possibility for a national court to refuse extradition in a case such as this would spread doubt on "the uniformity of the standard of protection of fundamental rights as defined in that framework decision" (p. 63) which would, consequently, undermine the principle of mutual recognition and ultimately the confidence between the legal systems of the Member States. In other words, uniformity and mutual trust is superior to human rights protection. But if this line of reasoning is to be followed, prison sentences for as long as ten years rendered in the absence of the accused are generally to be accepted in the EU of today, which is slightly surprising, to put it mildly.

Thus, it is hardly surprising that the Melloni judgment has led to such a vivid discussion. Here, however, it is of course above all interesting to analyse its relevance and importance in the context of Opinion 2/13.

First of all, then, it must be underlined that Melloni is part of a gradually ever wider jurisprudence applying the CfR which has emerged and grown since 2010. At the same time, however, it is not entirely typical of this jurisprudence, although some other judgments related to the European Arrest Warrant and other parts of the former "third pillar" of EC law, Justice and Home Affairs or the area of Freedom, Security and Justice as it is nowadays normally called do point in the same direction.[51] It is however also, from most points of view mentioned here, more controversial than the other jurisprudence in this field (and, indeed, than most other recent judgments of the ECJ).

In the well-known Åkerberg Fransson case[52], which was rendered the same day as Melloni (26 February 2013), the ECJ also made a number of very important general statements concerning the relationship between the Charter, national law and secondary EU law, which are unfortunately hard or even impossible to reconcile with some of its simultaneous positions and statements in Melloni. This is all the more regrettable since it must be supposed that the Court intended

[50] As argued e.g. by Judge Christopher Vajda at the conference organized by the Swedish Network of European Law Studies on 20 Years of Swedish EU Membership, Stockholm 16–17 February 2015.

[51] Joined cases, C-411 and C-493/10, ECLI:EU:C:2011:865.

[52] Åkerberg Fransson, C-617/10, ECLI:EU:C:2013:105.

to send one single message to the surrounding world with the two simultaneous judgments. A close reading of them, however, reveals that this intended effect was simply not achieved. This difference between them may of course be explained by the fact that Melloni deals with a harmonized area of EU law and Åkerberg Fransson not, but it is still quite striking.

If we put it another way, did the ECJ here really speak with one single voice? Any reader who is, like me, critical of the Melloni judgment will quickly find that this is simply not so.

Without going into the details of the Åkerberg Fransson case on *ne bis in idem* or alleged double penalty for one single criminal act[53], we quickly find that the ECJ there stated (p. 21) that

> the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.

Now, given that the ECJ in Melloni managed to find that the Arrest Warrant was compatible with the Charter on the point there in question, this statement is perhaps not outright contradictory to Melloni. But what then of p. 29 of Åkerberg Fransson?

Here, the ECJ stated that

> where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.

This statement is made with reference to Melloni, but its content is indeed very hard to reconcile with the prohibition for the Spanish Constitutional Court to apply art. 24 of the Spanish Constitution that was established in the Melloni case. And this contradiction becomes even clearer when reading p. 48 of Åkerberg Fransson, where the ECJ, with a clear message to the Swedish Supreme Court which had previously made some severe mistakes in its handling of *ne bis in idem* matters[54], stated that

> European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the

[53] Concerning Swedish law, see below in section 6.

[54] See the cases NJA 2010 p. 168 and 2011 p. 444, commented on further here below.

> Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter.

Thus, according to the ECJ, national courts must have the power to assess whether certain legal provisions are compatible with the CfR. In order to make such assessments, cooperation with the ECJ is sometimes necessary. But that cooperation, and the very basis of it, is, needless to say, undermined when the ECJ itself does not take the provisions of the Charter seriously. Therefore, the two simultaneous judgments of Melloni and Åkerberg Fransson have totally different implications. They point in different directions as far as the status of the Charter is concerned, Åkerberg Fransson increasing its status and impact in national law but Melloni in reality undermining it by protecting secondary EU law at any cost. Thus, reading and analysing Melloni but also comparing it with Åkerberg Fransson, the shortcomings of the former, unfortunate judgment are indeed very clear.[55] And, unfortunately, it must be held that some of those very shortcomings occur in Opinion 2/13 as well.

In its Opinion 2/13, the ECJ has accepted, as noted above, that some differences in the review(s) made by the ECJ and the ECtHR would inevitably occur after an accession:

> It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognized by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR … (p. 185).

As we have seen, the ECJ then continues by saying that

> The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU (p. 186).

This statement would in itself also probably be rather natural and uncontroversial, but with a view to the Melloni case, what causes concern here is the concept "ratione materiae of EU law", however that is to be defined. In Melloni, as discussed above, the ECJ interpreted art. 53 CfR as meaning that the application of national standards of protection of fundamental rights must not compromise the primacy, unity and effectiveness of EU law. And here, in Opinion 2/13, the ECJ now finds that

[55] It is however encouraging to note that the ECJ showed a far more human rights-friendly approach in its recent Judgment on the Data Retention Directive (Joined Cases C-293/12, Digital Rights Ireland and C-594/12, Seitlinger and Others, Judgment 8 April 2014).

> In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed 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 Article 53 of the ECHR is limited – with respect to the rights recognized 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. However, there is no provision in the agreement envisaged to ensure such coordination (p. 189-90, italics added here).

Here, it may once again be mentioned that articles 53 of the ECHR and CfR are in a way equivalents or reflections of each other, since they both make it possible, in short, for Contracting Parties or Member States to maintain a higher human rights standard than what follows from the two documents or texts. However, in the light of the Melloni doctrine, the ECJ here requires an interpretation of art. 53 ECHR that is compatible with the controversial line of reasoning used in that case. It also requires all EU Member States as well as the ECtHR to make a very limited use of art. 53 ECHR, in much the same way that the Court through Melloni has already curtailed the future use and scope of art. 53 CfR, at least in legal situations falling within the "ratione materiae of EU law".[56] This is, by any standard of analysis and interpretation, far-reaching. It begs the question whether the ECJ is here actually asking for too much. To say the least, it does not show a great interest in cooperation with other main legal actors in Europe.

Finally, a few words must be said about the – suddenly – quite complicated issue of inter-state cases (5). Those do not occur frequently in any of the two courts and had rarely been a great cause of concern before 18 December 2014.

In the Opinion, however, the ECJ links possible problems in this respect related to the possible accession with its quite new wish not to be considered as a state or equal to a state, which in its view might be the result of the accession:

> The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law (p. 193).

[56] Cfr p. 192 of the Opinion, concerning the significance of "mutual trust" between the EU Member States: "Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of 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."

Thus, if reading this with an understanding and reasonably mild view, what seems to be the real problem for the ECJ is not the already existing possibility for EU Member States, under art. 33 ECHR, to bring cases against each other before the ECtHR, but rather the risk that they may initiate proceedings there against the EU. Furthermore, the ECJ objects the possibility that Member States may bring cases against each other concerning the "ratione materiae of EU law" before the ECtHR, as seems to follow from the next paragraph of the Opinion:

> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, *including where such relations are governed by EU law*, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law (p. 194, italics added).[57]

Once again, what the ECJ is here saying is basically that an as such already existing possibility for an EU Member State to bring an action against another one before the ECtHR is contrary to EU law (or more specifically against the Melloni-inspired idea of "mutual trust" between the Member States). It may be argued that the ECJ here seems to warn against non-existing dangers, since such cases within the scope "ratione materiae" of EU law may already now be brought to the ECJ under articles 258 and 259 TFEU, albeit in a slightly different legal context. Why, then, would a Member State care to bring it before the ECtHR? And if such a risk does after all exist, could not the ECJ simply recommend the Member States to sign an agreement obliging them to bring any such matter to the ECJ and not to the ECtHR, in a manner and with words that are perhaps clearer than DAA and art. 344 TFEU? [58] Once again, the ECJ seems to overreact.

Here, the view of AG Kokott is apparently clearer and better argued, taking the (future) legal complexity surrounding this matter into full account while still managing to envisage realistic solutions to any possible problem. She starts by observing the evident tension between the obligation of EU Member States under art. 344 TFEU to bring disputes concerning EU law before the ECJ and the similar obligation under art. 55 ECHR to settle disputes relating to the

---

[57] This worry about EU Member States checking each other before applying the apparently superior principle of mutual trust may at least partly be due to recent jurisprudence from the ECtHR criticizing shortcomings in the so-called Dublin system that allocates responsibility for each asylum-seeker's application to a single Member State; see e.g. Sharifi et al v. Italy and Greece, 16643/09, 21 October 2014 as well as Tarakhel v. Switzerland, 4 November 2014 (29217/12).

[58] Concerning art. 344 TFEU, the ECJ conducts a thorough argumentation in pp. 201-14, which basically aims at showing that art. 5 DAA does not offer sufficient guarantees against the risk "that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law". Hardly surprisingly, in the eyes of the ECJ, "(T)he very existence of such a possibility undermines the requirement set out in Article 344 TFE." (p. 207-08)

ECHR before the ECtHR, in reality by making use of the inter-state procedure prescribed in art. 33 ECHR. Thus, since the ECHR would after accession be an integral part of the EU legal order, disputes between EU Member States or between the EU and its Member States on the interpretation and application of the ECHR as part of EU law might well arise.[59] This could probably violate art. 344 TFEU and it is in her view doubtful whether art. 5 DAA offers sufficient protection against such a risk, since it *allows* the EU and its Member States to continue to bring any disputes to the ECJ, without being prevented by art. 55 ECHR, but does on the other hand *not preclude* Member States from bringing disputes concerning the ECHR as part of EU law (or EU law when applied or interpreted by use of the ECHR) to the ECtHR as inter-state cases.

How, then, is this contradiction to be viewed and resolved? The AG is quite clear on this point:

> If one wished to ensure that, in EU-law disputes concerning the ECHR, no such failure on the part of the Member States of the EU to respect the exclusive jurisdiction of the Court of Justice could arise under any circumstances, the proposed accession agreement would … have to contain a rule going beyond Article 5 of the draft agreement, by which Article 344 TFEU would not only be unaffected but would take precedence over Article 33 ECHR. An objection of inadmissibility could then be raised before the ECtHR in respect of any inter-State case that was nevertheless initiated (p. 115.).[60]

However, in the end she finds that such an additional provision or agreement, which would after all not be very difficult to arrange, is really not necessary:

> In my view, 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 Court of Justice of the EU, with the added possibility that interim measures may be proscribed within those proceedings if necessary (Article 279 TFEU), is sufficient to safeguard the practical effectiveness of Article 344 TFEU (p. 118).

The AG, who also correctly notes that the far-reaching new provision that she initially envisaged "would implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them" (p. 115), does here seem to be much more realistic than the Court (and also more sophisticated in her analysis). In a way, however, she seems to have foreseen future problems occurring when the Court was going to deal with this issue, and thus envisaged a model for the solution also of that likely problem:

---

[59] See pp. 108-10.

[60] As she correctly adds, the ECJ should then also be given a chance to give its view on whether an inter-state case before the ECtHR does really concern EU law "for the purposes of Article 344 TFEU".

> Should this Court nevertheless consider the provision of stronger safeguards for the practical effectiveness of Article 344 TFEU than those currently provided for in the draft agreement to be necessary, it could make the compatibility with the Treaties of the EU's proposed accession to the ECHR subject to a declaration by the EU and its Member States at the time of the EU's accession. In that declaration, the EU and the Member States would have to declare, vis-à-vis the other contracting parties of the ECHR, in a way that is binding under international law, their intention not to initiate proceedings against each other before the ECtHR pursuant to Article 33 ECHR in respect of alleged violations of the ECHR when the subject-matter of the dispute falls within the scope of EU law (p. 120).

Once again, this is hardly a problem that would be impossible to resolve should an accession eventually take place. The lack of a really constructive attitude of the Court in view of such an accession is here indeed quite striking.

5 The current legal status

Before analysing the current legal situation further, and in a wider perspective, with an emphasis on future European human rights protection, it may just be noted that the realization of the obligation on the EU to accede to the ECHR imposed by art. 6(2) TEU must now be put in doubt, if not for legal then for simple political and even practical reasons. Needless to say, an accession of the EU to the ECHR will require approval and ratification of no less than 47 European states. It is today, with "accession" to Opinion 2/13 in all European capitals, very hard to assess the interest throughout Europe in continued or new negotiations, with a view to changing the DAA in line with the wishes of the ECJ. This matter will of course not be analysed here, through a survey of attitudes in different states or by use of different methods of a similar kind. Suffice it to say that this path seems longer and more difficult than ever.

It is also impossible for the EU simply to ignore the Opinion and accede to the ECHR as if nothing had happened, since that would violate art. 218 (11) TFEU. In other words, Europe and the EU here find themselves in a deadlock situation or at a dead-end street. Art. 6(2) is of course still valid and will not cease to exist simply due to the Opinion (at least not until the EU Treaties are changed). But its real legal significance may today be put in doubt. Thus, Europe today finds itself in a legal status quo compared to the situation before 18 December 2014, which is the point of departure for the following discussion.

There is thus at the moment in my view no obvious point in discussing what the legal situation would have been or will be like in case of future accession.[61] What we do know, however, is that the purely political process of continuing with accession is not dead. On the contrary, the Latvian Presidency has organized meetings within COREPER and also issued papers explaining its position. It proposes to address all or most of the concerns raised by the ECJ[62], starting in April 2015, and then discuss how to proceed during the General Affairs Council meeting in June, on the basis of a contribution from the Commission. Speaking for the Commission, its Vice President Mr Timmermansn has declared, in a speech before the European Parliament on 12 February 2015 that it is, at least after an initial period of reflection, determined to continue with the accession process which is, thus, not at all dead from a purely political point of view.

[61] This has otherwise been a very popular topic in the legal doctrine in recent years. See e.g. Christina Eckes, EU Accession to the ECHR: Between Autonomy and Adaptation, Modern Law Review 2013 p. 254-85 and Lock in ELR 2010 p. 777-97.

[62] To be more precise, it recommends identifying options on the CRM, the prior involvement procedure, the specific characteristics and autonomy of EU law, divided into coordination between art. 53 ECHR and art. 53 CfR "as interpreted by" the ECJ (which ought to include what is referred to here as the Melloni doctrine) and the relationship between art. 267 TFEU and Protocol 16 ECHR as well as, finally, the application of art. 344 TFEU.

Based on a so-called non-paper or technical written contribution from the Commission, the working group FREMP within the Council then decided, on 21 April, to recommend continued accession negotiations with a view to bringing about changes in the DAA concerning CRM and the prior involvement procedure, in line with the wishes of the ECJ.[63] So far, other issues addressed by the ECJ have not been discussed.

[63] See DS 1216/15, LIMITE, 14 April 2015.

6 Legal consequences for Sweden and some other Member States

With the topical limitations mentioned above in mind, it is still possible to say a few words about recent legal developments and thus also the implications of Opinion 2/13 in some of the EU Member States.

Spain is indirectly very concerned by the Opinion, since it repeats and even reinforces the Melloni doctrine, that went against and overturned national law, in this case Spanish constitutional law. As mentioned above, the Spanish constitutional court, *Tribunal Constitucional*, had there asked for a preliminary ruling. Once that ruling arrived, the *Tribunal Constitucional* complied with it, to some surprise, in a plenary judgment of 13 February 2014.[64] Here, the protection offered by art. 24 of the Spanish Constitution was openly lowered, which was formally justified by invoking art. 10(2) of that same constitutional text, stating that the norms concerning fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and with other international agreements ratified by Spain. Thus, EU law and the CfR was here seen as just another kind of international law, in order to justify the severe limitation of (national) human rights protection that had just occurred. At the same time, the Spanish constitutional court, invoking the preamble of the Constitution, seemed to reserve for itself the right or possibility to give priority to the national constitution in future, similar cases[65] (in line with previous, well-known *Solange* cases and other case law from the *Bundesverfassungsgericht* (BVerfG), the German constitutional court[66].

In Germany, the constitutional court has for a long time – ever since the 1970s – been fighting a kind of battle with the ECJ concerning supremacy in the relation between EU law and the national constitution (and also on the question whether national courts may set aside EU acts that are considered unconstitutional as being *ultra vires*, i.e. outside the competence of the EU to enact). The BVerfG is an extremely powerful court in the financially and politically most important of all Member States, so if any court anywhere in Europe would be in a position to challenge the views of the ECJ, this is definitely the most likely candidate. Without going into details of this long battle between two powerful judicial bodies in Karlsruhe and Luxembourg, suffice it here to say that the German

[64] STC 26/2014.
[65] Cfr Besselink, op.cit. p. 550 s.
[66] See BVerfGE 37, 271 and 73, 339, as well as 89, 155.

attitude has inspired constitutional and high courts in many other EU Member States, such as Cyprus, Denmark, Italy and Poland.[67]

At the same time, however, the BVerfG has in recent years also shown signs of cooperation and loyalty towards the ECJ, being, after all, a national court in a Member State and thus bound by the principle of loyalty in art. 4(3) TEU. For instance, in the so-called Canissa decision of July 2011, it made clear that foreign legal persons may invoke certain rights of the German Constitution that would according to the text appear to apply only to Germans.[68] And in January 2014, the BVerfG for the first time ever asked for a preliminary ruling from the ECJ, in a case concerning the so-called stability funds within the euro zone.[69] Regardless of the legal context, the fact that this happened at all has symbolic weight. It may also be noted that in particular articles 23 and 59 of the German Constitution (*Grundgesetz*), as well as its Preamble, do actually require it to be interpreted in a manner that is open and friendly towards Europe and to international law in general.[70]

Both Germany and Spain can thus to a certain extent be said to have anticipated, through their constitutional courts, the outcome of the Opinion 2/13, with the partly unclear legal situation that it has created. Both countries have also been much affected by what we may call a gradually intensified battle between powerful European courts, i.e. the ECJ, ECtHR and national constitutional courts. To a certain extent, this tendency has been visible also in Sweden, although Sweden lacks a constitutional court. Here, some decisions of the Supreme Court have merited particular attention.

The most well known of these are undoubtedly the cases concerning *ne bis in idem*, the prohibition against double sanctions in tax affairs. This has come to be known also at European level, due to the Åkerberg Fransson case already mentioned above (which never went to the Supreme Court). There are however also other important cases here, both before and after the Åkerberg Fransson judgment of 26 February 2013.

---

[67] See here, in alphabetical order of the countries, judgments from the Constitutional Court of Cyprus 7 November 2005 in case 294/2005, *Höjesteret* in Denmark, U 1998.800 H, *Corte Costituzionale* in Italy, Frontini, 183/1973, 1974 Giur.Cost. 330 and in Poland a judgment of the Constitutional Court on 17 April 2005, in case P I/05. Concerning the initial development in some of the Member States that joined EU in 2004, see Dawid Miasik, Application of General Principles of EC Law by Polish Courts – Is the European Court of Justice Receiving a Positive Feedback? In Bernitz/Nergelius/Cardner (eds.), General Principles of EC Law in a Process of Development, Alphen aan den Rhijn 2008 p. 357-92. – It may also be noted that the *Solange* cases and the Maastricht case from October 1993 (BVerfGE 89, 155) have to a large extent inspired the Swedish regulation of the constitutional conditions and requirements for EU Membership, as follows from chap. 10, art. 6 in the Swedish Constitution.

[68] 19 July 2011, BVerfGE 129, 78.

[69] Decision of 14 January 2014, 2BvR 2728/13 u.a.

[70] See e.g. Markus Ludwigs, Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR, Europäische Grundrechte Zeitschrift 2014 at p. 279.

If we focus first on the Åkerberg Fransson case, a few words may be said about its background (also with a view to the previous discussion).

Mr Åkerberg Fransson was a self-employed fisherman with only one fishing boat. He ran his financial activities as a sole trader and was therefore personally responsible for paying income tax and VAT. He fished vendace in the north of Sweden, at the mouth of the Kalix River. Vendace is full of valuable roe, *Kalix löjrom*, which is an expensive and delicious speciality that enjoys a protected designation of origin in the EU. Mr Åkerberg Fransson sold *Kalix löjrom* to buyers in Sweden, primarily first class restaurants, but he had also sold a smaller amount of eviscerated vendace as mink food in Finland.

The Swedish Tax Agency scrutinized the tax returns and the book-keeping of Mr Åkerberg Fransson, assessing that there were errors in the book-keeping for the sale of roe and deciding to increase Mr Åkerberg Fransson's declared income and declared VAT for 2004 and 2005 to approximately SEK 500 000 and the VAT to approximately SEK 150 000 (approximately € 16,000). The Tax Agency also decided to charge a tax surcharge as the tax returns were found unsatisfactory. For the income part the surcharge was 40% and for the VAT part 15%. Mr Åkerberg Fransson did not appeal against the Tax Agency's decision.

Despite the fact that Mr Åkerberg Fransson had been ordered to pay a tax surcharge, he was summoned to appear before Haparanda District Court in 2009 on charges of serious tax offences. Given the circumstances, he risked a prison sentence of some 6–8 months. His defence counsel pleaded that the case should be rejected, invoking the *ne bis in idem* principle. In December 2010, the District Court decided to request a preliminary ruling from the ECJ, asking whether the Swedish policy of double procedures and sanctions could be regarded as being compatible with the prohibition against *ne bis in idem* in Article 50 of the Charter. In its request to the ECJ, the District Court stressed that the tax surcharge partly concerned VAT.[71]

The issue whether it was legally possible under the ECHR to apply separate legal proceedings for tax surcharge and tax offences based on the same information in a tax return had been debated in Sweden for a long time. In 2002, the ECtHR had concluded in two cases that the Swedish system with tax surcharges was of a criminal kind.[72] However, the decisions by the ECtHR did not change the Swedish legislation. Neither did the courts change their practice. However, the sharpened definition of what constitutes *ne bis in idem* in the Zolotukhin

[71] The decision by the Supreme Court majority not to refer a similar case to the ECJ, NJA 2011 p. 444, was handed down approximately six months later. For some reason, the referral of the Åkerberg Fransson case which was already being considered by the ECJ, was not mentioned in the Supreme Court ruling.

[72] Janosevic v. Sweden, App. No. 34619/97 and Västberga Taxi and Vulk v. Sweden, App. No, 36985/97.

judgment in 2009 (see below) made the problem urgent. The Supreme Court ruled on the matter in two new decisions in 2010 and 2011. In the 2010 decision, which focused on the ECHR, the majority of the justices took the view that the Zolotukhin judgment did not give "clear support" to the need to change Swedish practice.[73]

Also in the 2011 case[74], the defendant invoked the *ne bis in idem* principle in Article 50 of the Charter. The case dealt partly with tax surcharges for undeclared VAT. A majority of three justices of the Supreme Court concluded that the Swedish legal provisions on tax offences and tax surcharges lay outside the scope of the Charter, and that, thus, a preliminary ruling was not required. Two dissenting justices took a different view and concluded that the legal position was not clear as regards the possible applicability of the Charter and that a preliminary ruling should thus be requested. In reality, the Supreme Court voted on whether a preliminary ruling should be requested from the ECJ or not. As is well known, according to Article 267 sect. 3 TFEU, the highest instance court is obliged to request a preliminary ruling if a case pertains to EU law, unless the legal position is clear (*acte clair,* as follows from the well-known CILFIT case). Obviously, the Supreme Court did not observe that obligation, which was even sharper as the ECJ at that time had not clarified its position on the scope of the Charter. In its Åkerberg Fransson judgment the ECJ found it necessary to include a reminder – obviously addressed to the Supreme Court – about the duty to observe Article 267 TFEU as interpreted in the CILFIT case.[75]

In Sweden, decisions of the Supreme Court are not formally binding on judges in lower courts, but nevertheless hitherto they have always been observed and followed. However, in this case, some judges in lower courts found the position of the Supreme Court clearly wrong and refused to follow it. This much observed "revolt" among Swedish judges is an important part of the background to the Åkerberg Fransson case, in which a district court judge in a small town thus decided to question the established Swedish system by asking the ECJ for a preliminary ruling.

In the Åkerberg Fransson judgment, then, the ECJ as we know emphasized the importance of the CfR and underlined the need for national courts to apply it whenever possible, i.e. when the case is within the scope of EU law. After the Åkerberg Fransson judgment, the Swedish Supreme Court in two other rulings in June and July 2013 based on the *ne bis in idem* principle totally reversed the practice of imposing a tax surcharge on a person and then also prosecuting

[73] NJA 2010 p. 168.
[74] NJA 2011 p. 444.
[75] CILFIT, Case 283/81, ECLI:EU:C:1982:335.

the same person for a tax offence in different legal proceedings.[76] In the first ruling, a unanimous plenary ruling in June 2013[77], the Supreme Court found that the established Swedish double sanction system (tax surcharge and criminal sentence), applying two different legal procedures for providing false information in a tax return, was not compatible with the *ne bis in idem* principle. It is obvious that this important change in the Swedish legal position was brought about by the decision of the Court of Justice in the Åkerberg Fransson case.

Later, in July 2013[78], the Supreme Court established that a result of this change in the law is that everyone has the right to a new trial if he or she has paid a tax surcharge and in addition been sentenced in a criminal procedure for a tax offence. The Supreme Court set the date of "birth" for the use of this extraordinary legal remedy to 10 February 2009, the date of the ECtHR judgment in the Zolotukhin case.[79] In the following months, a substantial number of persons serving sentences for tax offences were thus released from prison and many ongoing tax offence prosecutions were terminated in cases where the accused persons had had to pay a tax surcharge.

Thus, it is clear that the Åkerberg Fransson judgment had very important repercussions in Swedish constitutional law, strengthening both human rights and judicial review. The Supreme Court has, also in other cases, been eager to stress the increased importance of the ECHR and the fact that Swedish laws will normally not be upheld should they violate or be in conflict with the Convention.[80] In 2014, the Supreme Court even launched its own "equivalent" of the Bosphorus doctrine, stating in the so-called Billerud case[81] that Swedish courts must follow the ECJ's interpretation of EU acts unless the application of the specific act would amount to a clear, obvious violation of the ECHR. The Court stressed that this means that the possibilities for Swedish courts to deviate from the jurisprudence of the ECJ are extremely limited, given that EU law must be supposed to meet the standard(s) of the ECHR.

---

[76] The literature on this subject is now large. See in English D. Sarmiento, Who's Afraid of the Charter?, CMLR 2013 p. 1267 ff., I Kargopoulos, Ne bis in idem in Criminal Proceedings, Swedish Studies in European Law, vol. 5, Oxford 2014 p. 85 ff, Ola Zetterquist, *Ne Bis in Idem* and the European Legal Tsunami of 2013: A Vision from the Bench, and Magnus Gulliksson, Effective Sanctions as the One-Dimensional Limit to the *Ne Bis in Idem* Principle in EU Law, both in J. Nergelius/E.Kristoffersson (eds.), Human Rights in Contemporary European Law – Swedish Studies in European Law, vol. 6, Oxford 2014 p. 131-40 and 141-89, respectively.

[77] NJA 2013 p. 502.

[78] NJA 2013 p. 746.

[79] App. No. 14939/03, Zolotukhin v. Russia, Judgment 10 February 2009.

[80] From recent years, see e.g. NJA 2012 p. 211 and 1028.

[81] NJA 2014 p. 79.

7 The future of human rights protection in Europe

It is of course very natural that an important and rather unexpected outcome like the one in Opinion 2/13 will have a huge aftermath and be very much discussed in legal and political circles throughout Europe. The question may even be raised whether an EU accession to the ECHR, with all the reservations and obstacles now identified by the ECJ, would be beneficial for and really strengthen the human rights protection in Europe today. That is in fact far from certain, given that an accession would then come about by sacrificing some of the elements that have led to the current high human rights standard. Here, I will however focus on what the Opinion might mean for the relationship between the ECJ and other European courts, not only the ECtHR but also constitutional and/or supreme courts in the Member States (the so-called Bermuda Triangle of high European courts). Also some hitherto unresolved legal issues will be further discussed.

First, we may ask if such a thing as a legal dialogue between the highest courts in Europe does actually exist. Here, opinions seem to shift from very optimistic to rather cynical ones. For example, Koen Lenaerts has recently talked about some "sunshine stories" in this respect[82], pointing to a case before the ECJ brought from Belgium[83] and decisions from the Austrian Constitutional Court (*Verfassungsgerichtshof*).[84] He stresses that the very existence of the preliminary ruling procedure in art. 267 TFEU intends to create a climate of dialogue, which he believes will thrive in an era characterized by what is often called *constitutional pluralism*. Although this article was obviously written before Opinion 2/13 was published, he does however also point to some potential problems, such as the negative attitude towards the supremacy of EU law shown by the Czech constitutional court in 2012.[85]

There are undoubtedly some tendencies in the jurisprudence[86] and also a number of rules in the EU Treaties, the CfR and the ECHR that may very well foster

[82] See K. Lenaerts, Kooperation und Spannung im Verhälnis von EuGH und nationalen Verfassungsgerichten, Europarecht 2015 p. 3-27.

[83] C-73/08, Bressol, ECR 2010 I p. 2735.

[84] ÖVerfGH 28 November 2012, G-47/12-11 u.a.

[85] Pl. Ús 5/12, "Slovak Pensions", 31 January 2012, which is available in English at http://www.usoud.cz/. In this judgment, the Czech Court declared the judgment in the case Landtova, C-399/09, ECLI:EU:C:2011:415 to be *ultra vires*.

[86] See here in the doctrine Ludwigs, op.cit. p. 278, invoking the case of Michaud v. France, 12323/11, Judgment of the ECtHR, 6 December 2012.

such a dialogue. Here we may point to the obligation of the EU to respect the national identities of the Member States, "inherent in their fundamental structures, political and constitutional" in art. 4(2) TEU, as well as the principle of loyalty (art. 4(3)), the fact that the fundamental rights form a part of the general principles of EU law (art. 6(3)) and not least the attempts to sideline the Charter with the ECHR and human rights in the constitutions of the Member States in art. 52 (3-4) CfR (whereas art. 53 CfR seems to be hopelessly undermined by the Melloni judgment, as discussed above). Also art. 53 ECHR may be mentioned here, as well as the many articles in the ECHR (e.g. articles 1, 13, 35) indicating that national courts must be involved in the application of the convention, in the spirit of subsidiarity, that is probably more important than ever given the very heavy workload of the ECtHR.[87] We may also find examples of cases from the ECJ that seem to be cooperative, so to speak, towards national courts. For instance, Åkerberg Fransson may be said to have such an effect, extending the range of the CfR (or perhaps rather stressing its already very wide range) while at the same time leaving the decision-making in individual cases to national courts, who know best the specific circumstances in each case.

> Another such case may be Kamberaj[88], where the ECJ found – albeit perhaps somewhat controversially – that art. 6(3) TEU does not in itself oblige national courts to set aside national rules that are contrary to the ECHR, since art. 6(3) does not regulate the relationship between the ECHR and national law. This may certainly be interpreted in different ways, but it may after all make life a little bit easier for national judges, who are of course anyway obliged to set aside national rules that violate the ECHR due to the convention itself and to established rules and custom of international law.

But then, as mentioned above, Melloni points in a totally different direction that makes judicial dialogue in Europe more or less impossible.[89] And unfortunate though it may be, it is clear that Opinion 2/13 reinforces the Melloni doctrine rather than loosening it. It is also worth noticing here that the "Melloni-inspired" objections to accession based on mutual trust and the scope *ratione materiae* of EU law represent the only critical points in the Opinion on which the AG did not comment or analyse. In a way, then, this real or perceived problematic aspect of accession may be said to have been invented by the Court itself.

When analysing the legally crucial parts of Opinion 2/13, it seems clear that the risk or possibility that the ECtHR might, after EU accession, have the right to

---

[87] See here also the new Additional Protocol 15 ECHR, which has yet not entered into force.

[88] Kamberaj, C-571/10: ECLI:EU:C:2012:233.

[89] Like many other European judges who have commented on the issue, Koen Lenaerts, a distinguished scholar, seems surprisingly unwilling to accept this. See Lenaerts, op.cit. p. 21 ss. Besselink (op.cit. p. 551), on the other hand, goes so far as to state that Melloni shows that the ECJ finds it easier to get involved in a conflict with an "embattled" constitutional court such as the Spanish than with a powerful one like the German, which in his view shows that the whole idea of a judicial dialogue is somewhat futile.

examine aspects of the relationship between EU law and national law was one of the main problems for the ECJ. This problem or general fear seems to have mattered much more than, for example, the existence as such of Protocol 8 and other special provisions. In particular this sometimes perhaps understandable worry seems to have mattered in areas that are supposed to be characterized by a so-called mutual trust between the EU Member States. Here, it may even be said that the ECJ wishes to impose an interpretation of the ECHR (including its art. 53) that is inspired by Melloni on the other main judicial actors in Europe, including the ECtHR. And that is not a sound basis for a dialogue.

Now, arguments in favour of the Melloni doctrine do of course exist.[90] In the doctrine, it has been argued that the Melloni doctrine and the idea of mutual trust is necessary within the areas of harmonized EU law, in order to protect the achievements of the Single Market. It may perhaps also be argued that the higher standard of human rights protection at national level that art. 53 stipulates shall only apply if this protection enjoys support from all or at least a majority of the Member States' constitutions, though that is far from clear.[91]

Nevertheless, even if those arguments are accepted to some extent, it is still quite surprising to find the Melloni argumentation at the very core of the Court's rejection of the accession to the ECHR. Even if it should be accepted that the ECJ wishes to limit human rights protection *within* EU law in this manner, due to certain other important key values of EU law[92], it is still not easy to understand that those same values – i.e. mutual trust between Member States within the scope of EU law *ratione materiae* – should matter quite as much in relation to a future EU accession to the ECHR. Here, as said before, it seems the ECJ wishes to impose its controversial jurisprudence on the ECtHR, in a situation where the ECJ fears a future supervision from the latter. To some extent, this is what permeates Opinion 2/13, and this attitude of the ECJ does not promote any future judicial dialogue between the highest courts in Europe. The reluctance to accept the final word of the ECtHR in future human rights issues that follows from this line of reasoning will hardly make national supreme or constitutional courts more willing to accept the precedence of the ECJ in future conflicts between EU law and national constitutional law.

---

[90] For a kind of defence of Opinion 2/13 and its consequences, see Daniel Halberstam, "It's the Autonomy, Stupid!". A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, Michigan Law, University of Michigan, Public Law and Legal Theory Research Paper Series No. 432, February 2015, http://ssrn.com/abstract=2567591. Halberstam is however also critical towards many aspects of the Opinion.

[91] This matter has never really been clarified, either in the doctrine or in the jurisprudence of the ECJ or in any declarations, explanations, interpretations or other kinds of *travaux préparatoires* for the CfR. All that can be said for certain is that a human rights-friendly interpretation of art. 53 should not impose too strict requirements in this respect.

[92] Cfr Aida Torres Perez, Melloni in Three Acts: From Dialogue to Monologue, European Constitutional Law Review 2014 p. 308-31.

Meanwhile, and as indicated above, it seems that some of the highest national courts throughout the EU, while wishing to engage in a constructive dialogue and acknowledging more than ever before the supremacy of EU law, are at the same time preparing themselves for "bad times", when they will need to resort to the – sometimes obviously stronger – protection of fundamental rights offered by national constitutions.[93] Thus, the tendency, at least in the countries discussed here, may be described as doing the best effort while preparing for the worst situation. It will certainly be very interesting to follow the debate and constitutional development in Europe in the next few years.

[93] See in this respect some interesting remarks by Anneli Albi, An Essay on how the Discourse on Sovereignty and on how the Co-operativeness of National Courts has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU, in M. Claes/M. de Visser/P. Popelier/ C. van de Heyning (eds.), Constitutional Conversations in Europe: Actors, Topics and Procedures, Cambridge 2012 p. 41-69.

8 Concluding remarks

After this survey, we may thus conclude that, formally speaking, the accession negotiations will continue, despite the harsh words used by the ECJ in Opinion 2/13 and the many difficult legal problems that the Court managed to find. There is of course a considerable amount of political prestige invested in the project, from the EU as well as the Council of Europe. At the same time, the ECJ has a power of veto concerning the accession of the EU to international agreements, as follows from art. 218 (11) TFEU. It is thus simply not possible to imagine that the points observed and criticized by the ECJ will not be addressed in future negotiations.

Given that all those points concern vital legal issues, it is perhaps unavoidable that the issue of a treaty change will now also be on the agenda. As we know, the last Treaty change was the Lisbon Treaty, which entered into force on 1 December 2009. Also other important things happening in Europe might perhaps point in that direction; one such issue is the British wish for a re-negotiation of its membership conditions (possibly preceding a referendum on future British EU membership) and another one may be changes in the direction of a so-called fiscal union. At least some of the elements addressed by the ECJ in Opinion 2/13 may be suitable elements in order to "spice up" new negotiations on a treaty change, but that is of course pure speculation. What is sure is that the ever more important issue of human rights protection would definitely merit its place there, as one of the issues requiring a treaty change. However, if such negotiations are to lead to any successful results, it is crucial that no "Pandora's box" of all sorts of human rights interests from different countries or NGOs is allowed to be opened; here, the delicate balance between concrete, specific issues raised by Opinion 2/13 and a totally unmanageable maze may be hard to find. At the same time, changes concerning the role of the ECJ and its competences and jurisdiction are possible to imagine, in order to accommodate some of the worries now raised by the Court (e.g. concerning CFSP).

As we know, any treaty change will require the consent and ratification of all the EU Member States, in line with their respective constitutional traditions (art. 48 TEU). It is normally preceded by an inter-governmental conference. At the moment it is very difficult, to say the least, to foresee whether and to what extent the different Member States are interested in discussing new treaty changes, but should such a will occur in the next few years, the issues addressed by the ECJ in view of accession to the ECHR are definitely very likely to be part in any such discussions. And in fact, it is not easy to imagine how the EU (and the Council of Europe) might overcome the hurdles now posed by the ECJ without a process of that kind. Thus, at the moment a treaty revision seems more realistic than a revision of the DAA.

9 References

Cases

European Court of Justice

Case 1/58, Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community, ECLI:EU:C:1959:4

Case 6/64, Flaminio Costa v. ENEL, ECLI:EU:C:1964:66

Case 29/69, Erich Stauder v. City of Ulm, Sozialamt, ECLI:EU:C:1969:57

C-11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:EU:C:1970:114

Case 4/73, J.Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities ECLI:EU:C:1974:51

Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, ECLI:EU:C:1978:49

Case 44/79, Hauer v. Rheinland-Pfalz, ECLI:EU:C:1979:290

Case 283/91, SrL CILFIT and Lanificio di Gavardo SpA v. Ministerio della santà, ECLI:EU:C:1982:335

Case 314/85, Foto-Frost v. Haiptzollamt Lübeck-Ost, ECLI:EU:C:1987:452

C-159/90, Society for the Protection of Unborn Children Ireland v. Grogan, ECLI:EU:C:1991:378

C-73/08, Nicolas Bressol and Others v. Gouvernement de la Communauté français, ECLI:EU:C:2010:181

C-399/09, Marie Landtová v. Česká správa socialního zabezpečení, C-399/09, ECR 2011 I p. 5573, ECLI:EU:C:2011:415

C-411/10, N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, ECLI:EU:C:2011:865

C-571/10, Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES), ECLI:EU:C:2012:233

C-617/10, Åklagaren v. Hans Åkerberg Fransson, ECLI:EU:C:2013:105

C-399/11, Stafano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107

Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources and Kärntner Landesregeirung and Other, ECLI:EU:C:2014:238

European Court of Human Rights

Ireland v. UK, Judgment 18 January 1978, Series A No 25

Open Door and Dublin Well Woman Center v. Ireland, Judgment 29 October 1992, Series A No. 246

Bosphorus v. Ireland, 45036/98, Judgment 30 June 2005, 42 EHRR 1

Janosevic v. Sweden, App. No. 34619/97 and Västberga Taxi and Vulk v. Sweden, App. No, 36985/97, Judgment 23 July 2002

Zolotukhin v. Russia, 14939/03, Judgment 10 February 2009
Michaud v. France, 12323/11, Judgment by ECtHR 6 December 2012
Sharifi et al. v. Italy and Greece, 16643/09, Judgment 21 October 2014
Tarakhel v. Switzerland, Judgment 4 November 2014 (29217/12)

National courts

Austria
ÖVerfGH, 28 November 2012, G-47/12-11

Cyprus
Judgment of the Constitutional Court, 7 November 2005 in case 294/2005

Czech Republic
Pl. Ús 5/12, "Slovak Pensions", 31 January 2012, available in English at http://www.usoud.cz/

Denmark
U 1998.800 H

Germany
BVerfGE 37, 271
BVerfGE 73, 336
BVerfGE 89, 155
BVerfGE 129, 78.
Decision of 14 January 2014, 2BvR 2728/13 u.a.

Italy
Corte Costituzionale, Frontini, 183/1973, 1974 Giur.Cost. 330

Poland
Constitutional Court, Judgment 17 April 2005, in case P I/05

Spain
STC 26/2014

Sweden
NJA 2010 p. 168
NJA 2011 p. 444
NJA 2012 p. 211
NJA 2012 p. 1028
NJA 2013 p. 502
NJA 2014 p. 79

Litterature

Albi, Anneli: An Essay on How the Discourse on Sovereignty and on How the Co-operativeness of National Courts has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU, in M. Claes/M. de Visser/P. Popelier/C. van de Heyning (eds.), Constitutional Conversations in Europe: Actors, Topics and Procedures, Cambridge 2012 p. 41-69

Besselink, Leonard: The Parameters of Constitutional Conflict after Melloni, European Law Review 2014 p. 531-52

Duff, Andrew: EU Accession to the ECHR: What To Do Next, at http://www.verfassungsblog.de/en/eu-accession-to-the-echr-what-to-do-next

Eckes, Christina: EU Accession to the ECHR: Between Autonomy and Adaptation, Modern Law Review 2013 p. 254-85 and Lock in ELR 2010 p. 777-97

Groussot, X./E. Stavefeldt: Accession of the EU to the ECHR: A Legally Complex Situation, in J. Nergelius/E. Kristoffersson (eds.), Human Rights in Contemporary European Law, Swedish Studies in European Law vol. 6, Oxford 2014 p. 21 ss

Gulliksson, Magnus: Effective Sanctions as the One-Dimensional Limit to the *Ne Bis in Idem* Principle in EU Law, in J. Nergelius/E. Kristoffersson (eds.), Human Rights in Contemporary European Law – Swedish Studies in European Law, vol. 6, Oxford 2014 p. 141-89

Halberstam, Daniel: "It's the Autonomy, Stupid!". A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, Michigan Law, University of Michigan, Public Law and Legal Theory Research Paper Series No. 432, February 2015, http://ssrn.com/abstract=2567591

Jacqué, Jean Paul: The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, Common Market Law Review (CMLR) 2011 p. 995-1023

Kargopoulos, I: Ne bis in idem in Criminal Proceedings, Swedish Studies in European Law, vol. 5, Oxford 2014 p. 85 ss

Lenaerts, Koen: Kooperation und Spannung im Verhälnis von EuGH und nationalen Verfassungsgerichten, Europarecht 2015 p. 3-27

Ludwigs, Markus: Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR, Europäische Grundrechte Zeitschrift 2014 p. 273-85

Miasik, Dawid: Application of General Principles of EC Law by Polish Courts – Is the European Court of Justice Receiving a Positive Feedback? In Bernitz/Nergelius/Cardner (eds.), General Principles of EC Law in a Process of Development, Alphen aan den Rhijn 2008 p. 357-92

Rasmussen, Hjalte: On Law and Policy in the European Court of Justice, Dordrecht/Boston/Lancaster 1986

Ryngaert, Cedric: Oscillating between Embracing and Avoiding *Bosphorus*: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the European Union, ELR 2014 p. 176-92

Sarmiento, D.: Who's Afraid of the Charter?, Common Market Law Review (CMLR) 2013 p. 1267 ss

Torres Perez, Aída: Melloni in Three Acts: From Dialogue to Monologue, European Constitutional Law Review 2014 p. 308-31

Toth, A.G.: The European Union and Human Rights: The Way Forward, Common Market Law Review (CMLR) 1997 p. 491-529

Wennerström, Erik: EU Accession to the European Convention on Human Rights – the Creation of a European Legal Space for Human Rights or the Last Stand for the Normative Supremacy of the Strasbourg System?, Europarättslig tidskrift 2013 p. 375-92

Wennerström, Erik: EU Accession to the European Convention on Human Rights – the Creation of a European Legal Space for Human Rights, in J. Nergelius/E. Kristoffersson (eds.), Human Rights in Contemporary European Law – Swedish Studies in European Law vol. 6 Oxford 2014 p. 91-104

Zetterquist, Ola: *Ne Bis in Idem* and the European Legal Tsunami of 2013: A Vision from the Bench, in J. Nergelius/E. Kristoffersson (eds.), Human Rights in Contemporary European Law – Swedish Studies in European Law vol. 6, Oxford 2014 p. 131-40

Svensk sammanfattning

I december förra året meddelade EU-domstolen sitt yttrande i frågan om huruvida EU inom en nära framtid kan ansluta sig till Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (EKMR). Med all önskvärd tydlighet och med hjälp av ett antal argument som berör olika områden avvisade domstolen det förslag till anslutningsavtal som under 2013 förhandlades fram mellan EU och Europarådet.

Det var dock inte första gången som EU-domstolen behandlade frågan om möjligheterna för EU att ansluta sig till EKMR och heller inte första gången som den argumenterade emot att det skulle kunna vara möjligt. Men när saken förra gången var uppe till prövning (1996), var omständigheterna annorlunda. Inte minst som EU då saknade det uttryckliga mandat som idag återfinns i artikel 6, punkt 2 i EU-fördraget och som anger att EU *skall* tillträda EKMR. Också villkoren i EKMR har ändrats för att möjliggöra ett medlemskap för EU, vilket framgår av tilläggsprotokoll 14. Utöver denna förändring är avtalet som EU-domstolen tog ställning till förra året genomsyrat av en helt annan politisk vilja än den som fanns 1996. Det framgår av att såväl majoriteten av EU:s medlemsländer som andra europeiska länder är huvudsakligen positiva till ett EU-tillträde.

Efter EU-domstolens tydligt kritiska yttrande angående frågan om EU:s tillträde kan man förstås ifrågasätta den rättsliga betydelsen av artikel 6 i EU-fördraget. Men bestämmelsen går inte att bortse från, vilket leder till att domstolens yttrande närmast kan sägas hamna i konflikt med fördraget. Det är mot den bakgrunden inte överraskande, utan snarare logiskt, att domstolens yttrande på bara några få månader har lett till en bred rättslig debatt över hela Europa.

I denna rapport diskuteras yttrandet och dess rättsliga samt politiska konsekvenser för Europa. Det är tydligt att EU:s skydd för mänskliga rättigheter har blivit starkare med åren, särskilt under de senaste tjugo åren, och att dagens skydd är starkare än någonsin. Den rättsliga analysen görs alltså mot den bakgrunden, och därefter diskuteras och analyseras själva yttrandet. Slutligen ges några perspektiv på de rättsliga och politiska konsekvenserna av domstolens yttrande. Rapporten innehåller således såväl en genomgång av innehållet i yttrandet som en analys av själva yttrandet och dess konsekvenser.

När det gäller de sammanlagt sju skäl som EU-domstolen nämner för varför man anser att EU inte kan tillträda EKMR på de villkor som anges i förslaget till anslutningsavtal, är fem rättsligt sett viktigare och mer intressanta än de båda andra. De fem rör sig inom ett brett område som omfattar allt från EU:s gemensamma utrikes- och säkerhetspolitik (GUSP) till de processuella

svårigheter som ett tillträde föranleder, bland annat i förhållande till den så kallade medsvarandemekanismen. Enligt anslutningsavtalet föreskriver den mekanismen att unionen ska kunna bli part i mål som anhängiggörs vid Europadomstolen. De ovan nämnda fem invändningar som EU-domstolen lyfter fram analyseras samtliga i denna rapport. En särskilt relevant rättslig aspekt rör det faktum att EU-domstolen genom sitt yttrande har upprepat och bibehållit den kontroversiella linje som man första gången lanserade i den så kallade Melloni-domen från 2013. Det bekräftas av att domstolen genom sitt yttrande dels kräver att principen om ömsesidigt erkännande ska fortsätta att gälla i relationerna mellan EU:s medlemsstater i de fall då de tillämpar olika standarder för skyddet för mänskliga rättigheter, dels också begär att Europadomstolen inte ska ha jurisdiktion då ett mål aktualiserar tillämpningen av EU:s stadga för mänskliga rättigheter.

I rapporten analyseras också – ur olika rättsliga och konstitutionella perspektiv – yttrandets innebörd för det bredare skyddet för mänskliga rättigheter i Europa. Det innefattar även frågan om hur de framtida relationerna mellan EU-domstolen och de nationella högsta domstolarna sannolikt kommer att påverkas och vad det kommer att innebära för dialogen dem emellan. Det är tydligt att EU-domstolen oroar sig över att dess jurisdiktion i framtiden på vissa områden kommer att delas med Europadomstolen, inklusive inom områden där EU-domstolen är van vid att ha exklusiv jurisdiktion. I vissa fall är denna oro dock begriplig och berättigad.

Enligt EU:s fördrag har EU-domstolen vetorätt när det gäller att avgöra om vissa internationella avtal kan ingås mellan EU och tredje part. Detta framgår av artikel 218, punkt 11 i EU:s funktionsfördrag. Det innebär att EU och Europarådet nu är bundna att beakta EU-domstolens kritiska synpunkter i sina fortsatta förhandlingar. Vad som kommer att hända den närmaste framtiden är bland annat avhängigt av vad det nuvarande ordförandelandet i ministerrådet, Lettland, och EU-kommissionen har att säga om saken. De har än så länge inskränkt sig till att försäkra att förhandlingarna om EU:s tillträde till EKMR kommer att fortsätta trots domstolens kritik, men frågan kommer att diskuteras vid ett möte med allmänna rådet i juni 2015. Också Europarådet har visat intresse för fortsatta förhandlingar. Ser man på situationen från krass politisk synvinkel är det svårt att se någon annan utgång än just fortsatta förhandlingar, eftersom såväl EU och unionens medlemsstater som Europarådet och dess medlemsstater redan har investerat mycket prestige i frågan. Ur ett rättsligt perspektiv är det dock svårare att se hur man skall kunna få till stånd ett anslutningsavtal. Kanske är det till och med mer realistiskt att tänka sig en fördragsändring som en lösning på de politiska och konstitutionella svårigheter vi nu står inför? Genom en sådan fördragsändring skulle även andra frågor, som exempelvis hur framtida finanskriser ska hanteras, kunna ses över.

Oavsett vilket alternativ som väljs står det dock klart att yttrande 2/13 också på ett bredare plan utmanar det rådande europeiska regelverket till skydd för mänskliga rättigheter. Mot bakgrund av alla de hinder som EU-domstolen har ställt upp för EU:s tillträde till EKMR, kan man till och med fråga sig om en EU-anslutning till EKMR totalt sett verkligen skulle stärka det europeiska skyddet för mänskliga rättigheter. Om man dessutom beaktar utgången i Melloni-domen, kan man undra hur en anslutning skulle påverka relationerna mellan de två mäktiga europeiska domstolarna och de högsta domstolarna i EU:s medlemsländer.

SIEPS publications in English

2015

2015:3
The accession of the EU to the European Convention on Human Rights
Author: Joakim Nergelius

2015:2
Investor-state arbitration under TTIP
Author: Hannes Lenk

2015:1
Homophobia and genderphobia in the European Union: Policy contexts and empirivcal evidence
Author: Judit Takács

2015:1op
Same, same but different: The Nordic EU members during the crisis
Authors: Pernilla Bäckman (ed.), Julie Hassing Nielsen, Juha Jokela, Jakob Lewander (ed.) and Göran von Sydow (ed.)

2015:13epa
The impact of mega regional agreements on international investment rules and norms
Author: Steve Woolcock

2015:12epa
The Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Spanish Regions – A Preliminary Analysis
Author: José Villaverde and Adolfo Maza

2015:11epa
Transatlantic Market Integration, Business and Regulation: Building on the WTO
Authors: Bernard Hoekman and Petros C. Mavroidis

2015:10epa
Juncker's investment plan: what results can we expect?
Author: Martin Myant

2015:9epa
Russia's economic troubles – a perfect storm of falling oil prices, sanctions and lack of reforms
Author: Torbjörn Becker

2015:8epa
Entering a World of Footloose Tax Bases: Can the EU Generate Its Own Income?
Author: Daniel Tarschys

2015:7epa
Britain and the EU: a negotiator´s handbook
Author: Roderick Parkes

2015:1
Homophobia and genderphobia in the European Union: Policy contexts and empirivcal evidence
Author: Judit Takács

2015:1op
Same, same but different: The Nordic EU members during the crisis
Authors: Pernilla Bäckman, Julie Hassing Nielsen, Juha Jokela, Jakob Lewander and Göran von Sydow (Ed.)

2015:6epa
Europe´s pivotal peace projects: Ethnic separation and European integration
Author: Lynn M. Tesser

2015:5epa
Groundhog Day in Greece
Author: Thorsten Beck

2015:4epa
The Greek elections of 2015 and Greece´s future in the eurozone
Author: Dionyssis G. Dimitrakopoulos

2015:3epa
The diplomatic role of the European Parliament´s parliamentary groups
Author: Daniel Fiott

2015:2epa
Social Policy and Labour Law during Austerity in the European Union
Author: Niklas Bruun

2015:1epa
International Trade Union Solidarity and the Impact of the Crisis
Authors: Rebecca Gumbrell-McCormick and Richard Hyman

2014

2014:7
Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020
Authors: Jonathan Zeitlin and Bart Vanhercke

2014:6
EU External Action in the Field of Development Cooperation. The impact of the Lisbon Treaty
Authors: Morten Broberg and Rass Holdgaard

2014:2
The impact of the financial crisis on European housing systems: a review
Authors: Christine Whitehead, Kathleen Scanlon and Jens Lunde

2014:7epa
A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone
Authors: Claire Kilpatrick and Bruno De Witte

2014:4epa
Why vote at an election with no apparent purpose? Voter turnout at elections to the European Parliament
Author: Mark N. Franklin

2014:3epa
The EU Budget and balance of Powers between the European Parliament and the EU Governments
Author: Sara Hagemann

2014:2epa
Between a rock and a hard place: the future of EU treaty revisions
Author: Carlos Closa

2014:1epa
Scrutiny in Challenging Times – National Parliaments in the Eurozone Crisis
Authors: Katrin Auel and Oliver Höing

2013

2013:8
Close Encounters of the Third Kind: The Interface between the EU and International Law after the Treaty of Lisbon
Author: Ramses A. Wessel

2013:7
Regulating Lifestyles in Europe: How to Prevent and Control Non-Communicable Diseases Associated with Tobacco, Alcohol and Unhealthy Diets?
Authors: Alberto Alemanno and Amandine Garde

2013:6
The Future of the Schengen Systems
Author: Steve Peers

2013:5
Immigration to Sweden from the New EU Member States
Authors: Christer Gerdes and Eskil Wadensjö

2013:4
Institutions, Policies and Growth in Europe: Quality versus Stability
Authors: Niclas Berggren, Andreas Bergh and Christian Bjørnskov

2013:2
States as Market Participants in the U.S. and the EU? Public purchasing and the environment
Author: Jason J. Czarnezki

2013:1
EEAS 2.0 – A legal commentary on Council Decision 2010/427/EU on the organisation and functioning of the European External Action Service
Authors: Steven Blockmans, Marise Cremona, Deirdre Curtin, Geert De Baere, Simon Duke, Christina Eckes, Christophe Hillion, Bart Van Vooren, Ramses Wessel and Jan Wouters

2013:1op
EEAS 2.0 – Recommendations for the amendment of Council Decision 2010/427/EU on the European External Action Service
Authors: Steven Blockmans, Marise Cremona, Deirdre Curtin, Geert De Baere, Simon Duke, Christina Eckes, Christophe Hillion, Bart Van Vooren, Ramses Wessel and Jan Wouters

2013:18epa
The outer reach of state obligations under deposit guarantee schemes – What can we learn from the Icesave case?
Authors: Thor Petursson and Asta Solillja Sigurbjörnsdottir

2013:17epa
Towards Cruising Speed? Assessing the EU Strategy for the Baltic Sea Region
Authors: Kristine Kern and Stefan Gänzle

2013:16epa
The European Council – the new centre of EU politics
Author: Uwe Puetter

2013:15epa
Why the 2014 European Elections Matter: Ten Key Votes in the 2009–2013 European Parliament
Author: Simon Hix

2013:14epa
Germany at the polls – what Europe can expect
Author: Julian Rappold

2013:13epa
A First Leadership Trial: What to Expect from the Lithuanian Presidency of the Council
Author: Margarita Šešelgyte

2013:11epa
Enlarging the European Union and deepening its fundamental rights
Author: Christopher Hillion

2013:7epa
Strategic Use of Public Procurement – Limits and Opportunities
Author: Jörgen Hettne

2013:6epa
Aternative Dispute Resolution for Consumers in the Financial Services Sector: A Comparative Perspective
Author: Iris Benöhr

2013:3epa
The EU Neighbourhood Competence under Article 8 TEU
Author: Christophe Hillion

2013:2epa
The creation of an internal market for mortgage loans: A never-ending story?
Author: Christian König

2013:1epa
What to Expect from Ireland´s Presidency of the Council of the European Union
Author: Linda Barry

"Regardless of what happens in that respect, Opinion 2/13 also poses some urgent issues concerning the future of European human rights protection in a wider sense. Given the many obstacles that the ECJ has found to an accession and the changes that the Court wishes in order for it to happen, is it even clear that the accession would be beneficial for human rights?"

Joakim Nergelius

SIEPS carries out multidisciplinary research in current European affairs. As an independent governmental agency, we connect academic analysis and policy-making at Swedish and European levels.

www.sieps.se • info@sieps.se • +46-8-586 447 00