Jean Monnet Saar

EUROPARECHT ONLINE

Saar Blueprints

Emil Knerr

Accession to the ECHR:

Draft Revised Accession Agreement of 2023

DFG Deutsche Forschungsgemeinschaft
German Research Foundation

08/2025 EN

About the author

Emil Knerr, LL.B., Lic. de droit (Université Côte d'Azur) is a research assistant at the chair of Univ.-Prof. Dr. Julien Dubarry, LL.M. and the Centre Juridique Franco-Allemand. He studied German and French Law and is currently a student of the LL.M. program of the Europa-Institut (Saarland University).

Preface

This publication is part of an e-paper series (Saar Blueprints), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany.

The opinions and analysis within these papers reflects the author's views and is not to be associated with Jean-Monnet-Saar or the respective employers or institutions that the author works for.

Editor
Lehrstuhl Prof. Dr. Thomas Giegerich
Universität des Saarlandes
Postfach 15 11 50
66041 Saarbrücken
Germany

ISSN
2199-0050 (Saar Blueprints)
DOI: 10.17176/20250814-121940-0

Citation
Emil Knerr, Accession to the ECHR:Draft Revised Accession Agreement of 2023, Saar Blueprints 08/25, accessivle via: https://jean-monnet-saar.eu/wp-content/uploads/2025/08/Saar-Blueprint_Emil-Knerr.pdf.

Funded by the **Deutsche Forschungsgemeinschaft** (DFG) – Project No.: 525576645

Table of Content

A. Introduction: The difficulty of EU accession to the ECHR

Primus inter pares. This latin Brocard, first employed by the roman Emperor Gaius Octavius, commonly known as Augustus, can be translated to "first among equals". Back in the roman ages, Augustus made a calculated effort to appear as *primus inter pares*, when, in reality, he was the sole ruler of the Roman Empire.[1] With this designation, the Emperor wanted to emphasize his subordination to the republican institutions, although, *de facto*, he held most of the powers.

In a way, this maxim aptly encapsulates the European Union's paradoxical position as it prepares to accede to the European Convention on Human Rights (ECHR). While the accession to the Convention will surely not result in an EU dictatorship in its position as a new High Contracting Party, the Union will, however, not enter this legal order as a mere participant. Despite the fact, that the accession of the EU to ECHR marks a formal alignment of the EU's human rights framework to the Convention system, it does also remain a supranational entity with autonomous quasi-constitutional structures, judicial mechanisms within a *sui generis* normative order. Hence, to preserve the autonomy of the EU's legal order, the instrument regulating the accession to the ECHR will have to consider the requirements stemming of the special nature of the EU. This will confer a unique position to the Union; a position unlike any State party before it. The EU's accession is not merely a step toward coherence and accountability in a broader human rights order on the European continent, it is also a constitutional moment[2] that raises many question marks concerning the balance of powers between both legal orders, the limits of judicial dialogue of the two "European Courts", and the meaning of equality among sovereign State actors when one of them is procedurally the *primus inter pares*.[3]

B. Introductory chapter: An *ex tunc* will of accession

The idea of the European Union acceding to the European Convention on Human Rights is not a novelty. It dates back to the 1970s where it was first mentioned in political debates and is,

[1] *Joukowsky*, Augustus, First Among Equals.
[2] *Reestman/Claes/Besselink*, EuConst 2015, 2 (12).
[3] *Canor*, EuLR 2000, 3 (4).

hence, nearly as old as the process of European integration itself.[4] This political wish of accession to the Convention system was rooted in the chance to enhance the legal protection of individuals in so far as it would enable a person to bring a case against acts of EU institutions that infringe their fundamental rights before the European Court of Human Rights (ECtHR), pursuant to Article 34 ECHR.[5] The lack of such a procedure within the EU's legal framework still fragilizes today the human rights protection in the Union. Thus, accession would amount to a strengthening of individual (human) rights. Moreover, potential divergences in the case law of the Court of Justice of the European Union (CJEU) and the ECtHR could be prevented at an early stage.[6] Lastly, accession would also carry symbolic significance, as it would establish a form of external oversight over the Union's legal system. This, in turn, would increase the EU's legitimacy in the field of human rights protection on the global stage.[7]

This early political wish, can also be interpreted as an *ex tunc* will of accession of the European Community (EC) to close a human rights protection and accountability gap of its own legal order. However, just a few years after the first positive echoes of accession, hopes for the swift realization of this project were dashed by the first Opinion (Opinion 2/94) of the CJEU regarding the EU's accession to the ECHR.[8] This first judicial stumbling block to the accession of the Community should not be the last one rendered by Luxembourg. However, the reasoning of the judges of the Court of Justice was highly impactful, since the retained competence of the Member States in the field of human rights was neither conferred explicitly nor implicitly to the European Community.[9] Such a missing provision in the European legal order could also not be overcome by the so-called flexibility clause[10], since the accession to the ECHR would entail profound institutional changes both for the Community and the Member States; changes exceeding the scope of the aforementioned flexibility clause.[11] The conclusion of an international agreement marking the formal accession of the European Community to ECHR could not be

---

[4] See e.g. *European Commission*, Memorandum of 4 April 1979, C4/1.3.1, Bulletin of the European Communities, COM(1979) 88 final, p. 38.
[5] *Gourdet*, p. 563.
[6] *Editorial Comments*, CMLR 2015, 1 (4).
[7] *Blaschke*, Saar Blueprints 2024, 1 (2).
[8] ECJ, Opinion of 28 March 1996, *Accession to ECHR*, Opinion 2/94.
[9] *Ibid.*, para. 27.
[10] Currently the flexibility clause is enshrined in Article 352 TFEU, see for further informations: *Khan*, in: Geiger/Khan/Kotzur/Kirchmair (eds), Art. 352 AEUV, para. 1-5.
[11] *Blaschke*, Saar Blueprint 2024, 1 (2).

archived without a necessary amendment of the Treaties.[12] Furthermore, the Court pointed out that there were no sufficiently concrete provisions indicating that the Community intended to subject itself to an international judicial body.

Following this categorical rejection of an accession by the ECJ, the Community made no serious attempt to pursue the idea of accession to the ECHR for nearly two decades. Although Treaty amendments had occurred during this period, the Member States preferred to build up a competitive EU human rights framework which had its climax with the adoption of the Charter of fundamental Rights of the European Union (CFREU) during the Nice Treaty.

C. Main body: From objections to accession?

With the adoption of the Lisbon Treaty in 2007 and its coming into force in 2009, the Member States agreed to insert a formal provision requiring the EU to accede the Convention. This provision, enshrined in Article 6 § 2 TEU and Protocol No. 8 respectively, addressed an obligation of result by its wording ("shall").[13] Obliging the Union to accede to the ECHR transformed a former wish into a legal commitment. The introduction of Article 6 § 2 TEU was indeed a response to the first rejection of the Court of Justice in its opinion 2/94, where the Luxembourg judges required an explicit basis in the Treaties, because accession would have been of too far-reaching consequences for the EC legal order.[14] However, the methods and means used to archive accession were (and are still) placed under the margin of discretion of both international organizations, namely the Council of Europe and the European Union. Less than a year after the coming into force of the Lisbon treaty, the EU decided, by using its discretionary power, to open negotiations on the basis of a Council mandate.[15]

On the 4th of June 2010 the negotiations initially began within an expert group composed by seven representatives from non-EU states, seven from EU Member States, and the members of the European Commission. The full negotiating group included also all High Contracting

---

[12] ECJ, Opinion of 28 March 1996, *Accession to ECHR*, Opinion 2/94, para. 35.
[13] *European Parliament*, Policy Department Citizens' Rights and Constitutional Affairs, What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR?, EP (2016), 54 final, p. 9.
[14] ECJ, Opinion of 28 March 1996, *Accession to ECHR*, Opinion 2/94, para. 35; *Reestman/Claes/Besselink*, EuConst 2015, 2 (4).
[15] *European Parliament*, Policy Department Citizens' Rights and Constitutional Affairs, What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR?, EP (2016), 54 final, p. 9; *Meinich*, EP 2024, 685 (685).

Members of the Council of Europe.[16] This composition is generally described as the 47+1 or 46+1 negotiation composition.[17] This heterogenous group composed of different parties agreed on a draft package of accession instruments in April 2013.[18] Besides the Draft Accession Agreement (DAA), the negotiators agreed on a draft declaration from the EU on the use of the co-respondent mechanism and prior involvement[19]. They also agreed on a draft Memorandum of Understanding concerning the intervention by the EU according to article 36 ECHR.[20] Furthermore, they agreed on a special supervision of the execution of judgments when the Union is a party[21] and added a draft Explanatory Report.[22] All accession instruments were then submitted by the Commission to the CJEU for its opinion on the basis of article 218 § 11 TFEU.[23]Whenever the opinion of the Court is adverse , the agreement may, however, only enter into force if it's amended or if the Treaties are revised (Article 218 § 11 sentence 2 TFEU).

I. Opinion 2/13: starting point of the negotiations

As probably foreseeable for the reader of this thesis, the Court of Justice decided to give a negative response to the compatibility of the draft accession instruments with the Treaties. However, this outcome was not as foreseeable for the negotiators who had, until the very last moments, taken into consideration prior objections of the EU into the draft instruments.[24] It can even be said that considerable efforts were made across the board to prevent a renewed rejection in the context of a second opinion procedure before the ECJ.[25]

1. CJEU's concrete objections

The judges in Luxembourg identified several key aspects of the Draft Accession Agreement that failed to meet the requirements of EU law in their opinion 2/13.[26] However, in some sense

[16] *Meinich*, EP 2024, 685 (686).
[17] The diverging numbers are the result of the exclusion of Russia as a former member of the Council of Europe.
[18] *47+1 Ad hoc group*, "Report to the CDDH", 47+1 (2013) 008rev2 (2013 DAA), 10 June 2013.
[19] *Ibid*, Appendix I, Art. 3, para. 1-8.
[20] *Ibid*, Appendix IV.
[21] *Ibid*, Appendix III.
[22] *Ibid*, Appendix V, p. 16.
[23] *European Parliament*, Policy Department Citizens' Rights and Constitutional Affairs, What next after Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR?, EP (2016), 54 final, p. 9.
[24] *Ibid.*
[25] *Bergmann*, p. 164.
[26] ECJ, Opinion of 18 December 2014, opinion 2/13.

the Court's concerns seem all to be related to the *sui generis* nature of the Union and its autonomous legal order.

a) Fundamental rights standards

First of all, the Court in Luxembourg considered that Article 53 ECHR needed to be coordinated with Article 53 of the Charter of Fundamental Rights of the European Union (CFREU).[27] The EU-judges interpreted Article 53 ECHR as permitting the High Contracting Parties to establish higher standards of protection than those guaranteed by the Convention, thereby posing a potential risk to the uniformity and primacy of EU law.[28] Although Article 53 CFREU appears to mirror the provision in the ECHR, the ECJ ruled in *Melloni* that the Member States may not apply higher national standards where the relevant area has been fully harmonized under EU law.[29] Accordingly, the ECJ emphasized that the ECHR must be interpreted in a manner consistent with its own interpretation of the CFREU. It further found that the Draft Accession Agreement lacked a provision to ensure such coordination.[30]

b) The EU principle of mutual trust

Second, the Court stressed that the principle of mutual trust and the deriving mutual recognition between the Member States of the Union could be undermined by a potential accession, since the functioning of the ECHR requires from its High Contracting Parties to monitor another's compliance with fundamental rights. This would disrupt and weaken the balance and autonomy of EU-law.[31] An accession under these circumstances would, moreover, compromise the area of freedom, security and justice (e.g. Art. 3 § 2 TEU) relying on the presumption of human rights compliance across the Member States of the European Union.[32]

---

[27] *European Parliament*, The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward, Europeans Parliament's Committee on Constitutional Affairs, EP (2016), 52 final, p. 8.
[28] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 188.
[29] ECJ, *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013, Case C-399/11, para. 56, 57.
[30] *European Parliament*, The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward, Europeans Parliament's Committee on Constitutional Affairs, EP (2016), 52 final, p. 8.
[31] *Ibid*, p. 9.
[32] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 172.

c) The advisory opinion coordination

Thirdly, the ECJ expressed concerns about Protocol No. 16 of ECHR, allowing the highest national courts or tribunals to seek advisory opinions from the Strasbourg Court on Convention rights. By that time this additional Protocol was only ratified by six High Contracting Parties.[33] Although the EU never planned to accede this Protocol, the Court of Justice saw a risk in potential accessions of EU Member States and feared it could encourage national judges to bypass the ECJ's preliminary ruling procedure (Art. 267 TFEU) in favor of seeking guidance from Strasbourg, thus undermining the exclusive jurisdiction of the CJEU and threatening the autonomy of Union law.[34]

d) The allocation of responsibility within the "executive federalism"

Another aspect causing difficulties raised before the Court concerned a procedural element. On the one hand, primary EU law is at the peak of the legal hierarchy and its entry into force is associated with the ratification in each Member State.[35] On the other hand, the functioning of secondary EU law is mainly based on the process of implementation operated by Member States, while the EU only acts occasionally *vis-à-vis* individuals (Art. 288 TFEU).[36] In many instances Member States have no discretion in implementing EU secondary law (e.g. Art. 288 § 2 TFEU). An infringement of the ECHR may arise from both, either from primary law, or from secondary legislation.[37] If an applicant wants to start, on the basis of EU primary law, proceedings before the ECtHR, there will be the question against whom the application should be turned. At this point it would be a fallacy to think, that the Union bears full responsibility. As "masters of the Treaties"[38] the Member States are without any doubt responsible for the compatibility of the provisions with the requirements of the ECHR.[39] Concerning applications of alleged violations by secondary law, the citizen will logically turn against his own Member State.[40] However, in such situations the alleged violation stems from the legislative EU act itself

[33] Ratification of Prot. 16 by 2 October 2013: Georgia, Albania, Finland, San Marino, Lithuania, Slovenia.
[34] ECJ, Opinion of 18 December 2014, opinion 2/13, ECLI:EU:C:2014:2454, para. 198.
[35] *Daukšienė/Grigonis*, ICJ 2015, 98 (100).
[36] *Lock*, YEuL 2012, 162 (164).
[37] *Daukšienė/Grigonis*, ICJ 2015, 98 (100).
[38] BVerfG, Judgment of 12 October 1993, *Maastricht-Entscheidung*, 2 BvR 2134/92, 2 BvR 2159/92, para. 112.
[39] *Daukšienė/Grigonis*, ICJ 2015, 98 (100).
[40] *European Parliament*, The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward, Europeans Parliament's Committee on Constitutional Affairs, EP (2016), 52 final, p. 11.

and not from its national implementation. This complex issue regarding both responsibilities is generally described as the co-respondent mechanism. Its denomination results from the proposal made in the draft accession agreement (Art. 3 DAA), namely allowing a High Contracting Party to join proceedings either by accepting an invitation or by decision of the Court in Strasbourg (Art. 3 § 5 DAA). This mechanism is designed to ensure that both, the relevant Member State and the EU, can be parties to a case concerning an alleged violation of the ECHR stemming from EU law. In cases concerning secondary law, the EU may need to join as a co-respondent, as the contested legal act may be attributable primarily to the Union.[41] Concerning cases involving primary law, the ECJ especially addressed concerns in regard to the review of granting the co-respondent status. This procedure would be operated by an external court carrying out a review over EU rules and adopt a final decision being binding on Member States and the Union.[42] This would pose a considerable risk for the division of powers between the EU and its Member State and was therefore sanctioned by the ECJ.[43]

e) The sole power of interpretation

As the CJEU stressed continuously, international agreements shall neither undermine "the autonomy of the EU legal order", nor alter the fundamental character of the powers of the Union's institutions.[44] From this general prohibition that international agreements, for instance the draft revised accession agreement (DAA), have to respect, the ECJ concluded that no other (international) court should be conferred the power to interpret Union law (e.g. Art. 344 TFEU). This sole power of interpretation should be retained by the Court in Luxembourg.[45] Concerning this further issue which is indeed related to the exclusive jurisdiction of the ECJ, the judges had consistently affirmed that a concluded international agreement shall neither alter the principle of conferral established by the Treaties (Art. 5 § 1 TEU) nor the autonomy of the EU legal order.[46] Given that the draft accession agreement did not exclude the possible recourse to the

[41] *Ibid*.
[42] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 224.
[43] *Ibid*, para. 225.
[44] Beginning with: ECJ, Opinion of 14 December 1991, opinion 1/91; see also: *Lock*, CMLR 2011, 1025.
[45] At this point, it could be mentioned that the CETA stands as an exception to the aforementioned general rule of the ECJ, therefore see ECJ, Opinion of 30 April 2019, opinion 1/17.
[46] *Ibid*, para. 161.

ECtHR to settle potential disputes, the ECJ found that this omission undermines the special nature of Union law.[47]

As a related aspect, the Court of Justice also named the prior involvement mechanism. In order to safeguard the autonomy of Union law, the ECJ must have the opportunity to interpret the underlying EU law of a given case before the ECtHR rules on its compatibility with the Convention. Although this procedure is enshrined in Article 3 § 6 of the draft accession agreement, it causes problems whenever a case involving Union law is brought before a national judge.[48] The preliminary reference procedure is not mandatory in all circumstances. Thus, the national judges have, pursuant to Article 267 § 2 TFEU, the discretion to submit the case to the ECJ. If the national court decides not to do so, the Court in Luxembourg would be denied of its interpretation monopoly. Consequently, the Court in Strasbourg could assess Union law without prior involvement of the ECJ. Despite the fact that the Presidents *Skouris* and *Costa* proposed a safeguard procedure to address this risk, the ECJ found the proposed mechanism unconvincing and insufficient.[49]

f) The Common Foreign and Security Policy

The last aspect of concern for the Court in its opinion 2/13 was its limited jurisdiction in the area of the Common Foreign and Security Policy (CFSP). However, this thesis will treat this aspect only superficially because it is not an aspect covered by the new accession agreement. Given the ECJ's limited jurisdiction, there is a risk that the Court in Strasbourg may be required to interpret provisions concerning CFSP on which Luxembourg does not have the entitlement to rule upon.[50] The possibility of a feasible action against the Union in this specific field would entrust the Court in Strasbourg with the exclusive judicial review of the EU's compliance with the ECHR.[51] For the Union's judges the draft accession agreement seemed to fail the safeguard

[47] *European Parliament*, The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward, Europeans Parliament's Committee on Constitutional Affairs, EP (2016), 52 final, p. 10.
[48] *Ibid*, p. 12.
[49] *Court of Justice of the European Union*, Joint Communication from Presidents Costa and Skouris, CJEU (2011), 3 final, p. 1-3.
[50] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 96.
[51] *European Parliament*, The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward, Europeans Parliament's Committee on Constitutional Affairs, EP (2016), 52 final, p. 13.

of the *sui generis* nature of the EU by putting at stake the autonomy of Union law and jeopardizing the ECJ's interpretative monopoly (Art. 344 TFEU) in the field of CFSP.[52]

2. Restarting the negotiations – a checklist to follow

Although the ECJ has largely rejected the first version of a draft accession agreement, its concerns were not unfounded. They all seemed, hence, to be interlinked by two equal limitations: No interference with the specific characteristics of the Union and no affection of the Union's competences as defined in the Treaties by the accession of the Union to the ECHR.[53]

Thus, the Court addresses an assignment of improvement in the areas mentioned to the EU's negotiating team by furnishing a "checklist" in order to be able to foresee a compatible accession agreement. The specific EU-law features figuring on the so-called "checklist" should therefore be adequately recognized in the negotiation process.[54] The general ambition to (re-)start the negotiation process was, however, put on hold. Some even thought that the idea of an accession would be abandoned at least until the next major revision of the EU Treaties.[55] Renewed optimism arose in the second half of 2019, as rumors of a potential resumption of the accession negotiations began to spread. During those years, the judicial dialogue between the CJEU and the ECtHR remained continuous. From the Strasbourg perspective, the judges preferred to maintain their support for the Union and its legal framework rather than retaliate against Luxembourg and its Opinion 2/13.[56] The Luxembourgish side, although following mainly the trajectory laid down in its own Opinion, introduced significant developments concerning the enforcement of EU law, the CFREU and its scope of application.[57] Through their respective case law, the two jurisdictions thus helped to lay down the foundations for renewed accession negotiations.

However, they created a(nother) challenge for the negotiators: Given the ECJ's "check-list", should the negotiations strictly deal with those issues? Or should the negotiators presume that

---

[52] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 101-107.
[53] These legal limitations have been enshrined in Art. 6 § 2 TEU and Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.
[54] *Barnard*, EU Law Analysis, 16 February 2015.
[55] *Johansen/Ulfstein/Follesdal/Wessel*, EP 2024, 641 (642).
[56] *Ibid.,* p. 643.
[57] *Ibid.*

at least some identified obstacles had been partially resolved by the case law of the last six years?

The negotiations, howsoever, were excepted to be thorough but not overly prolonged.[58] Before its kick-off, the European Commission formulated internally a position paper seeking only strictly necessary amendments and a small number of clarifications of the DAA.[59] Nevertheless, the re-negotiation took approximately the same amount of time as the initial round. It is worth recalling that at this stage the *ad hoc* negotiation group was a heterogenous gathering of several parties with different purposes and issues. Notably four major groups have taken part in the negotiations: the representatives of the EU-Institutions (1. Group), the representatives of the EU-Member States (2. Group), the representatives of the High Contracting Parties to the ECHR, not being an EU-Member State (3. Group) and the representatives of the Council of Europe's Institutions (4. Group). After just over three years, this diverse gathering reached an agreement on the final version of the Draft Revised Accession Agreement (DRAA).[60] The CDDH's Interim Report proudly stipulates that a unanimous provisional agreement was reached on all the issues raised by the Court in Luxembourg.[61] Hence, the negotiated version addressed all the obstacles to the EU's accession identified in the ECJ's Opinion 2/13, [62] as if Luxembourg had given them the roadmap to follow.

However, on the one hand, the "provisional nature" and the exception of the CFSP issue[63], characterizes the uncertainty and incompleteness regarding the draft revised accession agreement (DRAA). Lastly, this international agreement has not yet been submitted to the Court of Justice pursuant to Article 218 § 11 TFEU, which is considered to be the last but still intimidating hurdle to overcome for the Union. On the other hand, the ECJ has considerably soften its autonomy approach in the last few years, which the judges defended so fiercely in their

---

[58] *Ibid.*, p. 642.
[59] *European Commission*, Position paper for negotiations on the European Union's accession to European Convention for the protection of Human Rights and Fundamental Freedoms, COM (2020), 3 final, p. 1.
[60] *Johansen/UIfstein/Follesdal/Wessel*, EP 2024, 641 (642).
[61] *Steering Committee for Human Rights* (CDDH), Interim Report, for information, on the negotiations on the accession of the European Union to the European Convention on Human Rights, including the draft revised accession instruments in Appendix (CDDH(2023)R_EXTRA ADDENDUM) of 4 April 2023, available under: https://rm.coe.int/steering-committee-for-human-rights-cddh-interim-report-to-the-committ/1680aace4e (last accessed 26 April 2025).
[62] *Giegerich*, ZEuS 2024, 591 (626).
[63] *Steering Committee for Human Rights* (CDDH), Interim Report, *supra*, § 7, fn. 190.

Opinion 2/13. The Court in Luxembourg demonstrated its will to soften the often-used autonomy test in another Opinion concerning the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada.[64] The judges even mentioned its relevance for the draft accession agreement.[65] This pretorian shift to a more favorable soil for a new attempt has surely influenced the negotiators to take things back into their own hands. However, it cannot be expected that the Court of Justice will subject the new DRAA to such a permissive scrutiny as it did for the CETA.[66]

In the following we will proceed to a detailed analyze of the draft revised accession agreement of 2023. However, the main part of this thesis will not only focus on what the parties agreed upon. We will also center the reflections on how the innovations of 2023 will affect the ECHR and the EU's legal order in a post-accession scenario.

II. The draft revised accession agreement 2023 – prospect of success

With only eight pages including 13 articles, the Draft Revised Accession Agreement represents a clear and concise formulation of a complex matter. This not only ensures legal certainty, it also aims to promote clarity for all the parties involved. By crossing out several parts of the old DAA and clarifying certain aspects, the new DRAA seems to fulfill the formal criteria expected of a renewal. However, from a material point of view, an *interim* result cannot be given to the reader that easily.

In order to find a suitable solution, securing simultaneously the EU's "permission" to ratify the DRAA in a hopefully near future, the negotiators entrusted the EU with a *crucial procedural role* which is embedded in the new agreement. Its very essence can be subdivided into six major aspects, which will be analyzed in the following. As a first aspect we will shortly analyze the DRAA's interpretation of the diverging fundamental rights standards between the CFREU and the ECHR (**1.**). Then, we will discuss the requirement(s) of prior involvement of the ECJ (**2.**), the decision about the applicability and the functioning of the co-respondent mechanism (**3.**), the solution to the concurrence between the advisory opinion and the preliminary reference (**4.**),

[64] ECJ, Opinion of 30 April 2019, opinion 1/17.
[65] *Ibid*., para. 71, 132.
[66] *Johansen/UIfstein/Follesdal/Wessel*, EP 2024, 641 (645).

the consequences of the inter-party application and how the ECJ safeguards the Union's legal order (**5.**) and the multiple issues deriving from the mutual trust principle (**6.**).

1. The fundamental rights standard divergence – a balanced interpretation

The 2023 Draft Revised Accession Agreement offers a carefully calibrated solution to one of the key issues the Court of Justice undermined in its Opinion 2/13, namely the interpretation of Article 53 ECHR, its potential impact on the uniformity of Union law and its relation with Article 53 CFREU. The core issue was, as mentioned above, the possibility for High Contracting Parties to adopt *higher national standards* of human rights protection which could undermine the coherence of the EU's legal order, especially in areas of full harmonization.

The DRAA addressed this issue in Article 1 § 9 and also gave additional explanations in the added Report to the DRAA. Through the Explanatory Report[67] the negotiators interpreted Article 53 ECHR as not prohibiting any High Contracting Parties from jointly applying a legally binding common level of human and fundamental rights protection, such as the established one within the EU, as long as the aforementioned common level does not fall below the *minimum standard* set by the ECHR as interpreted by the case law of the ECtHR.[68]

However, in order to address this issue correctly, we will firstly have to assess the relationship between the CFREU and the ECHR. Their relationship is addressed in the horizontal clauses of Article 52 and 53 of the Charter. These two provisions aim to provide guidance in cases of conflict. For those Charter rights that correspond to rights guaranteed by the ECHR, Article 52 § 3 CFREU stipulates that they shall have the same scope and meaning as those conferred by the ECHR.[69] However, this does not preclude the Union from providing more extensive protection under EU law.[70] By contrast, Article 53 CFREU, mirrored in Article 53 ECHR, provides that "nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized" among others, namely by the ECHR and the Member States' constitutions.

---

[67] Draft Revised Accession Agreement 2023 (No. 1) Explanatory Report, para. 38.
[68] See e.g. ECtHR, *M.N. and Others v Belgium*, Judgement of 26 November 2018, No. 3599/18.
[69] *Grabenwarter*, in: Grabenwarter/Pabel (eds.), Die EMRK und das Recht der Europäischen Union, § 4, para. 8.
[70] *Ibid*; *Borowsky*, in: Meyer (ed.), Charta der Grundrechte der Europäischen Union, Art. 52 CFREU, para. 32-35.

This formulation ensures that the *minimum standard* set by the ECHR and the ECtHR's case law, as well as the interpretation made by the negotiators of the conflicting Articles is preserved. Hence, the solution and insertion of a provision addressing the issue in the DRAA offers reassurance to the EU that its model of harmonized human and fundamental rights protection is compatible with the ECHR, while preserving the ECHR's role as a minimum protection standard.

2. The new prior involvement mechanism

The EU see's itself granted the decisive authority in determining whether the ECJ's prior involvement will occur. Enshrined in Article 3 § 7 DRAA, the prior involvement procedure aims to uphold the principle of subsidiarity also underlying the ECHR.[71] Thus, this mechanism is intended to address situations where, during national court proceedings of a respondent EU Member State, the ECJ has not been engaged through its preliminary ruling procedure (Art. 267 TFEU). To address this situation, the Court of Justice shall be afforded sufficient time by the ECtHR "to make such an assessment".[72] In addition, the aforementioned Article "shall not affect the powers of the ECtHR, including to make a final determination of whether there has been a violation of the Convention".[73] The earlier version of the accession agreement had included a substantively similar provision, but didn't specify which jurisdiction would have the authority to decide whether prior involvement of the ECJ was necessary. This textual omission brought up the possibility that the ECtHR might be in charge of the determination. This would require the Court in Strasbourg to interpret the case law of the Court in Luxembourg – a fact the CJEU sanctioned as incompatible with the autonomy of the Union's legal order.[74] As a result, the ECJ insisted that the determination shall be solely conferred to the Union; a will which is now reflected in the DRAA. The new formulation ensures that the EU's determination will be binding on the Court in Strasbourg and as a consequence, suspend ongoing proceeding for the duration of the ECJ's involvement.[75]

[71] Preamble of the ECHR.
[72] Wording of Article 3 § 7 Draft Revised Accession Agreement (DAA).
[73] *Ibid*.
[74] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 238-239.
[75] See the formulation "determinative and authoritative" of the DRAA 2023 (No. 1) Explanatory Report, para. 76.

The very essence of the proceedings will be governed by internal Union law. However, it remains questionable if the procedural rules are going to be based on an already existing procedure. Article 267 TFEU allows the CJEU[76] through its preliminary ruling procedure to answer questions about the interpretation of EU law or the validity of Union acts.[77] Therefore, the prior involvement procedure could be modeled on the already existing preliminary reference procedure. Legislatively speaking, this would simply require to amend the Statute of the CJEU on the basis of Art. 281 TFEU, by way of ordinary legislative procedure (Art. 294 TFEU).[78] Although it is yet not quite clear which EU institution will be conferred the power to introduce the prior involvement procedure, the underlying legal question will however not be formulated by the ECtHR.

In addition, it remains unclear whether the CJEU's decisions under this new procedure would only deploy its effects between the parties (*inter partes*) or would be equivalent to a declaration of invalidity of the conflicting Union law (*erga omnes*)?[79] Most probably, the parties would be bound to the case but the underlying interpretation of EU law given by the CJEU, would have the authority of a general and *ex tunc* decision. If these presumptions prove correct, the prior involvement mechanism would formally be very similar to the preliminary ruling procedure. The slight difference resides in the fact that in the prior involvement mechanism the Court in Luxembourg does not refer the case back to a national judge who submitted a (preliminary) question. Also, the Court does not address the EU Institution which submitted the underlying question. The CJEU then lets the ECtHR have its final say concerning the "determination of whether there has been a violation" of the ECHR (e.g. Art. 3 § 7 DRAA). However, it should be beard in mind, that, if it is the will of the parties to have recourse to a friendly settlement of the dispute under Art. 34 ECHR, the Court in Strasbourg will no longer have the possibility to render a judgment. Nevertheless, a qualified violation of "equivalent" fundamental rights under the CFREU and the ECHR by the Court in Luxembourg does not affect Strasbourg's competence to assess also violations of the fundamental rights enshrined in the Convention. As

[76] Since the entry into force of the Regulation (EU Euratom) 2024/2019 amending Protocol No. 3 on the Statute of Court of Justice of the European Union, the Court now shares with the General Court of the European Union the competence to give a preliminary ruling on the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the European Union.
[77] *Ehricke*, in: Streinz (ed.), EUV/AEUV, Art. 281 TFEU, para. 3.
[78] *Lock*, ECHRLR 2025, 1 (14).
[79] *Lock*, ECHRLR 2025, 1 (14).

mentioned expressly in the Explanatory Report the assessment of the CJEU will not bind the ECtHR.[80] If however, the judges in Strasbourg consider that the dispute is resolved, they can declare the case inadmissible on the basis of the lack of the victim status (e.g. Art. 34 ECHR).[81]

3. The co-respondent mechanism – between allocation and activation

One of the main difficulties with the accession of the EU to the ECHR is the fact that as High Contracting Parties, the Member States of the Union will fully remain bound by the Convention. This EU specificity raises key questions regarding the responsibility and accountability for certain acts which are for now not subject to any judicial overview.

a) Secondary law adjudication

EU legislative acts are generally adopted by the competent Union's Institutions and implemented by the Member States (e.g. Art. 288 TFEU). The EU principle of "executive federalism"[82] complexifies the general attribution of responsibility of the Convention. The *Bosphorus* case[83] in this regard has shown by its facts how complicated the attribution of responsibility can be. As an EU Member State, Ireland was under an EU Regulation legally obliged (Art. 288 § 2 TFEU) to impound an aircraft belonging to Bosphorus Airlines. They challenged the Irish execution before the ECtHR claiming a violation of their right to property under Article 1 of Protocol No. 1.[84] Would the EU have been a member of the ECHR at that time, it would have been necessary for the judges in Strasbourg to determine who bore responsibility for the alleged violation: the Union as a legislative actor of the Regulation, Ireland as the executive/implementing authority or both of them? Furthermore, in a case of qualified shared responsibility it would have been questionable how the liability should have been apportioned between the two actors. One possible approach, which was, however, sanctioned in 2013 by the ECJ would have been to permit the ECtHR to develop its own rules on the attribution of conduct and allocation

[80] DRAA 2023 (No. 1) Explanatory Report, para. 78.
[81] *Harris and others*, p. 91.
[82] *Schütze*, p. 347-352.
[83] ECtHR, *Bosphorus v Ireland* [GC], Judgement of 30 June 2005, No. 45036/98.
[84] *Ibid.,* para. 16.

of responsibility, grounded in Article 1 ECHR, or alternatively to have recourse to general law standards.[85]

Thus, the co-respondent mechanism represents the principal innovation of the Draft Revised Accession Agreement. It is based on a general rule of attribution of responsibility which finds its legal basis in Article 1 § 4 DRAA. The mechanism ensures that where responsibility for an alleged violation was required or prompted by Union law, both, the EU and the concerned Member State can appear jointly before the ECtHR. But before the attribution of responsibility, there has to be an assessment of the conduct. However, this assessment did not change in comparison to the DAA 2013.[86] The conflicting conduct will, in principle, be attributed to the concerned Member State, even if a legislative act of the Union is the source of the issue. Once the conduct has been attributed, thus, the legal question of responsibility arises. In order to determine if there is a single or co-responsibility, an application before the ECtHR will either be brought against a Member State, and the EU may join as a co-respondent if there are substantial doubts about the compatibility of Union law with the ECHR, or, conversely, the application is directed against the EU, and Member State(s) may join the proceedings if an alleged violation could have been avoided by a national action.[87] This reflects a carefully negotiated balance. Already during the drafting process of 2013, a broader standard requiring simply a "substantive link" to the EU law was rejected due to the risk of over-extension of the concept.[88]

b) Primary law adjudication

However, the need for a functioning co-respondent mechanism is undoubtable. Despite the already mentioned *Bosphorus* case concerning secondary law, there have been other groundbreaking judgments triggering this need. Cases like *Kokkelvisserij*[89] and *Matthews*[90] are ECtHR judgments where the Union's Member States as single respondents are in a position of impossibility to execute the judgment of Strasbourg because it would require an amendment of an EU

[85] *Lock*, ECHRLR 2025, 1 (7).
[86] *Lock*, ECHRLR 2025, 1 (7).
[87] *Polakiewicz/Suominen-Picht*, EP 2024, 729 (731).
[88] Steering Committee for Human Rights (CDDH), 4th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the ECHR with the European Commission, CDDH-UE (2010)16, p. 5.
[89] ECtHR, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands*, No. 13645/05, admissibility decision, 20 January 2009.
[90] ECtHR, *Matthews v the United Kingdom*, Judgement of 18 February 1999, No. 24833/94.

Treaty related provision. The reader will notice, in the following, that the *Matthews* case is also a good option to address the diversity of variations of the co-respondent mechanism. In this judgment the applicant had sought to be registered to vote in the elections for the European Parliament but was denied inclusion on the electoral roll. Subsequently, she challenged the refusal of the competent authority, a conduct which would be attributable to the Member State under Article 1 § 4 DRAA. However, the reason for the refusal to register the applicant was based on the EU Act on Direct Elections (primary law) [91], depriving her of her vote. Pursuant to Article 3 § 2 DRAA, the aforementioned primary law provision would allow the Union to join the proceedings as a co-respondent. However, in the case of accession Ms. Matthews could have brought the case directly against the EU, without firstly having to request registration on the electoral list. Since the conflicting EU act is part of the primary law of the Union, the alleged violation of the ECHR would have been attributable solely to the EU.[92] In this hypothetical scenario, the case would raise the issue of whether a provision of EU primary law, like the EU Act on Direct Elections would be compatible, for instance, with Article 3 of the Protocol No. 1 of the ECHR. The fact that a provision of an equivalent legal value as the Treaties is at stake would, consequently, allow the Member States, as the "Masters of the Treaties" to become a co-respondent to the proceedings (Art. 3 § 3 DRAA).

c) The activation of the co-respondent mechanism

But what are exactly the requirements to enjoy the status of co-respondent? For instance, Article 3 § 4 of the DRAA offers the possibility to shift the status of party from respondent to co-respondent, if the requirements of the mechanism are fulfilled. It concerns cases which are brought at the same time against the Union and one or more of its Member States. To determine the abstract conditions, clarifying whether the activation of the co-respondent mechanism can be invoked,[93] we have to refer to Article 3 § 5 DRAA.

[91] OJ L 278, 08/10/1976.
[92] *Lock*, ECHRLR 2025, 1 (11).
[93] *Ibid.*

aa) Acceptation or initiation of the co-respondent status

According to that provision the EU or a Member State may become a co-respondent to a proceeding "either by accepting an invitation from the [ECtHR] or upon their own initiative". Although the further internal rules on the requirement of the co-respondent mechanism by the European Union have yet not been published[94], we will have to proceed to an in-depth analysis of the DRAA and its explanatory report to determine the exact requirements at least from the side of Council of Europe. Once the first step of acceptation or initiation of the co-respondent status is overcome, the Strasbourg Court has to, according to Article 3 § 2 and 3 DRAA, provide to the potential co-respondent the same informations about the application procedure than those "communicated to" the respondent.

Apart from a decision of inadmissibility or a manifestly ill-founded application (Art. 35 § 3a ECHR), this communication is mandatory and has to be made by the Court (see Rule 54 § 2b of the Rules of Court). An additional paragraph to Article 36 ECHR will clarify in future that the admissibility of a case is assessed independently of whether a co-respondent participates in the proceedings or not.[95] Concerning the inadmissibility, the data of 2024[96] shows that such decisions on applications before the ECtHR are still very high; the number of future ECtHR-cases involving jointly the Union and a Member State will therefore probably not be that relevant. This will result in several cases where the aforementioned mandatory communication will not be notified to a prospective co-respondent for the reason of inadmissibility.

Once the hurdle of admissibility is overcome, the activation of the co-respondent mechanism can take two procedural paths: either the ECtHR invites the potential co-respondent to join proceedings simultaneously with the communication of the case, or the Court merely informs the potential co-respondent of the communication. Concerning the first path, the ECtHR may set a deadline for accepting the co-respondent status.[97] Concerning the second, the potential co-respondent has to submit its request to join the proceedings "in a timely manner".[98] These

[94] Latest verification by the author in May 2025.
[95] *Lock*, ECHRLR 2025, 1 (11).
[96] On decided applications in the year 2024 the percentage of Inadmissibility decisions was of 61,1 %, see Annual Report 2024, European Court of Human Rights, p. 36, Annual report ECHR 2024 (last accessed 3 May 2025).
[97] Draft Revised Accession Agreement 2023 (No. 1) Explanatory Report, para. 62.
[98] *Ibid.*, para. 61.

requirements are, however, only mentioned in the Explanatory Report and not in the DRAA. Hence, it seems unclear if the intention of the negotiators was to reserve this time limitation only in such situations where there is an abuse of process. The so-called *abuse of process doctrine* under public international law aims to protect a fruitful interaction between international jurisdictions by imposing (unwritten) rules ensuring that abuses under all their forms are prevented.[99] These additional formalities will, on the one hand, not hinder an effective participation as a co-respondent since the requirement does not seem hard to fulfill in practice. On the other hand, the imposed formalities which were the presumed aim of the *ad hoc* negotiation group, will indeed preserve the procedure from any abuses.

bb) The EU's reasoned assessment

Significant change has also been done with regards to Article 3 § 5 DRAA compared to the 2013 DAA. This Article stipulates that the Court shall admit a co-respondent "by decision if a reasoned assessment by the [EU] sets out that the conditions in paragraph 2 or 3 of this Article are met". This formulation directly addresses one of the main concerns of the ECJ in its opinion 2/13, which found that allowing the Court in Strasbourg to evaluate the necessity and plausibility of a co-respondent request, would undermine the autonomy of the Union's legal order.[100] The exclusive decision to activate the co-respondent mechanism is, hence, placed in the hands of the European Union. The ECtHR has, thus, no more power over the decision whether to grant the co-respondent status to its very own proceedings or not. This conferred discretionary power which the EU will embody is only limited to the submission of a reasoned assessment affirming that all aforementioned requirements are met. This assessment will not be an object of any (judicial) review or further questioning; it has to be treated as "determinative and authoritative".[101] This authentic interpretation[102] of the explanatory report shows clearly that the negotiators have taken steps towards the ECJ but to the detriment of the ECtHR power in this regard.

[99] *Ceretelli*, JIDS 2020, 47 (48); *Baetens*, Blog of the European Journal of International Law 2019.
[100] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 224-225.
[101] Draft Revised Accession Agreement 2023 (No. 1) Explanatory Report, para. 62.
[102] The concept of authentic interpretation in international public law seeks to consider a legal text as conclusive and binding, if it has been accepted by all the parties, see *Berner*, HJIL 2016, 845 (865).

4. The (unsatisfactory) advisory opinion solution

As it has already been mentioned above, the ratification by several EU Member States of the Protocol No. 16 to the ECHR had raised concerns about the exclusive jurisdiction of the ECJ and the sole power of interpretation of Union law. The lack of provisions addressing this issue in a correct manner, was sanctioned by the ECJ.

a) The interpretation of the "highest court or tribunal"

Of 24 overall ratifications of Protocol No. 16, twelve have been made by EU Member States.[103] Those States will, according to the Protocol, designate respectively one "highest court or tribunal" which will be conferred the right to request an advisory opinion from the Court in Strasbourg regarding the application and interpretation of the Convention (Art. 1 § 1 Prot. No. 16). Back in 2014, as said, the ECJ in its Opinion 2/13 objected this mechanism, fearing that it might circumvent the preliminary reference procedure. Pursuant to Article 267 § 1 a), b) TFEU the CJEU has to decide any questions on the interpretation and validity of EU law. Since the Court in Luxembourg would consider the ECHR an integral part of its legal order once the Union has acceded,[104] a coordination had to be found in the new DRAA. Article 5 of the DRAA provides that with regards to Protocol No. 16, national courts "shall not be considered a highest court or tribunal if the question falls within" the scope of Union law. At first sight this appears to be a reasonable solution for cases where the CJEU would be considered the "highest court" and after its intervention transfer the case to Strasbourg for the sought advisory opinion. Indeed, this would also entail in a near future, that the EU has acceded the additional Protocol to the Convention.

b) The controversial assessment of an EU law background

It remains, however, unclear who is going to declare whether a formulated question falls within or outside the scope of EU law. Neither Art. 5 DRAA, nor the Explanatory Report states to whom this task is conferred. The silence of the text concerning this matter has been interpreted by the literature as if it would be reasonable to assume that the task of the assessment would be

---

[103] Belgium, Estonia, Finland, France, Greece, Lithuania, Luxembourg, Netherlands, Romania, Slovakia, Slovenia, Sweden, Full list - Treaty Office (last accessed 5 May 2025).
[104] Compare to ECJ, Judgment of 30 April 1974, *R.&V. Haegeman v Belgian State*, para. 5.

conferred to the ECtHR.[105] An argument in favor of this hypothesis is the Court's overall jurisdiction to authoritatively interpret the ECHR.[106] However, this position seems problematic for several reasons. First of all, this solution bears the risk of infringing the autonomy of the Union's legal order. If the ECtHR were to make the assessment about whether a case falls within the scope of EU law, the CJEU might view this as an unacceptable external review of questions falling within its exclusive competence. The assessment is also considered to be a notoriously complex and highly contextual determination, whether a specific case falls within the scope of EU law.[107] The lacking expertise of the ECtHR in the field of EU legislation and the case law of the ECJ disqualifies *de facto* the judges in Strasbourg to proceed to the aforementioned assessment. The only comparable assessment being made EU internally, is when determining if a Member State implements Union Law and is, therefore, bound by the rights enshrined in the Charter (Art. 51 § 1 CFREU). According to the *Åkerberg Fransson* case[108] of the ECJ "implementing Union law" is to be equated with acting within the scope of Union law. This complex but comparable assessment is, hence, conferred to the Court of Justice, which would also in the situation involving Protocol No. 16 be far more equipped than the ECtHR to complete to proceed to such an assessment.

Moreover, conferring the assessment to the Court in Strasbourg fails to recognize the dual ability of the higest national courts, as solely domestic courts and as an integral part of the EU judicial system, ensuring a uniform application and interpretation of the EU law.[109] Since the very beginning of the European Community, the President of the Court of Justice stated that "every national judge is also an EC judge".[110] Hence, the question remains why the negotiation group of the DRAA has decided to relocate the assessment decision from the highest courts and tribunals of a Member State to another undetermined jurisdiction?

Although generally the Court of Justice remains the most competent jurisdiction to assess if a "question falls within the field of application of EU law" (Art. 5 DRAA), the task of assessing a Union law background in a case should in my opinion remain in the hands of the designated

---

[105] *Lock*, ECHRLR 2025, 1 (20).
[106] See wording of Art. 55 ECHR; ECtHR, *Cyprus v Turkey*, Judgement of 10 May 2001, No. 25781/94.
[107] *Sarmiento*, CMLR 2013, 1267 (1292); *Ward*, in: Peers, Hervey, Kenner, Ward (eds), The EU Charter of Fundamental Rights, Art. 51 CEUFR, p. 1417.
[108] ECJ, *Åklagaren v Hans Åkerberg Fransson*, Judgment of 26 February 2013, para. 20.
[109] ECJ, Opinion of 8 March 2011, *Creation of a Unified Patent Litigation System*, opinion 1/09, para. 84.
[110] *Martucci*, p. 672.

highest courts and tribunals of the Member States. The principle of sincere cooperation (Art. 4 § 3 TEU) and the preliminary reference ruling (Art. 267 TFEU) as mandatory safeguarding procedures, are already sufficiently ensuring that a potential risk of bypassing the CJEU is shattered, even if the national jurisdiction is seeking ultimately the guidance of Strasbourg. In the spirit of a general obligation to submit any question regarding the application or interpretation of Union law to the ECJ, the highest national courts and tribunals would, nevertheless, be able to evaluate if the matter including EU law, is in no need of a clarification (*acte clair* doctrine)[111] or has already been clarified by the CJEU (*acte éclairé* doctrine)[112] and could, if so, be sent directly to the ECtHR. Hence, the current solution unnecessarily complicates the procedure. A legal filter which the highest courts and tribunals of the Member States of the Union would have exercised automatically, was excluded by the negotiators with the current formulation of the DRAA.

In any case, it has been convincingly demonstrated that Article 5 of the DRAA shall not be read in a way that the ECtHR is assigned the role to determine the EU law background of a case. Not only do clear practical arguments speak against it, but also the monopoly position of the CJEU, which, due to the exclusive wording of the Article, is for now (unfortunately) meant to carry out the assessment alone.

5. The inter-party cases – a safeguarding application

The inter-party application is governed by Article 4 of the DRAA and has been revised since 2014 in order to secure legally the autonomy of Union law and the exclusive jurisdiction of the CJEU (e.g. Art. 344 TFEU). Already Article 3 of EU-Protocol No. 8[113], dealing with the accession of the EU to the ECHR reiterated the need of protecting Article 344 TFEU. According to the CJEU, its pretorian monopoly for resolving disputes between EU Member States concerning the interpretation or application of EU law, could only be safeguarded if a potential competence of ECtHR to adjudicate such disputes, is explicitly precluded.[114]

---

[111] *Hummert*, p. 14.
[112] ECJ, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Judgment of 6 October 1982, Case 283/81; *Wegener*, in: Calliess, Ruffert (eds), EUV/AEUV, Art. 267 AEUV, para. 33.
[113] OJ C 326, 26/10/2012, Art. 3.
[114] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 213.

Consequently, Article 4 § 3 sentence 1 DRAA now categorically excludes inter-party applications between the EU and its Member States whenever these involve questions regarding Union law. The privilege status of the EU concerning this specific procedure, resulting in a quasi-immunity[115], derogates from the general rule enshrined in Article 33 ECHR. It is therefore of no wonder, that there are voices calling the EU the future "super-party" to the ECHR.[116] These suspicions are even accentuated by the fact that, unlike the co-respondent or prior involvement mechanisms, in which the Union may be directly implicated in a dispute, the EU is not even a party to the case. Even if the term "super party" therefore seems somehow inappropriate, the concerns are, however, not unfounded. The sole function of the EU in the inter-party procedure is, hence, to safeguard the integrity of EU law by ensuring that any cases involving the interpretation or application of Union law are brought before the CJEU.

Comparable to the proposal made for the advisory opinion, the EU's role changes regarding the DRAA whenever the preservation of the CJEU's authority and autonomy of the *sui generis* legal order are at stake. It is, hence, totally acceptable that the Union is granted this exceptional status, provoking a shift from a potential party actively participating at a case (co-respondent/prior involvement), to its *own institutional guardian* (advisory opinion/inter-party case). The need to this self-defense role should not be interpreted by the reader as a protection against direct attacks by the Council of Europe. It is ultimately limited to preserve the exclusive jurisdiction of the CJEU and, therefore, to block any external adjudication over disputes falling within the scope of EU law.

The inter-party case offers another dimension when the application involves two Member States of the EU. Indeed, not all such dispute necessarily implicated Union law, although some of them did. Due to the case-by-case nature of these applications a very flexible mechanism was needed for the DRAA. Although inter-party cases under Article 33 ECHR are already a minority in the overall case-law of the ECtHR,[117] still some inter-state proceedings between Member States of the European Union occur. The only judgement containing an analysis of the merits in an intra-EU Member State case brought before the Court in Strasbourg was the *Ireland v the*

---

[115] Excluding the possibility for more than the half of the High Contracting Parties to the ECHR (27 EU Member States) to sue the European Union under Art. 33 ECHR, results in a privilege that is clearly related to an immunity status.
[116] *Lock*, ECHRLR 2025, 1 (19).
[117] *Ulfstein/Risini*, EJIL Talk 24.01.2020.

United Kingdom case[118] from 1978. This inter-party case concerned an alleged violation of Article 3 ECHR regarding degrading treatment or punishment in Northern Ireland; an issue which was entirely unrelated with the existing Community law. This was most probably also because both States were not yet Member States of the EC when the facts of the case took place. If, however, a comparable situation would occur once the EU has acceded the ECHR, there would be no need for the CJEU to fear for its exclusive jurisdiction, although its Member States are parties to a case pending before the Court in Strasbourg. The fact that there was no implication of Union law, would qualify the case as outside of the scope of Article 4 § 4 DRAA. Other cases, such as *Latvia v Denmark*[119] and *Slovenia v Croatia*[120] were settled before and, hence, declared inadmissible by the ECtHR. The first case concerned a citizen of Latvia who risked to be extradited to South Africa. The Second concerned Croatia's actions in preventing a Slovene bank to enforce and collect debts of Croatian debtors. Although there has been no judgment on the merits, the cases involved several basic freedoms, such as the free movement of the EU citizens (Art. 21 TFEU), the free movement of services or capital (Art. 56, 63 TFEU) and the enforcement of judgments within the Union. Related questions to such pillar provisions of EU-law would have needed, in a post-accession hypothesis, the assessment of the European Union under Article 4 § 4 DRAA.

Thus, the *ad hoc* negotiation group of the DRAA faced the challenge to create a system that would allow inter-party cases unrelated to Union law to take place before the ECtHR, while excluding cases that involved EU law provisions. For that purpose, the legal wording of Article 4 § 4 DRAA mirrored the co-respondent mechanism approach, according to Article 3 § 7 DRAA, that provides that ECtHR must grant the EU, upon request, sufficient time to assess whether and to what extent an inter-party application under Article 33 ECHR between two EU Member States concerns "the interpretation or application of EU law". The EU's assessment will then be decisive, whether a case before the ECtHR can be declared admissible or not.[121] However, it remains unclear which EU institution will proceed to the aforementioned

[118] ECtHR, *Ireland v the United Kingdom* [Plenary], Judgement of 18 January 1978, No. 5310/71.
[119] ECtHR, *Latvia v Denmark*, Judgement of9 July 2020, No. 9717/20.
[120] ECtHR, *Slovenia v Croatia* [GC], Judgement of 18 November 2020, No. 54155/16.
[121] *Lock*, ECHRLR 2025, 1 (19).

assessment. In its function as "the guardian of the Treaties" this task will most probably fall to the European Commission.

While the practical impact of this procedural solution to the inter-party case will most probably be limited, due to the minority of these disputes, its symbolic and legal importance is uncontestable. It not only grants the European Union the authority to determine which inter-state applications between its Member States may proceed before the ECtHR (admissibility), it also reinforces its position as its *own institutional guardian*.

6. The multidimensional mutual trust solution

Another aspect addressed in the new DRAA of 2023 is the principle of mutual trust, which constitutes a foundational element of the EU's legal framework and especially for the Area of Freedom, Security and Justice.[122] This fundamental principle can, also, be seen as the basis of the doctrine of mutual recognition, a core mechanism through which EU Member States are required to accept the fundamental and procedural rights protection standard afforded by another Member State of the European Union, as being sufficiently equivalent.[123] This legal presumption of compliance has the effect of precluding any national court to scrutinize the compatibility of any act of another Member State with its own fundamental rights standards.[124] Thus, it seems evident that the mutual recognition/trust mechanism serves significantly in order to accelerate judicial and administrative intra-EU cooperation. However, this is not considered to be an irrebuttable presumption: challenges to that presumption have, therefore, to be brought before the jurisdiction of the concerned Member State that allegedly violated the invoked rights.

a) A rebuttable presumption

However, Union law does not recognize unlimited or blind trust.[125] If the general recognition obligation between the Member States are understood as acts of trust, then the standardized limits of this "recognition obligation" shall also be seen as the limits of necessary trust.[126] Some Member State courts also have called for greater sensitivity to fundamental rights concerning

---

[122] *Kaufhold*, EuR 2012, 408.
[123] *Ibid.*, p. 41.
[124] *Von Danwitz*, EuR 2020, 61 (65).
[125] *Xanthopoulou*, CMLR 2018, 489 (497).
[126] *Ibid.,* p. 84.

the mutual trust.[127] Lastly, the case law of the ECtHR considered that an unconditional presumption of trust without exception can give rise to conflicts with the ECHR.[128] Surprisingly, the ECJ mirrored in its own case law some of those Strasbourg rulings, internally related to the mutual trust principle. Interesting jurisprudence on that matter concerned the European Arrest Warrant (EAW) within the area of freedom, security and justice which is mainly based on the concept of the mutual recognition. For instance, the Court of Justice stressed in the *Aranyosi and Căldăraru* case[129] that evidence of systemic deficiencies concerning prison conditions in the issuing Member State could result in inhuman or degrading treatment pursuant to Article 4 CFREU. Another illustrative example concerned the *LM* case[130] where independence deficiencies in the judicial system of the issuing state bears a risk for the fair trial provision of the Charter (e.g. Art. 47 CFREU). Hence, mutual recognition is not an absolute principle which sometimes finds its limitations in situations where an individual assessment is necessary to avoid a human rights violation condemnation of the executing State. Nevertheless, for those rulings, the judges in Luxembourg took advantage of the already existing, well-argued case law of the ECtHR. One case, namely *Soering v. United Kingdom*[131] concerned an extradition request from the United States involving an individual, risking, in case of an extradition, the death penalty. Despite the now well-established regional *jus cogens* prohibition of death penalty in Europe,[132] the Court in Strasbourg insisted, back then, on the potential violations of Art. 3 ECtHR. Due to indirect judicial pressure radiating from the ECtHR rulings, the potentially harsh effects of mutual recognition have therefore been mitigated by the CJEU to temper its effects within the EU's legal order.

Another practical situation involving regularly the connected principles of mutual recognition and trust, are the asylum seeker requirements. Under the system of the Dublin Regulation[133], governing the such requirements, asylum seekers are distributed between the EU Member States. Notable ECtHR rulings in this regard, like *M.S.S. v Belgium and Greece*[134], as well as

---

[127] BVerfG, Judgement of 6 November 2019, *Right to be forgotten II*, 2 BvR 84/2019, para. 140; UKSC, *R v Secretary of State for the Home Department*, No. 2014/12, 19 February 2014.
[128] ECtHR, *Avotiņš v Latvia* [GC], Judgement of 23 May 2016, App. No. 17502/07.
[129] ECJ, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Judgment of 5 April 2016, Case C-404/15.
[130] ECJ, *LM*, C-216/18, Judgment of 25 July 2018.
[131] ECtHR, *Soering v the United Kingdom* [Plenary], Judgement of 7 July 1989, App. No. 14038/88.
[132] *Abdollahi, Behzadi*, IRUNS 2020, 34 (47).
[133] OJ L 189/31, 29.06.2013.
[134] ECtHR, *M.S.S. v Belgium and Greece*, Judgement of 21 January 2011, No. 30696/09.

the *Tarakhel v Switzerland* case[135] have for the most parts also been acknowledged by the CJEU's own case law[136], subjecting the principle of mutual trust/recognition to the pretorian limitation.

b) Diverging judicial views

Does that mean that both "European Courts" have a consensus on the matter? By looking in the Opinion 2/13 of the Court of Justice we realize, that the judges in Luxembourg demanded that the DRAA shall avoid creating obligations that would compel one Member State to review the fundamental rights compliance of another, *a contrario* to the principle of mutual trust that governs their relationship under EU law.[137] So, although the ECJ acknowledged a lot, especially concerning the limitation of the mutual trust principle by referring its ruling to the equivalent ECtHR judgements, Luxembourg, however, reminded that in case of an accession, this principle cannot be undermined by a constant *in concreto* review between the EU-Member States. As we have already examined in the inter-party case section of this thesis, the Convention system allows under Article 33 ECHR to bring up a case before the Court, if the claiming High Contracting Party considers that the respondent High Contracting Party has violated the Convention rights. Although the review in that case is more of indirect nature, it questions the principle of mutual trust. Moreover, the ECtHR had the chance to directly respond to the concerns of the ECJ in its case *Avotiņš v. Latvia*.[138] The case concerned another aspect of high importance in the area of freedom, security and justice, namely the procedural fairness for the cross-border recognition and enforcement of civil decisions and judgments in private international law according to the Brussels I and II Regulations[139]. In its judgment, the ECtHR drew a parallel between the so-called *Bosphorus* presumption and the principle of mutual recognition. According to the *Bosphorus* presumption, the EU's legal order provides, in principle, equivalent protection to the Convention system and therefore no national Member State act implementing or applying EU law shall be subject to a review by the ECtHR.[140] However, a national measure

[135] ECtHR, *Tarakhel v. Switzerland* [GC], Judgement of 4 November 2014, No. 29217/12.
[136] In this regard, the following cases are to mention: ECJ, *N.S. v Secretary of State for the Home Department and M.E. and Others*, Judgement of 21 December 2011, Case C-411/10 – C-493/10; ECJ, *C.K. and Others v Republika Slovenija*, Judgment of 16 February 2017, Case C-578/16 ppu.
[137] ECJ, Opinion of 18 December 2014, opinion 2/13, para. 194-195.
[138] ECtHR, *Avotiņš v. Latvia* [GC], Judgement of 23 May 2016, No. 17502/07.
[139] OJ L 12, 16.01.2001; OJ L 178, 02.07.2019.
[140] *Robert*, RUE 2023, 519 (523).

can exceptionally be reviewed when the protection of the rights enshrined in the Convention is found to be "manifestly deficient".[141] Thus, in the *Avotiņš* case the Court stressed that the mutual recognition principle should apply as long as the protection of the ECHR rights is not considered to be manifestly deficient.[142] The Court in Strasbourg indeed acknowledged the importance of the mutual recognition principle for the Union's legal order, however, it reminded that the EU Member State courts shall "at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".[143] Hence, this direct answer to the ECJ's Opinion 2/13 clarifies how the ECtHR applies the EU's mutual recognition principle not "automatically and mechanically".[144]

c) An arranged marriage – Article 6 DRAA

The DRAA had to find a solution to that multi-level issue, especially figuring out how to arrange a marriage between the ECtHR's stricter standard and the ECJ's demand to avoid intra-Member States' checks of Convention compliance. Although the ECJ acknowledged some limitations in specific areas, the Court in Strasbourg feared that this could, practically, run counter the conditions imposed by the ECHR.[145] The starting situation for the negotiators was, therefore, difficult to resolve.

With Article 6 of the 2023 DRAA the negotiators brought up a provision that could not be more ambiguous. The new Article states that the EU accession to the ECHR "shall not affect the application of the principle of mutual trust within the European Union." This first sentences clearly aims to preserve the mutual trust within the EU's legal order, implicitly supporting the CJEU's Opinion 2/13. The second sentence states that "[i]n this context, the protection of human rights guaranteed by the Convention shall be ensured". This part, however, seems to acknowledge the established case law of both "European Courts", accepting that the mutual trust principle may be limited in situations involving serious human rights violations.

---

[141] ECtHR, *Bosphorus v Ireland* [GC], Judgement of 30 June 2005, No. 45036/98, para. 156.
[142] ECtHR, *Avotiņš v. Latvia* [GC], Judgement of 23 May 2016, No. 17502/07, para. 116.
[143] *Ibid.*, para. 113-114.
[144] *Ibid.*, para. 116.
[145] *Glas/Krommendijk*, HRLR 2017, 567 (584).

Article 6 DRAA appears to be a provision which did not really address the concerns of the ECJ's Opinion 2/13. Hence, the new DRAA doesn't preclude explicitly the situation where EU Member States review each other's conduct under the Convention. Although this situation was a core issue for the ECJ under Article 344 TFEU, Article 6 DRAA appears to represent a compromise, aiming to reconcile the different approaches of both Courts. The formulated conciliation, however, introduces new tensions and a lack of clarity (*lex certa*). Also, the Explanatory Report offers only minimal clarification. It refers briefly to CJEU's case law and the unwritten exceptions to the principle of mutual trust and to the ECtHR judgments in the same context. Thus, it seems like the drafters intended to maintain the *status quo* pre-accession concerning the mutual trust principle: a general validation of the principle of mutual recognition/trust, with exceptional limitations, whenever serious fundamental rights violations are at stake. While this might be of guidance for unfamiliarized lawyers with the legal background, it provides not enough clarity for the judges of ECtHR when interpreting their own review competences under Article 6 DRAA. For instance, if a case like *M.S.S. v Belgium and Greece* concerning an asylum seeker transferred by the Belgian authorities back to Greece and then being detained in inhumane conditions, were to arise post-accession, the ECtHR would need to interpret Article 6 DRAA in the light of the Convention standards.[146] The Court would then need to assess whether the mutual trust principle has been affected or not. In order to proceed to that assessment, the judges in Strasbourg would need to interpret this developing EU concept, which would practically leave the last word concerning the limits of mutual trust where it is already located today. Thus, Article 6 DRAA simply reiterated the general pre-accession functioning in matters involving the mutual trust principle and is therefore practically meaningless.[147]

d) Further observations

Article 6 DRAA gives the opportunity to address two further observations. Firstly, the lack of a formal role attributed to the EU in cases involving mutual trust. In contrary to the inter-state cases where the Union has the competence to block proceedings (Art. 4 § 3 DRAA), no EU institution will be granted that possibility with mutual trust matters. There might be well-founded reasons for the negotiators to exclude that possibility. After all, a literal adoption of

[146] ECtHR, *M.S.S. v Belgium and Greece*, Judgement of 21 January 2011, No. 30696/09.
[147] *Lock*, ECHRLR 2025, 1 (25).

the ECJ's request in Opinion 2/13 might have "resulted in a regression in protection standards in mutual trust cases",[148] and an unacceptable removal of an already existing fundamental rights procedure for individuals. If there had been an explicit exclusion of jurisdiction for the Strasbourg Court in order to protect the Union's legal autonomy and the exclusive jurisdiction of the ECJ (Art. 344 TFEU), this would have resulted in a lower protection standard concerning cases involving the mutual trust principle in comparison to the pre-accession protection level for individuals. Secondly, there is a procedural distinction from the advisory opinion mechanism. Although the EU also lacks a formal role under the DRAA concerning the advisory opinion mechanism, the invocation of the mutual trust principle in a case, would automatically trigger ("interpretation or application of EU law") the co-respondent mechanism. The Union would, thus, participate in such proceedings and could, if necessary, advocate for the mutual trust principle before the ECtHR. This consequential safeguard is absent in the context of the advisory opinion, where the EU will not be a party to the proceedings.

For now, it is unclear whether the ECJ will accept this formulation of Article 6 DRAA in a future Opinion (e.g. Art. 218 § 11 TFEU) especially with regards to the EU's legal autonomy. It remains to be seen if the Court in Luxembourg follows the underlying arguments of the negotiators or decides to sanction once more the current mutual trust solution.

7. The source of (internal) concern – CFSP

Although the ECJ explicitly found in its Opinion 2/13 that the 2013 DAA failed to sufficiently address the Common Foreign and Security Policy (CFSP), the 2023 DRAA omits any reference to the CFSP. This omission by the negotiators can be easily explained: the CFSP issue is a homemade internal EU problem which results of the limited jurisdiction of the CJEU in such cases (Art. 24 § 1 TEU). In principle, the jurisdiction of the Court in Luxembourg over CFSP matters is excluded, except in two specific areas: firstly, ensuring compliance with Article 40 TEU, which delineates the boundaries between the CFSP and the other external actions under the TFEU.[149] The second exception constitutes Article 275 § 2 TFEU, allowing the CJEU to review the legality of decisions providing for restrictive measures.[150] Two potential solutions

[148] *Ibid.*
[149] *Marquardt/Gaedtke*, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, Art. 40 TEU, para. 2.
[150] *Dörr*, in: Grabitz/Hilf/Nettesheim (eds.), Das Recht der EU, Art. 275 TFEU, para. 3.

to the ECJ's concern in 2014 have been considered by the negotiators: either including a provision in the DRAA that would restrict the ECtHR's jurisdiction over CFSP cases to the same degree as the CJEU, or extending the CJEU's jurisdiction in order to cover all conceivable CFSP-related scenarios that might be brought before the Court in Strasbourg.[151] Realizing that the first option would not only be a very difficult one to negotiate successfully, but also realizing that such a clause would practically lead to a loophole in the judicial oversight of CFSP scenarios, the negotiators chose to leave the issue to the Union, where it should be better resolved.

As the thesis focuses primarily on the implications of the DRAA on a future accession to the ECHR system, a more detailed examination of CSFP jurisdiction lies beyond its scope. It suffices to note that any future solution falling short of an amendment of the Treaties, remaining a solution which is highly unlikely, will most certainly be subject to close scrutiny by the ECJ in a future opinion. Moreover, results of internal EU-solutions are a scarce commodity in the last two years. Although, the Commission proposed to include an adoption of an interpretive internal declaration giving the ECJ jurisdiction over all CFSP scenarios coming before the Court in Strasbourg. These adoptions have, although anticipated by the Commission, however, received a negative response from the French Senate even before the new DRAA was published.[152] Since this point in time, there has been no significant solutions proposed by the European Union to resolve the (never-ending) CFSP issue.

III. Further challenges of accession – The equal footing issue

In addition to the concerns raised under the ECJ's opinion 2/13, the *ad hoc* negotiation group discussed some further issues which could potentially complexify the EU accession to the ECHR. The preceding analysis highlights that, from the perspective of the ECHR system, EU accession entails certain trade-offs.[153] Procedurally, the ECtHR would be required to defer to internal assessments made by EU institutions, with no competence to challenge them. This raises concerns that the procedural privileges granted to the EU, particularly in relation to the co-respondent mechanism, prior involvement, and the inter-party applications, could be used

[151] *Blaschke*, Saar Blueprints 2024, 1(48-50).
[152] *French Sénat*, Proposition de résolution en application de l'article 73 quinquies du Règlement, sur le volet relatif à la politique étrangère et de sécurité commune des négociations d'adhésion de l'Union européenne à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, Rapport No. 308, 7 March 2023.
[153] *Lock*, ECHRLR 2025, 1 (22).

strategically to the Union's advantage, potentially undermining the very purpose of accession. If so, the legitimacy of the ECHR system as a whole could be at risk. These several aspects are, however, all related to the challenge of integrating the EU and its Member States on an equal foot with the other non-EU High Contracting Parties into the ECHR system.

1. The draft revised accession agreement – unequal mechanisms

The DRAA introduces several unique mechanisms that highlight the structural division between the 27 EU Member States and the 19 Non-EU High Contracting Parties. Concerns have been raised that those differences would amount in privileged and unprivileged parties, effectively creating double standards.[154] This need for equal treatment between the ECHR-Members was at the heart of the negotiations which resumed in 2020. The explanatory report of the DRAA acknowledges some explicit concerns by stating that an EU accession shall only operate "on an equal footing with the other High Contracting Parties."[155]

a) The non-EU Member States and EU law

The potential for unequal treatment is particularly evident where non-EU States apply EU law and see themselves involved in proceedings before Strasbourg. Such scenarios occur in Norway, Liechtenstein, Iceland, the UK and Switzerland. While not Member States of the European Union, these countries are integrated into the Union's legal order to varying degrees. As parts of the European Economic Area (EEA) and the European Free Trade Association (EFTA) the States of Norway, Liechtenstein and Iceland apply most single market and Schengen rules.[156]

aa) Norway

In a case brought before the ECtHR concerning Norway, the Norwegian supreme judges[157] had applied the freedom of establishment (Art. 31 EEA) under the EEA Agreement and had declared a boycott initiated by trade unions against a Danish-owned shipping company operating

[154] See reactions of Switzerland, Turkey and Andorra, *Council of Europe*, Virtual Informal Meeting of the CDDH Ad Hoc Negotiation Group (47+1) on the Accession of the European Union to the European Convention on Human Rights, p. 5-6, 22 June 2020.
[155] DRAA (No. 1), para. 7.
[156] OJ L 176, 10.07.1999; OJ L 2025/629, 27.03.2025; OJ L 160/3, 28.02.2008.
[157] Norvigian Supreme Court, *Holship*, HR-2016-2554-P, 16 December 2016.

in Norway as incompatible with the EU provision.[158] For doing so, the Norwegian Supreme Court followed the exact legal argumentation of the ECJ's *Viking* case[159] where a comparable situation had occurred, although the Norwegian judges are normally not bound by the case-law of the CJEU. The ECtHR could not qualify a violation of the freedom of association under Art. 11 ECHR. In the case *Konkurrenten.no v Norway*[160], the ECtHR reviewed a challenge, indirectly questioning an EFTA Court refusal to grant a company standing. However, a breach of the ECHR was also not found. Notably, in both Court judgements, the judges in Strasbourg refused to apply the already mentioned *Bosphorus* presumption to the EEA State of Norway.[161] This creates a disparity in the allocation of responsibility between the Union's Member States and non-EU High Contracting Parties while applying EU law. As a reminder, the *Bosphorus* presumption entails that when an EU Member State applies obligations arising from EU law without discretion, the Member State is presumed to act in conformity with the Convention.[162] This presumption shields the Member State from a substantive review by the ECtHR, regarding alleged violations of the ECHR. However, since this legal presumption does not apply neither to EEA States, nor to the UK or Switzerland, although that they are applying EU law *lato sensu*, these States may be fully subject to proceedings before the Court in Strasbourg in scenarios where, under similar circumstances, an EU Member State would not face a human rights violation scrutiny.[163]

bb) The United Kingdom

The UK, although no longer an EU Member State, remains bound by the fundamental freedom of movement of goods (e.g. Art. 34/35 TFEU) according to the UK-EU withdrawal agreement[164], only with regard to the boundary between the Republic of Ireland and Northern Ireland. Moreover, the United Kingdom has provided a non-diminution guarantee regarding the civil rights enshrined in the Good Friday Agreement of Belfast.[165] This entails that the standards of

---

[158] ECtHR, *Norwegian confederation of trade Unions and Norwegian transport workers' Union v Norway*, Judgement of 10 June 2021, No. 45487/17.
[159] ECJ, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, Judgment of 11 December 2007, Case C-438/05.
[160] ECtHR, *Konkurrenten.no v. Norway*, Judgement of 29 November 2019, No. 47341/15.
[161] *Fredriksen/Øby Johansen*, EP 2020, 707.
[162] *Kaufhold*, EuR 2012, 408.
[163] *Lock*, ECHRLR 2025, 1 (29).
[164] OJ L C 384l, 12.11.2019.
[165] *Frantziou, Craig*, NILQ 2022, 65 (66).

rights protection under EU law, as they existed at the time of the UK's withdrawal from the Union, remains binding upon the UK.[166] This continuing obligation, encompasses, for instance, the EU's asylum framework and some provisions of GDPR. These EU-derived guarantees may, in future scenarios, become relevant in litigation before the Court in Strasbourg as well.

cc) Switzerland

Switzerland, for instance, is not part of the EEA, but is required to apply several Union single market provisions.[167] The Union's asylum and migration law as well as the EU border regime also applies to the Alpine State. Switzerland is furthermore part of the Dublin Regulations and, hence, applies the Union's asylum framework. The ECtHR already had the chance to adjudicate cases in which this non-EU country applied EU law provisions. Such a scenario occurred in the *Tarakhel v Switzerland* case[168], where the Court found that returning a family under the Dublin Regulation to Italy, which arrived in Switzerland claiming its right to asylum, amounted to a violation of Article 3 ECHR. Thus, EU law litigation involving Switzerland before the ECtHR is not unlikely.

dd) The uncertain future of the *Bosphorus* presumption

On the one hand, the Court in Strasbourg is expected post-accession, not to apply the *Bosphorus* presumption anymore, though the DRAA 2023 does not require it.[169] This presumption, originally thought to reconcile conflicting obligations of EU Member States bound to implement and apply EU law even if it risked violating the ECHR, would, hence, after accession, not be used by the judges of the ECtHR. However, such normative conflicts could be addressed through the co-respondent mechanism, allowing the EU to share the accountability in case of a judgment and be obliged to remove the qualified ECHR-violation. After all, the Union's secondary law can only be amended through the appropriate EU process, involving a proposal by the Commission and the agreement of both the European Parliament and the Council (e.g. Art. 289 TFEU).[170] Thus, the need for the *Bosphorus* presumption may disappear.

---

[166] *McCrudden*, p. 148.
[167] *Oesch*, p. 37-39.
[168] ECtHR, *Tarakhel v Switzerland* [GC], Judgement of 4 November 2014, App. No. 29217/12.
[169] *Kornezov*, CYoELS 2013, 207 (238); *Craig*, FILJ 2014, 1140 (1141); *Polakiewicz*, EHRLR 2013, 592 (601).
[170] *Lock*, ECHRLR 2025, 1 (30).

b) Further inequalities to overcome

The potential abandonment of the presumption will, however, not eliminate all disparities. Rather, new asymmetries may arise due to the already analyzed exclusive procedural benefits created for the EU and its Member States, namely, the co-respondent mechanism and the prior involvement of the Court in Luxembourg. Not having the possibility to recurse to these mechanisms, non-EU Member States are clearly disadvantaged, especially when they apply EU law. Thus, a future case pending before the Court in Strasbourg concerning a non-EU Member State, applying EU law provisions, would be dealt by the judges in the same way as before accession. The non-EU States would be the sole respondent to the proceedings, without the possibility to be accompanied by the EU (co-respondent). If a violation is found, the non-EU State will be considered to be the only one responsible and find itself in the difficult situation of being accountable for the ECHR violation stemming of the EU law provisions.[171] However, a post-accession litigation before the Court in Strasbourg involving an EU Member State would enable the EU to join the proceedings under Article 3 § 2 DRAA, whenever "it appears that such allegation calls into question the compatibility with right at issue defined in the Convention of a provision of European Union law". In absence of a preliminary reference, the EU may as well ask to activate the prior involvement for the ECJ. These procedural advantages should not to be underestimated. Firstly, because a joint accountability for a violation bears the genuine possibility that the conflicting EU provision will be rectified by the Union's legislator. Secondly, if the ECJ had the chance to render its point of view through the prior involvement mechanism, the Court in Luxembourg might itself acknowledge a fundamental rights violation. Such a judicial recognition would create the opportunity for the Union and the concerned Member State to resolve the problem before the ECtHR delivers a judgment.[172] This may lead the Court in Strasbourg to conclude that the applicant is no longer a victim (Art. 34 ECHR), to strike out the application because the matter has been resolved (Art. 37 § 1b ECHR), or to approve a friendly settlement between the parties (Art. 39 § 1 ECHR). As sad, these benefits are, however, not available to non-EU States. At first glance, the asymmetry appears unfair though, particularly

[171] *Lock*, ECHRLR 2025, 1 (30).
[172] *Ibid.*

in the light of the *ad hoc* negotiation group's statement ensuring the equality among all High Contracting Parties under the DRAA.[173]

In order to address these concerns, the Union has made a written proposal, annexed to the DRAA, which intends to find alterative ways with non-EU Member States. This draft model of memorandum of understanding[174] commits the EU to leave intervention under Article 36 § 2 ECHR in cases where the alleged violation concerns a provision of EU law that the non-Member State is required to apply pursuant to an international agreement with the Union. If then the Strasbourg Court finds a violation against a non-EU Member State, the EU pledges to "examine which measure are required by the European Union following such judgment".[175] While this proposal partially addresses the procedural imbalance for the other High Contracting Parties not being part of the Union, it does not provide the same level of protection as the co-respondent mechanism, which was specifically designed to overcome the limitations of third-party interventions (e.g. Art. 36 ECHR). Third party interveners hold a significantly weaker procedural position than the co-respondents.[176] They are neither entitled to trigger the prior involvement of the ECJ, nor are they formally bound by the ECtHR's judgment. Moreover, the effectiveness of the draft model of memorandum depends on the consent of the non-EU Member States; a consent which cannot be assumed *ab initio*. Furthermore, the EU's commitment to merely "examine" the conflicting measure falls short of a binding obligation to remedy a qualified violation of the Convention, raising the risk of enforcement gaps.

Additionally, the Union's written commitment would not encompass all potential scenarios where a non-EU Member State has an interest for the EU to get involved into a pending case. Whether the EU chooses or not to participate in a given case will ultimately depend on the EU's interpretation of its own commitment made in the memorandum. Hence, a literal interpretation of the memorandum, limiting its scope to EU law *stricto sensu* could technically exclude the intervention of the EU, whenever third countries are simply applying EEA or EFTA provisions. Although those agreements mirror most of the provisions of primary EU law and although there

---

[173] DRAA (No. 1), Explanatory Report, para. 7.
[174] *Steering Committee for Human Rights* (CDDH), Appendix IV of the Interim Report, for information, on the negotiations on the accession of the European Union to the European Convention on Human Rights, including the draft revised accession instruments in (CDDH(2023)R_EXTRA ADDENDUM) of 4 April 2023.
[175] *Ibid*., para. 2.
[176] For the prerogatives of the third-party intervener, see *Ebert*, in: Meyer-Ladewig/Nettesheim/von Raumer, EMRK, Art. 36, para. 4-8.

is a judicial obligation for the EFTA Court to pay due account to the principles laid down by the relevant judgments of the ECJ,[177] such an EU interpretation of the memorandum leaves the risk of an insufficient tackle of inequality between the High Contracting Parties.

Thus, it appears that the concessions which have been made, might be seen as fragmenting forces undermining the foundational principle of equal treatment under international treaty law[178], raising the question of whether the benefits of an EU accession justify the cost it brings to the existing balance of the Convention system. In the end, the sovereign equality of States is a cornerstone of public international law and the key source of the international community.[179] Hence, accession would institutionalize the fragmentation between the EU and non-EU Member States within the ECHR framework, enshrining this division which for now only exists concerning the *Bosphorus* presumption, into the structure of the Convention system.

2. The Committee of Ministers – revision of voting rules

Another aspect related to the equal footing issue concerns a provision having effects on the voting procedure of the monitoring body of the Council of Europe. The revised voting rules concern the Committee of Ministers which is in charge of the supervision of the execution of judgments (Art. 46 § 2 ECHR) and friendly settlements (Art. 39 § 4 ECHR) in cases involving the European Union as a party. The Committee of Ministers undertakes one of its most important tasks whenever it ensures that the final judgments by the Court are being executed well by the respective High Contracting Party.[180] Back in 2013, the negotiators had already recognized that a special voting arrangement had to be found.[181] This was due to the obligation of the EU and its Member States to coordinate their positions and votes when the Committee supervises executions in matters involving the EU as a respondent or co-respondent. With 28 votes in total out of (future) 47, the significance of a joint voting alignment cannot be overlooked.

[177] OJ L 344/3, 31.01.1994, Art. 3 § 2.
[178] *Pellet*, p. 428.
[179] *Roth*, p. 53-55; *Shaw*, p. 192.
[180] *Brunozzi*, in: Meyer-Ladewig/Nettesheim/von Raumer, EMRK, Art. 46 ECHR, para. 44.
[181] *Meinich*, EP 2024, 685 (693).

Insufficiencies of the earlier version where, however, self-found by the negotiating group and had to be arranged in 2023. In particular, there remained a risk that the EU, jointly with its Member States and with the support of only a small amount of non-Union States, could gather enough votes to determine the outcome of decisions on the execution of judgments, where the EU would be involved as a (co-)responding party. To address this concern, a revised voting mechanism has been proposed to be codified as new "Rule 18" in the Rules of the Committee of Ministers for the supervision of the execution of judgments and the terms of friendly settlements.[182] Although the new "Rule" is not yet entered into force, the potential substance of this provision is currently already known. It will provide that a "four-fifthsmajority" of votes shall be sufficientfor the adoption of final resolutions[183] , if it is guaranteed that there is simple majority of votes cast by representatives of the High Contracting Parties other than the EU and its Member States, and if at least two-thirds of all representatives entitled to sit on the Committee of Ministers are in favor.[185] Furthermore, this Rule would apply, without prejudice to the general voting procedures under Art. 46 § 2 ECHR in conjunction with the Rules of Procedure of the Committee of Ministers, only if a case involves the EU under the co-respondent mechanism or as a sole respondent. While this rule may appear a bit complex, its purpose is clear: to prevent the coordinated voting power of the EU and its Member States from undermining the independent supervisory role and enforcement mechanism of the Committee of Ministers in cases involving the EU.

IV. A positive outlook to accession

Apart from all risks the formulation of the DRAA 2023 might bring, it must be noted that there are compelling reasons to believe that these risks are outweighed by the benefits of EU accession, which promises enhanced protection of human and fundamental rights, as well as an even more robust ECHR system overall. By focusing on the positive aspects of the accession and the

[182] *Ibid.*, p. 694; *Committee of Ministers*, Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies and on 6 July 2022 at the 1439th meeting of the Ministers' Deputies), 12 May 2006.
[183] *Grabenwarter,* in: Grabenwarter/Pabel (eds.), Die EMRK und das Recht der Europäischen Union, § 16, para. 16.
[185] DRAA (No. 1), Appendix 3, Rule 18 (1).

"new path of reinforced co-operation"[187] of both international organizations, we will have to review quickly several mechanisms, which were already discussed above.

First of all, accession will directly address existing protection gaps in human rights. For instance, the *Connolly* case[188] is jurisprudence addressing the issue which will be resolved by the future accession. In that given case, a senior official of the EU Commission published a book criticizing in general the EU's monetary policies. As a consequence, he faced disciplinary action because he did not seek a prior approval by its superior. Alleging a violation of his freedom of expression, M. Connolly saw his defense being rejected by the CJEU. The Court of Justice ruled that the disciplinary action was compatible with his freedom of expression and, hence, proportionate.[189] Back then, the alleged violation had not its roots within an act of national authorities and could, therefore, not be imputed to a High Contracting Party, thus, excluding the possibility for the ECtHR to render a judgement. In such a case, the responsibility for the violation would instead lie within the EU itself as a future High Contracting Party and be declared admissible *ratione personae* by the Strasbourg judges. Hence, thanks to the DRAA, the EU could be judged as every other party of the ECHR. Furthermore, if the European Court of Human Rights indeed abandons the *Bosphorus* presumption, this would remedy the existing accountability deficit. Under the current status, the EU Member States are generally shielded from responsibility for Convention violations, insofar as the violation does not reach the threshold of constituting a "manifest deficiency".[190] Accession would, thus, eliminate this structural gap in the oversight of the ECHR, ensuring a functioning accountability for fundamental rights violations within the EU legal order on both sides (EU and Member States).

Accession would also contribute to a more equitable allocation of responsibility between the EU and its Member States. Involving the EU as a co-respondent would result in a shared responsibility between the EU and the concerned Member State(s) in the case of an established

[187] *Council of Europe*, Reykavik Declaration: United around our values, 17 May 2023, p. 8, 089123GBR_Reykjavik Declaration.pdf (last accessed 18 May 2025).
[188] ECJ, *Bernard Connolly v Commission of the European Communities*, Judgment of 6 March 2001, Case C-274/99 P.
[189] *Ibid.*, para. 167.
[190] ECtHR, *Bosphorus v Ireland* [GC], Judgement of 30 June 2005, No. 45036/98, para. 156.

violation of the Convention. The framework of the co-respondent mechanism will also be an effective enforcement tool for the ECtHR judgments.

In addition, accession will promote a greater coherence and a functioning judicial dialogue between the jurisprudence of the ECtHR and the case law of the Court of Justice. Although the CJEU does not, in principle, interpret the ECHR, it does interpret and apply the EU Charter of Fundamental Rights of its own legal order, which mirrors the rights enshrined in the Convention either in their concrete formulations or in modernized versions.[191] This parallel structure raises the risk of divergent interpretations of what are, in essence, the same fundamental rights provisions. Accession would mitigate this risk in two important ways: first, by subjecting *de iure* the EU and *de facto* the CJEU, to an external review by the ECtHR. Second, through the implementation of the prior involvement mechanism, which would create a formal channel of judicial dialogue between the two European Courts. Taken together, these developments are likely to foster a deeper understanding and cooperation of the CJEU with the ECtHR jurisprudence. Such an engagement is indispensable for ensuring consistency in the pretorian interpretation on the European continent either through the CJEU aligning itself with the ECtHR's case law, or, where it departs from that jurisprudence, by providing reasoned justification as to why the ECtHR's interpretation has not to be followed in a given context.

Furthermore, the accession of the overarching organization, namely the European Union ,would serve to firmly consolidate the EU Member States' commitment to the values and principles of the ECHR at a time when political discourse in various High Contracting Parties includes calls for withdrawal from the Convention.[192] Although EU primary law does not explicitly state that being a party to the Convention is a formal requirement for EU membership, in practice, adherence to the Convention has long been considered an implicit (Copenhagen) criteria.[193] This is not only due to the fact, that the ECHR has been ratified by all the Member States even before they respectively joined the European Union, but also because it is considered to be part of the Union's *acquis*. Following the entry into force of the Draft Revised Accession Agreement, this implicit requirement will become more of a written explicit requirement, as the DRAA operates

---

[191] *Callewaert*, EHRLR 2009, 768 (779); *Douglas-Scott*, CMLR 2006, 629 (633).
[192] The EU Member State Hungary has pronounced several times being in favor of the denunciation of the Convention, *European Parliament*, Hungary's withdrawal from the European Convention on Human Rights, Question for written answer to the Commission, E-002208-17, Rule 130, 29 March 2017.
[193] OJ C 293, 05.12.2007.

under the presumption that all EU Member States have to be parties to the ECHR. Consequently, accession would render it practically impossible for an EU Member State to withdraw from the Convention without infringing its obligations under EU law. Hence, the principles and values enshrined in the ECHR, constituting ratifying obligations of the EU Member State, will be subject to the principle of sincere cooperation according to Article 4 § 3 TEU.

The dual membership is also necessary because the DRAA presupposes that EU acts potentially violating the ECHR, when implemented by Member States, are attributable to the respective Member State. Such attribution is what enables the EU to participate in ECtHR proceedings as a co-respondent. However, if a Member State would denounce the Convention and hence cease to be a party to the ECHR, the chain of attribution would break: the EU could no longer appear in Strasbourg proceedings. This legal gap would undermine the accountability architecture established under the DRAA and the Convention. Thus, following accession, continued subjection of Member States to the ECHR will effectively become a structural component of the Union membership.[194]

Finally, accession would generate significant financial advantages resulting in a substantial monetary contribution to the functioning of the Convention system. Under the DRAA 2023, the EU has committed in contributing 36% of the highest annual financial contribution made by any single Council of Europe Member towards the Convention system (Art. 9 § 1 DRAA). While a precise figure is not yet officially published, an approximation can be derived using Germany's last published contribution to the Council of Europe, which stood at 42,81 million Euros.[195] Based on this number, a hypothetical EU annual contribution would approximately be 15 million Euros. Given that the Strasbourg Court's total budget in 2024 was around 85 million Euros,[196] and notwithstanding the fact that part of the EU's contribution would be allocated to the Committee of Ministers and the Parliamentary Assembly (Art. 9 § 3 DRAA), this would still represent a meaningful and impactful increase in the Court's available resources and also ensuring a better functioning in monitoring and enforcement mechanisms of the ECtHR's judgements.

---

[194] *Lock*, ECHRLR 2025, 1 (35).
[195] *Deutscher Bundestag*, Deutscher Mitgliedsbeitrag zum Haushalt des Europarats, HIB 135/2023, 28.02.2023.
[196] Annual Report 2024, European Court of Human Rights, p. 20.

The key question remaining is whether in the light of the demonstrated favoritism of the European Union by the DRAA, the concessions made by non-EU Member States, particularly the compromise to the principle of equality among all High Contracting Parties, are justified *in fine*. This thesis tried to clarify that despite the inherent risks, the concessions made by the DRAA are indeed warranted. The overall advantages that the EU's accession would bring to the ECHR system, is clearly outweighing the disadvantages, which the 2023 DRAA has made considerable efforts to mitigate. To prevent an increasing fragility of the ECHR system in some European States, the EU's accession would represent a *vital booster of support* for the ECHR.[197] It would not only enhance the legitimacy of the system but also significantly strengthen it. Most importantly, accession would address existing accountability gaps by ensuring that individuals affected by potential violations of Convention rights, particularly in areas where neither a Member State nor an EU institution is currently held directly responsible, gain effective access to justice through new, previously unavailable procedural remedies before the ECtHR. Despite the afforded procedural privileges to the EU, these do not, most crucially, deprive individual applicants the access justice and to seek remedy before the European Court of Human Rights; it is reinforcing their position. Importantly, the structural and institutional autonomy of the EU makes it unlikely that similar concessions would be extended to any other international organization within the framework of the ECHR system. Hence, there is no formal objection that the goal of accession should be achieved under the DRAA which is clearly a prospect of success and that, finally, the vacant seat can be taken by the first EU-nominated judge in Strasbourg.

D. Conclusion: Things *always* come in threes?

The accession of the European Union to the European Convention on Human Rights on the basis of the Draft Revised Accession Agreement of 2023 will not seriously begin before a positive opinion by the Court of Justice of European Union under Art. 218 § 11 TFEU has been rendered. In order to obtain such an opinion, an EU institution, most probably the Commission, or a Member State has to render the revised agreement to the Luxembourg Court. This last hurdle has for now, not been taken. No further step has been for now engaged by the Union to submit the DRAA to the Court of Justice. It is been more than two years now that the EU-

[197] Under the former government the United Kingdom was another example of a High Contracting Party openly criticizing the Convention system and even thinking about denunciation, *McKeon*, Sunak hints that UK could leave ECHR if Rwanda plan blocked.

Commission President confirmed that she wanted to see the Union "join the European Convention on Human Rights as soon as possible".[198] However, a strong signal of concrete accession steps would be of great need now. Not only would the submission to the ECJ be considered as a last procedural step to overcome, before the actual accession agreement could be ratified, but also would the engagement strengthen both human rights systems by aligning them in a time, where nine European States declare jointly to rethink the manner how the ECHR should be interpreted.[199] Such political statements endanger the independent work of the Strasbourg judges even more, when several politicians declare that the scope of application of the ECHR has been extended too far from the Convention's original intentions.[200] This does not only fragilize the rule of law, it is also a negative evolution form the initial Member States' will of accession to strengthen the human rights order throughout Europe. Thus, such a critical positioning to the work of the ECtHR could jeopardize the future of accession.

Why is the accession procedure then put on pause? Is it because the EU negotiators fear a third rejection by the Court in Luxembourg? Probably yes, because further steps to accession are also not taken due to the Common Foreign and Security Policy issue; an issue the ECJ had strongly underlined in its Opinion 2/13. The EU's solution to the issue which should be found after internal discussions is for now not found. Absent from any mention in the DRAA, the CFSP aspect was not covered by the DRAA and this is possibly the reason why no solution has been found yet. Any internal EU decision that does not amount to a formal amendment of the Treaties conferring broader review competences to the ECJ, will necessarily have to remain within the current jurisdictional limits set out in the primary law. It is likely that the ECJ will progressively expand its competence through its own case law[201] in relation to human rights violations arising under the CFSP to such an extent, that it could ultimately assert that the Strasbourg Court's

---

[198] *Von der Leyen*, Speech by the Commission President von der Leyen at the General Debate "United for Europe" of the Council of Europe Summit (Reykjavik Summit), 17 May 2023, Speech by the President at the Council of Europe Summit (last accessed 24 May 2025).
[199] *Jacqué*, Immigration: neuf pays européens veulent affaiblir la Cour européenne des droits de l'homme, Immigration : neuf pays européens veulent affaiblir la Cour européenne des droits de l'homme (last accessed 25 May 2025).
[200] *Ibid.*
[201] *Giegerich*, ZEuS 2024, 591 (595).

jurisdiction in this domain no longer exceeds that of CJEUs' itself. If these presumptions should become reality, the fear of a third rejection would not materialize.

The ratification process of the accession will require the unanimous approval of all 46 High Contracting Parties to the Convention, as well as the Union itself. Among the non-EU States, some may express doubts regarding the amount of concessions granted to the Union legal order. However, in the end the DRAA is characterized by the need to balance participation in the ECHR system with the preservation of the EU's judicial autonomy. This thesis tried to clarify the functioning of these concessions and has argued, particularly concerning the equality among the High Contracting Parties, how the aforementioned concessions are justified. They are likely to enhance the allocation of legal responsibility, improve the enforceability of ECtHR judgments and to reinforce the overall integrity of the Convention system. While this thesis strongly supports the view that the EU accession to the ECHR under the 2023 DRAA is a development which should be welcomed, it remains evident that numerous obstacles must still be overcome before the European Union can call itself the *primus inter pares* of the High Contracting Parties to the European Convention on Human Rights.

Bibliography

Abdollahi, Mohsen/Behzadi, Keyvan, Regional Jus Cogens: Conceptual Difficulties and Practical Challenges, The Iranian Review for UN Studies 2020, p. 34–74.

Baetens, Freya, Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?, Blog of the European Journal of International Law, 15 October 2019, Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful? – EJIL: Talk! (last accessed 3 May 2025).

Barnard, Catherine, Opinion 2/13 on EU accession to the ECHR: looking for the silver lining, EU Law Blogs, 16 February 2015, EU Law Analysis: Opinion 2/13 on EU accession to the ECHR: looking for the silver lining (last accessed 17 April 2025).

Bates, Ed/Buckley, Carla M./Harris, David/O'Boyle, Michael, Law of the European Convention on Human Rights, 5th ed., Oxford, 2023.

Bergmann, Andreas, Zur Souveränitätskonzeption des Europäischen Gerichtshofs, Tübingen, 2018.

Berner, Katharina, Authentic Interpretation in Public International Law, Heidelberg Journal of International Law, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2016, p. 845–878.

Blaschke, Annika, Dealbreaker: GASP – Wie die verbundenen Rechtssachen C-29/22 P und C-44/22 P die Frage um den Beitritt der EU zur EMRK endgültig entscheiden könnten, Saar Blueprints 2024, p. 1–51.

Callewaert, Johan, The European Convention on Human Rights and European Union Law: a Long Way to Harmony, European Human Rights Law Review 2009, p. 768–783.

Calliess, Christian/Ruffert, Matthias (eds.), EUV/AEUV, 6th ed., Munich, 2022.

Canor, Iris, Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe? European Law Review 2000, p. 3-21.

Ceretelli, Carlotta, Abuse of Process: An Impossible Dialogue Between ICJ and ICSID Tribunals?, Journal of International Dispute Settlement 2020, p. 47–68.

Craig, Paul P., EU Accession to the ECHR: Competence, Procedure and Substance, Fordham International Law Journal 2014, p. 1114–1150.

Daukšienė, Inga/*Grigonis, Simas*, Accession of the EU to the ECHR: Issues of the co-respondent mechanism, International Comparative Jurisprudence 2015, p. 98–105.

Douglas-Scott, Sionaidh, A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis, Common Market Law Review 2006, p. 629–665.

Editorial Comments, The EU's Accession to the ECHR – a "NO" from the ECJ!, Common Market Law Review 2015, p. 1–16.

Forteau, Matthias/Miron, Alina/Pellet, Allain, Droit International Public, 9th ed., Paris, 2022.

Frantziou, Eleni/*Craig, Sarah*, Understanding the implications of article 2 of the Northern Ireland Protocol in the context of EU case law developments, Northern Ireland Legal Quarterly 2022, p. 65–88.

Fredriksen, Halvard Haukeland/*Johansen, Stian Øby*, The EEA Agreement as a Jack-in-the-box in the Relationship Between the CJEU and the European Court of Human Rights?, European Papers 2020, p. 707–743.

Geiger, Rudolf/*Khan, Daniel-Erasmus*/*Kotzur, Markus*/*Kirchmair, Lando* (eds.), EUV/AEUV, 7th ed., Munich, 2023.

Giegerich, Thomas, The Rule of Law, Fundamental Rights, the EU' Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance?, Zeitschrift für Europäische Studien, 2024, p. 591–629.

Glas, Lize R./*Krommendijk, Jasper*, From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts, Human Rights Law Review 2017, p. 567–587.

Gourdet, Sascha, Europäischer Grundrechtsschutz, Die Anwendung der Unionsgrundrechte in den Mitgliedstaaten der Europäischen Union und ihr Verhältnis zu den nationalen Grundrechten, 1st ed., Baden-Baden, 2021.

Grabenwarter, Christoph, Europäische Menschenrechtskonvention, in: *Grabenwarter, Christoph/Pabel, Katharina* (eds.), Die EMRK und das Recht der Europäischen Union, Munich, 2021, p. 725.

Von der Groeben, Hans/*Schwarze, Roland*/*Hatje, Armin* (eds.), Europäisches Unionsrecht, 7th ed., Baden-Baden, 2015.

Hummert, Katharina, Neubestimmung der acte-clair-Doktrin im Kooperationsverhältnis zwischen EG und Mitgliedstaat, Berlin, 2006.

Jacqué, Philippe, Immigration: neuf pays européens veulent affaiblir la Cour européenne des droits de l'homme, Le Monde, Immigration : neuf pays européens veulent affaiblir la Cour européenne des droits de l'homme (last accessed 25 May 2025).

Johansen, Stian Øby/*Ulfstein, Geir*/*Follesdal, Andreas*/*Wessel, Ramses A.*, The Revised Draft Agreement on the Accession of the EU to the ECHR: third time's a charm?, European Papers 2024, p. 641–646.

Joukowsky, Nikolai E., Augustus, First Among Equals, Brown University, 17 February 2011, Augustus, First Among Equals (last accessed 26 April 2025).

Kaufhold, Ann-Katrin, Gegenseitiges Vertrauen: Wirksamkeitsbedingung und Rechtsprinzip der justiziellen Zusammenarbeit im Raum der Freiheit, der Sicherheit und des Rechts, Europarecht (EuR) 2012, p. 408–432.

Kornezov, Alexander, The Area of Freedom, Security and Justice in the Light of the EU Accession to the ECHR – Is the Break-up Inevitable?, Cambridge Yearbook of European Legal Studies 2013, p. 227–254.

Lindeboom, Justin/*Wessel, Ramses A.*, The Autonomy of EU Law, Legal Theory and European Integration, European Papers 2023, p. 1247–1254.

Lock, Thomas, Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order, Common Market Law Review 2011, p. 1025–1054.

Lock, Thomas, End of an epic?, Yearbook of European Law 2012, p. 162–197.

Lock, Thomas, Implications of the Revised Draft EU Accession Agreement for the ECHR, European Convention on Human Rights Law Review 2025, p. 1–37.

Martucci, Francesco, Droit de l'Union européenne, 4th ed., Paris, 2025.

McCrudden, Christopher, The Law and Practice of the Ireland-Northern Ireland Protocol, 1st ed., Cambridge, 2022.

McKeon, Christopher, Sunak hints that UK could leave ECHR if Rwanda plan blocked, The Independent, 4 April 2024, Sunak hints that UK could leave ECHR if Rwanda plan blocked | The Independent (last accessed 20.05.2025).

Meinich, Tonje, From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective, European Papers 2024, p. 685–694.

Meyer, Jens/*Nettesheim, Martin*/*von Raumer, Stefan* (eds.), Europäische Menschenrechtskonvention, 5th ed., Baden-Baden, 2023.

Meyer, Jürgen/*Hölscheidt, Sven* (eds.), Charta der Grundrechte der Europäischen Union, 6th ed., Baden-Baden, 2024.

Oesch, Matthias, Switzerland and the European Union, Zurich, 2018.

Peers, Steve/*Hervey, Tamara*/*Kenner, Jeff*/*Ward, Angela* (eds.), The EU Charter of Fundamental Rights, 2nd ed., Oxford, 2014.

Polakiewicz, Jörg, EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?, European Human Rights Law Review 2013, p. 1–29.

Polakiewicz, Jörg/*Suominen-Picht, Irene*, A Council of Europe Perspective on the European Union's accession to the European Convention on Human Rights, European Papers 2024, p. 729–744.

Reestman, Jan Herman/*Claes, Monica*/*Besselink, Leonard*, A Constitutional moment: Acceding to the ECHR (or not), European Constitutional Law Review 2015, p. 2–12.

Robert, Loïc, La présomption *Bosphorus* à l'épreuve du mandat d'arrêt européen. Commentaire de CourEDH, 25 mars 2021, Bivolaru et Moldovan c/ France, n° 40324/16 et n° 12623/17, in : Revue de l'Union européenne 2023, p. 519–525.

Roth, Brad R., Sovereign Equality and Moral Disagreement, Oxford, 2011.

Sarmiento, Daniel, Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe, Common Market Law Review (50) 2013, p. 1267–1304.

Schütze, Robert, European Union Law, 3rd ed., Oxford, 2021.

Shaw, Malcolm N., Public International Law, 5th ed., Cambridge, 2007.

Streinz, Rudolph (ed.), EUV/AEUV, 3rd ed., Munich, 2018.

Ulfstein, Geir/Risini, Isabella, Inter-State Applications under the Euroean Convention on Human Rights: Strengths and Challenges, Blog of the European Journal of International Law, 24 January 2020, Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges – EJIL: Talk! (last accessed 7 May 2025).

Vermeule, Adrian, Contra "Nemo Judex in Sua Causa": The Limits of Impartiality, The Yale Law Journal 2012, p. 384–420.

von Danwitz, Luc, Der Grundsatz des gegenseitigen Vertrauens zwischen den Mitgliedsstaaten der EU. Eine wertebasierte Garantie der Einheit und Wirksamkeit des Unionsrecht, Europarecht (EuR) 2020, p. 61–89.

Von der Leyen, Ursula, Speech by the Commission President von der Leyen at the General Debate "United for Europe" of the Council of Europe Summit (Reykjavik Summit), European Commission, 17 May 2023, Speech by the President at the Council of Europe Summit (last accessed 24 May 2025).

Xanthopoulou, Ermioni, Mutual trust and rights in EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust, Common Market Law Review 2018, p. 489–509.

Index of Jurisprudence:

I. European Court of Human Rights:

II. Court of Justice of the European Union:

ECJ, Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Case 283/81, ECLI:EU:C:1982:335.

ECJ, Opinion of 14 December 1991, *opinion 1/91*, ECLI:EU:C:1991:490.

ECJ, Opinion of 28 March 1996, *Accession to ECHR*, opinion 2/94, ECLI:EU:C:1996:140.

ECJ, Judgment of 6 March 2001, *Bernard Connolly v Commission of the European Communities*, C-274/99 P, ECLI:EU:C:2001:127.

ECJ, Judgment of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, ECLI:EU:C:2007:772.

ECJ, Opinion of 8 March 2011, *Creation of a Unified Patent Litigation System*, opinion 1/09, ECLI:EU:C:2011:123.

ECJ, Judgement of 21 December 2011, *N.S. v Secretary of State for the Home Department and M.E. and Others*, C-411/10 – C-493/10, ECLI:EU:C:2011:865.

ECJ, Judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107.

ECJ, Judgment of 26 February 2013, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

ECJ, Opinion of 18 December 2014, *opinion 2/13*, ECLI:EU:C:2014:2454.

ECJ, Judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15, ECLI:EU:C:2016:198.

ECJ, Judgment of 16 February 2017, *C.K. and Others v Republika Slovenija*, C-578/16 ppu, ECLI:EU:C:2017:127.

ECJ, Judgment of 25 July 2018, *LM*, C-216/18, ECLI:EU:C:2018:586.

ECJ, Opinion of 30 April 2019, *opinion 1/17*, ECLI:EU:C:2019:341.

III. High national courts or tribunals:

BVerfG, Judgment of 12 October 1993, *Maastricht-Entscheidung*, 2 BvR 2134/92, 2 BvR 2159/92.

UKSC, Judgment of 19 February 2014, *R v Secretary of State for the Home Department*, No. 2014/12.

Norvigian Supreme Court, Judgement of 16 December 2016, *Holship*, No. HR-2016-2554-P.

BVerfG, Judgement of 6 November 2019, *Right to be forgotten II*, 2 BvR 84/2019.

List of abbreviations

BVerfG = Bundesverfassungsgericht

CDDH = Comité directeur pour les droits humains (Steering Committee for Human Rights)

CETA = Comprehensive Economic and Trade Agreement

CFREU = Charter of Fundamental Rights of the European Union

CFSP = Common Foreign and Security Policy

CJEU = Court of Justice of the European Union

EAW = European Arrest Warrant

EC = European Community

ECJ = European Court of Justice

ECHR = European Convention on Human Rights

ECtHR = European Court on Human Rights

EEA = European Economic Area

EFTA = European Free Trade Agreement

EU = European Union

DAA = Draft Accession Agreement of 2013

DRAA = Draft Revised Accession Agreement of 2023

GDPR = General Data Protection Regulation

TEU = Treaty of the European Union

TFEU = Treaty of the Functioning of the European Union

UK = United Kingdom

UKSC = United Kingdom Supreme Court