THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS

(RECONCILING THE ACCESION WITH THE AUTONOMOUS EU LEGAL ORDER)

LLM Paper

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THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS:

RECONCILING THE ACCESION WITH THE AUTONOMOUS EU LEGAL ORDER
1. CHAPTER 1 - INTRODUCTION

1.1 A VERY BRIEF HISTORY

1. In 2009 the Treaty of Lisbon came into force, in which the EU has pledged itself to join the European Convention of Human Rights and Fundamental Freedoms (hereinafter ECHR) in Art. 6 (2) TEU¹ which reads:

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

2. The process and relationship between the EU and the Council of Europe (hereinafter CoE) which lead to this commitment has been a long one historically, but as many authors have dealt with it time and again, this paper will not engage this². Instead, it will suffice to explain for the purposes of this paper that the reason behind this commitment was in order to breach the gap in fundamental rights protection in the EU, which had come to be a particularly sensitive issue in the EU since 1974 in part due to the case of Internationale Handelsgesellschaft³, which became known as Solange I⁴. The context of the case Solange I was concerned with fundamental rights of basic German Law, and whether EU law could take primacy over them, despite the fact that

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¹ See appendix for full text of Art.6 TEU
⁴ Ibid, p. 549-550
EU law did not provide as extensive a protection as the German constitution. The German Constitutional Court, in accepting the primacy of EU law over German national law, it made the clarification, that ‘so long as’ the EU autonomous legal order (hereinafter Legal Order) has not developed an adequate standard of fundamental rights protection in comparison to that in German constitutional law, it would not apply EU law which offers a lesser protection of fundamental rights. Whilst fundamental rights have always been a part of the EU, the case of Solange I highlighted that there was much room for improvement of the equality of protection of fundamental rights, which the EU has aimed to reprimand ever since.

1.2 THE LEGAL BASIS

3. Under Art.6 (2) TEU, this commitment was pledged in primary EU law, in the form of an accession of the EU to the ECHR. Thus, the accession became a binding obligation upon the EU. At this point it is worth noting that the parallel legal authority for accession in the ECHR is Art. 59 (2) (as amended by Protocol 14 Art. 17 (2)) which states that ‘The European Union may accede to this Convention’. No time period for this accession was specified in either legal authority, but in May 2010 negotiations between the EU and the CoE began for the Draft Accession Agreement (hereinafter DAA) in order to realise this commitment. Delegates from both sides took to negotiating the DAA and in April 2013 the final version of the DAA was ready, which was submitted by the European Commission (hereinafter Commission) to the Court of Justice of the EU (hereinafter CJEU) for an opinion on whether or not it is compatible with the Legal Order and the characteristics of the EU and EU law.

4. The main legal basis for the DAA, other than Art.6 (2) TEU is additional Protocol No.8 EU, which provides an additional safeguard for the preservation of the Legal Order

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5 Ibid, p.549-550
6 Case 29-69 Erich Stauder v City of Ulm - Sozialamt [1969] ECR 419, para 7
7 See para. 3 below
8 See appendix for text of Art. 59 ECHR
9 Ibid

10 See appendix for full text of Protocol No.8 EU
and characteristics of the EU\textsuperscript{11}, by ‘[constraining] the drafters of the [DAA]’\textsuperscript{12}, as per the wishes of the Member States of the EU. This was a catalyst for scholars who took to analysing the DAA in an attempt to anticipate the decision of the CJEU, with some being optimistic\textsuperscript{13} and others not so much.

1.3 THE VERDICT

5. On the 18\textsuperscript{th} of December 2014, just a few days before Christmas, the CJEU released the opinion on the DAA, numbered 2/13 (hereinafter the Opinion or Opinion 2/13). The timing of the release date was far from insignificant. Courts are known to release opinions and judgements around the holidays or in the summer, if they believe them to cause controversy, in hopes that they will go somewhat unnoticed. True enough, the Opinion sparked a great deal of controversy and debate\textsuperscript{14}. The legal world rushed to get their opinion out there, hence some opinions will come from online forums, as there is not yet a great deal of published scholarship on the Opinion.

6. The Opinion identified seven problematic areas\textsuperscript{15}. These are: the relationship between Art.53 of the Charter of Fundamental Rights of the EU (hereinafter CFR) and Art. 53 ECHR, the principle of mutual trust, Protocol No.16 to the ECHR, the jurisdiction of the CJEU under Art. 344 TFEU, the co-respondent mechanism, the prior involvement procedure and lastly judicial review in the area of CFSP. These have led the CJEU to declare the DAA incompatible with Art. 6(2) TEU and Protocol No. 8 EU, and hence incompatible with the characteristics of the EU and the Legal Order. For the purposes of this paper, only three of the issues identified will be dealt with. These have a direct link to the Legal Order.

\textsuperscript{11} This will be elaborated upon in Ch.2
\textsuperscript{13} See for example ibid
\textsuperscript{14} See chapter 6
\textsuperscript{15} Editorial Comments, 'The EU’s Accession to the ECHR – a “NO” from the ECJ!' 2015 Common Market Law Review 52: 1–16, 8
1.4 PLAN OF ATTACK

7. As stated above, many have rushed to critique the Opinion. However the CJEU indicated in the Opinion that its decision is based upon the characteristics of the Legal Order, which it has identified and established in its past case law. What none of the critics of the Opinion have done, is mapped out these characteristics, identified the case law in which they were established and then applied them directly to the conclusions of Opinion 2/13. Hence, the forthcoming chapters will do precisely that. The body of this dissertation will be comprised of four chapters and there will also be a concluding chapter.

8. This paper will start with Chapter 2 by clarifying what the Legal Order is. This will entail an identification of its key characteristics. As will become evident, the DAA is incompatible mainly with only one of these, namely the jurisdiction of the CJEU, which will be the main focus of Chapter 2. Chapters 3, 4 and 5 will deal with the co-respondent mechanism, the prior involvement procedure and Protocol No.16 to the ECHR, respectively. Each chapter will commence by explaining the relevant legal basis and set the context. Then the past case law of the CJEU on the Legal Order, as identified in Chapter 2, will be applied to the Opinion to determine if they do indeed follow in the previous case law. My prediction is that they will. Each chapter will conclude with trying to identify possible solutions and ways to move forward from the Opinion and towards accession. Having done this, the last chapter will comment on whether or not the decision in the Opinion, valid as it may prove to be, was also justified in view of the need to accede to the ECHR and in view of the importance of protecting fundamental rights in the EU.

1.4.1 Why these three issues?

9. As have noted above, the three issues in the DAA, identified in the Opinion which will be applied and analysed are the co-respondent mechanism, the prior involvement mechanism and Protocol No.16 to the ECHR. The reason for the discussion of these three issues in particular lies in their purpose. This is because the two latter were introduced to ensure that the DAA would preserve the Legal Order, by safeguarding the autonomy of the exclusive jurisdiction of the CJEU. The former issue pertaining
to Protocol No.16 to the ECHR impacts the Legal Order in a less direct way as will be explained below in Chapter 5. These three issues are, in theory at least, not the most challenging hurdles to overcome\textsuperscript{16}. It is nonetheless vital for the successful future of the accession proceedings that they be resolved.

1.4.2 Additional questions

10. To clarify, this paper will attempt to answer the question of how to reconcile the accession of the EU to the ECHR. In so doing this paper will also attempt to provide answers to the following questions:

   i. What are the main characteristics of the Legal Orders?
   ii. Do the co-respondent and prior involvement mechanisms and Protocol No.16 comply with Legal Order, as defined by the CJEU?
   iii. What, if any, improvements can be made in these three areas?
   iv. How to move forward with the accession?
   v. Is the CJEU justified in its judgement(s)?

1.5 CONCLUSION

11. According to Groussot, Lock and Pech, Protocol No. 8 EU mentions the characteristics of the Legal Order and that they shall remain unchanged, yet fails to define them\textsuperscript{17}. This task will be performed in the following chapter. It must be clarified in advance that the co-respondent and prior involvement procedures and Protocol No.16 are compatible with two of the three characteristics of the Legal Order. In other words, they raise no issues as regards Direct Effect and Primacy. Hence the preceding chapter will only briefly discuss them and place greater focus on the jurisdiction of the CJEU.

\textsuperscript{16} Editorial Comments, 'The EU’s Accession to the ECHR – a “NO” from the ECJ!' 2015 Common Market Law Review 52: 1–16, 11-12

2. CHAPTER 2-
THE LEGAL ORDER

2.1 INTRODUCTION

12. To begin with, it is imperative for the purposes of this paper that the Legal Order is defined. In order to do this, we look not to the Treaties, but to the CJEU. As Eaton confirms, the Legal Order is a ‘judicial creation’ \(^{18}\). The CJEU has taken it upon itself to establish the Legal Order and in so doing, it has time and time again made reference to key characteristics which comprise it \(^{19}\). Thus, by looking at the case law of the CJEU over the years, it is possible to identify recurring concepts, labelled by the CJEU as vital for the EU, which are deduced to be the main \(^{20}\) characteristics of the Legal Order. These are the common denominators, or the backbone if you will, of EU law \(^{21}\).

13. This chapter will be primarily based on cases and opinions delivered by the CJEU, from the landmark case of Van Gen den Loos \(^{22}\), to the recent Opinion 2/13 on the DAA. Whilst the following chapters, will focus much more on Opinion 2/13, this chapter is primarily concerned with recognising the characteristics of the Legal Order, by looking at how the CJEU established them though case law. Three characteristics which the CJEU has identified as the foundations of the Legal Order will be

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\(^{19}\) Opinion 2/13 (18 December 2014), para 157

\(^{20}\) Emphasis on the ‘main’ as the EU and EU law has other concepts and principles which characterise it, such as mutual trust, but I am focusing on the three imperative concepts which form the Legal Order.

\(^{21}\) The rule of law is a relevant concept, but due to the word limit constraints it will not be discussed in this paper. See Case 294/83 Parti écologiste “Les Verts” v European Parliament [1986] ECR 1339 and Communication From The Commission To The European Parliament And The Council ‘A new EU Framework to strengthen the Rule of Law’ (2014) COM158 final/2

\(^{22}\) Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 3763
enumerated. These are, the Direct Effect of EU law (hereinafter Direct Effect), the Primacy of EU law over Member State national law (hereinafter Primacy) and the nature of the jurisdiction of the CJEU. It must be noted, that this chapter is not concerned with the critical issues surrounding these three characteristics, but rather with how the CJEU identified and established them as vital characteristics for the Legal Order. Furthermore, in order to keep the focus on the DAA and the Opinion, this paper will only go into greater detail of the aspects of the jurisdiction of the CJEU. As regards Primacy and Direct Effect, they will only briefly be mentioned, as they do not appear to pose cause for concern as regards the Legal Order.

14. Let us begin with Direct Effect, as it provides a basis for the operation of Primacy, both of which set up a premise for the jurisdiction of the CJEU.

2.3 DIRECT EFFECT

15. To begin with, it should be noted that amongst others\textsuperscript{23}, Direct Effect is identified as a characteristic of the Legal Order in Opinion 1/91 of the CJEU, which unequivocally enumerates it as such\textsuperscript{24}. By definition, Direct Effect means that a provision ‘produces direct effects and creates individual rights which national courts must protect’\textsuperscript{25}. Direct Effect, put very simply, allows individuals at the Member State national level to seek justice under EU legislation which has an impact on them, thus ensuring the observance of the rule of law at an EU-wide level\textsuperscript{26}.

16. The principle of Direct Effect is not found in the Treaties, but rather was first defined by the CJEU in the landmark case of \textit{Van Gend en Loos}. On the facts of the case, \textit{Van Gend en Loos} was concerned with the charging of a higher rate of duty for movement of goods, which contradicted with the then Art.12 EEC. One of the arguments put forth in the case was that the existence of the possibility to bring actions

\textsuperscript{24} Opinion 1/91 [1991] ECR I-6079, para 21
\textsuperscript{25} Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 3763, para 1
\textsuperscript{26} J. H. H. Weiler, ‘50 Years After Van Gen den Loos: Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual’ (1st publication, Union européenne, 2013), p.11
by the Commission and the Member States against a Member State in breach of its obligations under EU law, precluded individuals from bringing an action against a Member State for the same kind of breach. In this respect, the CJEU noted that regardless of national legislation, EU law both imposes duties and grants rights to individuals, thus becoming part of national legislation. By doing so, EU legislation, thus grants the right to individuals to claim those rights given to them by EU legislation before national courts. The reason for this is that, it is arbitrary and hence contrary to the rule of law to impose obligations and create rights which affect individuals, but provide no recourse to justice when said rights and obligations are infringed. This ensures the Legal Order is effectively upheld.

17. Moving on, it should be noted that Direct Effect would have no real value if the next principle did not exist, as will be demonstrated below.

2.3 PRIMACY

18. As noted in the preceding section, alongside Direct Effect, Primacy has also been identified as a characteristic of the Legal Order in Opinion 1/91\textsuperscript{27}. Before dwelling into the establishment of Primacy as a characteristic of the Legal Order, it is worth defining what it means. Primacy is the principle which dictates that one legal order is to take precedence over another. According to Doblhoff-Dier and Kusmierczyk\textsuperscript{28}, this has been one of the main objectives which the CJEU has set out to establish, in its attempt to ensure that national law of the Member States cannot be used by a Member State to escape its obligations under EU law. This will ensure not only uniform application, but also the effective protection of the rule of law, as will be explained in the preceding paragraph. As Ritleng\textsuperscript{29} further clarifies, in the context of the Legal Order, Primacy takes effect when a Member State joins the EU, as by doing so it agrees to submit some of its sovereign power to the EU.

\textsuperscript{27} Opinion 1/91 [1991] ECR I-6079, para 21
\textsuperscript{28} Rosmarie Doblhoff-Dier and Sandra Kusmierczyk, ‘Present and Future Relations between the ECJ and the ECtHR with Special Consideration to the Draft Accession Agreement’ 2013 7 Vienna J. on Int’l Const. L. 349, 361
\textsuperscript{29} Dominique Ritleng, ‘The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms A Threat to the Specific Characteristics of the European Union and Union Law?’ Uppsala Faculty of Law Working Paper 2012:1, 4
19. Despite its importance, no provision on primacy of EU law was included in the Treaties and while there was such a provision in the draft Constitutional Treaty (which was not adopted), the Treaty of Lisbon only mentions Primacy, in a declaration. This is Declaration 17, which states:

“The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law”

20. As Declaration 17 to the Lisbon Treaty states, Primacy has been developed and clarified by the case law of the CJEU. The starting point is the case of *Costa v ENEL*. On the facts of the case *Costa v ENEL*, the matter at hand concerned whether Italian national law, which purported to nationalise the production and distribution of electrical energy in Italy, could take precedence over the provisions of the then EEC Treaty, by reason of it coming into force after the Treaty. This issue in turn brought about the question, of the extent to which EU law can be applied in the national legal order. *Van Gen den Loos* had already established that EU law was part of the national legal order, which left the matter as to the extent of the applicability to be clarified. In *Costa* this was to be answered by way of deciding what happens when there is a conflict of laws between the EU Treaties and the national legislation of a Member State. The CJEU provided the following answer to this question:

“The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions (...) the rights and obligations arising under the Treaty carries with it a permanent limitation of [the Member States’] sovereign rights, against which a subsequent unilateral act incompatible with the concept of the [EU] cannot prevail”

21. In other words, the CJEU stated in *Costa v ENEL* that the EU had established a new legal system, which is not to be overridden by national legislation- whether said legislation existed prior to the Treaty or came into force after the Treaty. Furthermore,

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30 See appendix for declaration No.17 TEU
31 Case 6-64 Flaminio Costa v E.N.E.L. [1964] ECR 558
32 Ibid, 594
as established by Van Gen den Loos, this new legal system, is an integral part of the national legal systems of the Member States\textsuperscript{33}. As EU law needs to be applied uniformly, it means that all Member States must give it an interpretation, in accordance with the Treaties, and so its interpretation must prevail over their national law. Thus, \textit{Costa v ENEL}, determined that EU law takes primacy over national law irrespectively of any temporal arguments against this.

22. The crucial role played by Primacy in the Legal Order lies in that EU law does not depend on the national law of Member States, but rather on the Treaties themselves\textsuperscript{34}, which in turn contributes to its autonomous character. The autonomous character of the Legal Order will become more evident in the following section, where the nature of the jurisdiction of the CJEU is discussed.

\section*{2.4 EXCLUSIVE JURISDICTION OF THE CJEU}

23. According to Ritleng\textsuperscript{35}, the area presenting most issues with regards to the DAA, is that of the jurisdiction of the CJEU owing to Art.218 (11) TFEU, which reads:

\textit{Art.218 (11) TFEU:}

A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised\textsuperscript{36}.

24. Under Art. 218 (11) TFEU, the Commission submitted the DAA to the CJEU for consideration, which has led us to the current situation of determining whether the application under Art.218 (11) is to be deemed compatible with the Legal Order.

\textsuperscript{33} Ibid, 593
\textsuperscript{34} Tobias Lock, 'Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order' 2011 Vol. 48 No. 4 August 1025-1054, 1029
\textsuperscript{36} See appendix for text of Art. 218 TFEU
25. As Eaton clarifies, the exclusive jurisdiction of the CJEU, could be regarded as having three functions: interpreting, adjudicating and determining the division of competences. This section will discuss the exclusive jurisdiction of the CJEU to interpret the Treaties under Art.19 TEU and to adjudicate on matters of EU law under Art.344 TFEU and lastly its jurisdiction to determine the division of competences within the EU as they have been interpreted, developed and clarified in the case law of the CJEU.

2.4.1 THE CJEU HAS THE SOLE JURISDICTION TO INTERPRET THE EU TREATIES

2.4.1.1 Introduction

26. As a starting point, this section will be premised with the case of Haegeman. Haegeman was the first case which stated that any international agreement concluded by the EU would form part of the Legal Order and thus bind the EU and its Member States. Accordingly, no international agreement which does not comply with the Legal Order, may become part of it, otherwise it will poison its smooth operation like a cancerous mass that does not belong and cause adverse effects. With this in mind, lets proceed to examine to jurisdiction of the CJEU to interpret EU law.

2.1.4.2 The Legal Basis

27. As discussed above, under the heading of Primacy, by the conclusion and ratification of an accession agreement, a state, becomes a Member State of the EU, thereby voluntarily surrendering some of its sovereignty to the EU. A most important part of this transfer of sovereignty by a Member State, is the allocation of said sovereignty to the CJEU. Specifically, Member States empower the CJEU with the function to be the

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38 Case 181-73 R. & V. Haegeman v Belgian State ECR 449
sole judicial body of the EU with the authority to interpret EU law\textsuperscript{40}. The legal basis for this jurisdiction can be derived from Art.19 (3), which reads:

> 'Art.19 TEU:
> 3. The Court of Justice of the European Union shall, in accordance with the Treaties:
> Rule on actions brought by a Member State, an institution or a natural or legal person;
> Give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
> Rule in other cases provided for in the Treaties\textsuperscript{41}.

\textbf{28.} Art.19 (3) defines the situations under which the CJEU may interpret EU law. These have been further refined by the CJEU. Below shall commence the mapping out of the past case law of the CJEU as regards its exclusive jurisdiction.

\textbf{2.1.4.3 Where to find the provisions for interpretation of fundamental rights in the EU}

\textbf{29.} This journey back in time begins with the case of \textit{Internationale Handelsgesellschaft}\textsuperscript{42}, delivered in 1970. On its facts the case concerned an import-export company, and a preliminary ruling request on the legality of a Council Regulation regarding export obligations. Specific attention is drawn to paragraph three of the judgement in which the CJEU stated, ‘The validity of measures adopted by the institutions of the [EU]...can only be judged in the light of [EU] law’. This is an excellent starting point as this paragraph of the decision clarified that the interpretation of fundamental rights must be done so in line with the provisions for fundamental rights


\footnote{See appendix for full text of Art. 19 TEU}

\footnote{Case 11-70 \textit{Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel} [1970] ECR 1125}
found in EU law. For current purposes, this is important because by joining the ECHR, the EU would be bound by an interpretation of fundamental rights by the European Court of Human Rights (hereinafter ECtHR). The crucial clarification to be made here is that the ECtHR may apply EU law in order to assess its compatibility with the ECHR. It may not however interpret EU law with the use of the ECHR in order to see if EU law is compatible with it. The CJEU alone is entitled to interpret EU law and this it must do, with the use of EU law on fundamental rights. Currently the EU law instrument on fundamental rights to be used for interpretation of EU law, is the CFR. The case of *Internationale Handelsgeüsselschaft* thus made it very clear from the outset that fundamental rights, as they are found in EU law, will be protected by the CJEU. This was not an explicit affirmation of the exclusive jurisdiction of the CJEU, but it nonetheless provides a foundation as regards where the CJEU must find the tools to interpret EU law.

2.1.4.4 The only interpretation that matters

30. Following *Internationale Handelsgeüsselschaft*, was the case of *Les Verts*\(^{43}\) in 1986. The case concerned the party *Les Verts*, which is a non-profit-making organisation, which applied to the CJEU for a declaration that two decisions were void. According to the Advocate General’s opinion in *Les Verts*\(^{44}\), no interpretation may be given to any provision of law, so that it conflicts with the provisions of the Treaties. If this is applied to the DAA, it could be said that any interpretation of the DAA in the explanatory report, which conflicts with Art.6 and Protocol No.8 TEU, will be deemed incompatible. This point will become especially relevant when it is observed how the CJEU has interpreted the provisions and explanatory report as regards the co-respondent and prior involvement mechanism and Protocol No.16 to the ECHR. As will become evident in the following paragraphs, it matters not if these can be interpreted differently than the CJEU has done, or if the interpretation given to them in the explanatory report by the drafters of the DAA would make these compatible with the Legal Order. The only interpretation that can be taken into account is that of the CJEU.


2.4.1.5 The nature of the jurisdiction to interpret

31. *Les Verts* further went on to state that ‘the Treaty established a complete system of legal remedies’ which the CJEU is to use. This quote provides a glimpse into the nature of the jurisdiction of the CJEU, with the use of the word ‘complete’. This could be read to imply that the system of review of legality of the EU allows for no other arbitral institution to be involved in the interpretation of EU law.

32. To this effect, the CJEU went on to more accurately pinpoint the nature of its jurisdiction in its 1987 judgement of *Foto-Frost*[^45]. The case concerned a preliminary ruling on the interpretation relating to post clearance recovery of import and export duties. In this case, the CJEU specified that ‘It must also be emphasized that the Court of Justice is in the best position to decide on the validity of [EU] acts’[^46]. This statement is relevant to the co-responded mechanism and the reasons for its introduction as will be seen in the following chapters.

2.4.1.6 Jurisdiction to interpret as regards international agreements

33. Moving on, *Opinion 1/91*[^47] concerned the conclusion of a mixed agreement between members of the EFTA and the EU and its Member States. The agreement proposed the creation of an EEA court, which would provide judicial supervision of the provisions of the EFTA agreement. In this instance the reasoning of the CJEU was that under Art.96 (1) (a) of this proposed agreement, the proposed EEA court would have jurisdiction to settle disputes between the contracting parties to the agreement. Following this reasoning, under Art.2(c) of the EEA the EEA court would have

[^45]: Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199
[^46]: Ibid, para 18
[^47]: *Opinion 1/91* [1991] ECR I-6079
jurisdiction to interpret the term ‘Contracting Parties’ for each dispute before it. This, was decided, was contrary to what is today Art. 19 TEU⁴⁸.

2.1.4.7 A binding Interpretation

34. What the CJEU did make clear in Opinion 1/91⁴⁹, was that the creation of the EEA court system is not in itself in conflict with the present characteristic of the Legal Order. Rather it is the ability by the EEA court to interpret [EU] law, which is in conflict with Legal Order⁵⁰. At a later date the CJEU reiterated the importance⁵¹ of this feature of the autonomy of the EU when it delivered Opinion 1/00 in 2002:

‘Preservation of the autonomy of the [EU] legal order requires therefore... that the procedures for ensuring uniform interpretation of the rules of the [agreement] and for resolving disputes will not have the effect of binding the [EU] and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of [EU] law referred to in that agreement’⁵³.

35. The opinion was based on a Commission request for an opinion of the compatibility of the ECAA agreement with the Legal Order. The above excerpt is of importance, as it implies that for the preservation of the Court’s exclusive jurisdiction to interpret the Treaties, what matters is that the effect of an agreement does not internally bind or allow the Member States to refer EU law for interpretation to another court system. In other words the internal effect of the agreement is the vital aspect⁵⁴.

36. Moreover, in Opinion 1/00 the CJEU made it very clear⁵⁵ that when entering into an agreement, the EU must make sure that any provisions in that agreement must not be possible to bind the EU, particularly for our purposes, as to the interpretation of EU

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⁴⁸ Ibid, papa 35
⁴⁹ Ibid, para 40
⁵¹ Tobias Lock, ‘Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order’ 2011 Vol. 48 No. 4 August 1025-1054, 1030
⁵² Opinion 1/00 [2002] ECR I-3493
⁵³ Ibid
law. At this point, a remark from *Opinion 2/94*\(^{56}\) is highlighted. This opinion regarded the question of the possibility of the EU to accede to the ECHR. It could be inferred from *Opinion 2/94* that it is not a provision which might allow interpretation of EU per se that would contradict the Legal Order, but rather that such an interpretation would be binding upon the EU.

37. According to the explanatory report on the DAA\(^{57}\), the decision of the ECtHR will be binding on the EU, including the CJEU. Thus, it is imperative for the CJEU that it ensures that when the EU binds itself with the DAA, it in no way prejudices its exclusive jurisdiction to interpret. This point was re-emphasised in *Opinion 1/00*\(^{58}\), which read that, 'It is particularly important that the mechanisms in the agreement should prevent the [EU], [...], from being bound by a particular interpretation of the rules of [EU] law'. This quote puts emphasis not only on the importance of the binding effect an agreement such as the DAA may have on the EU, but specifically that such an agreement cannot interpret EU law and then bind the EU with that interpretation. Such an event would be contrary to everything that the CJEU has stated in its case law as regards jurisdiction to interpret EU law thus far.

38. Following this, in the *MOX Plant*\(^{59}\) case, Ireland submitted a claim against the United Kingdom regarding the MOX plant, to the dispute settlement system under the United Nations Convention on the Law of the Sea (hereinafter UNCLOS), rather than to the CJEU, under the argument that it was a specialised court for the content of the dispute at hand. Unsurprisingly, the CJEU (after a claim was launched against Ireland by the Commission) found that regardless of the arguments presented by Ireland, it was in breach of its Treaty obligations, to refrain from referring a question of interpretation of EU law to a court other than the EU Courts\(^{60}\).

\(^{56}\) *Opinion 2/94* [1996] ECR I-1759

\(^{57}\) Draft Revised Agreement On The Accession On The Accession Of The European Union To The Convention For The Protection Of Human Rights And Fundamental Freedoms, para 26

\(^{58}\) *Opinion 1/00* [2002] ECR I-3493, para 11

\(^{59}\) Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-4635

2.4.1.8 A principle of founding importance

39. Finally, as a conclusion to this section it may be useful to demonstrate the paramount importance behind the exclusive jurisdiction of the CJEU to interpret EU law. In this regard, it is noteworthy that the provision on exclusive jurisdiction of the CJEU to interpret EU law was included in Art.87 ECSC, which points to the fundamental nature of this feature, and to the fact that it is a part of the foundations of the EU, which the Court explicitly stated in *Opinion 1/91*:

> ‘It follows that in so far as it conditions the future interpretation of the [EU] rules [by a machinery of courts other than the CJEU, conflict with the Treaties] and, more generally, with the very foundations of the [EU]61.

40. A testament to the importance of the exclusive jurisdiction of interpretation of EU law is made yet more evident when looking at Art.267 TFEU62. Without going into the details of the working of Art.267, its importance will nonetheless be re-emphasised as was done in *Opinion 1/91*63. The preliminary reference mechanism is in place to ensure that the interpretation of EU law is in line with that of the CJEU64. It is thus linked indirectly with the jurisdiction of the CJEU to interpret EU law, as it ensures the uniformity of that interpretation is maintained throughout the EU.

41. The exclusive jurisdiction of the CJEU to interpret EU law is only one third of the jurisdiction of the CJEU, with the second part being the exclusive jurisdiction to adjudicate, as will be presented in the following section.

2.4.2 NO NATIONAL OR INTERNATIONAL COURT MAY ADJUDICATE ON MATTERS OF EU LAW

2.4.2.1 The Legal Basis

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61 *Opinion 1/91* [1991] ECR I-6079, para 46
62 Ibid, para 83
63 Ibid, para 83
64 See chapter 5
42. In the second branch of the exclusive powers of the CJEU lies the power of the CJEU as the sole arbitrator of EU law. The key Treaty provision providing the legal authority is the following:

‘Article 344
(ex Article 292 TEC)
Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’.

43. The concern which led Member States to insist upon the introduction of Protocol No.8 was that a private person might bring a complaint before the ECtHR for the application or interpretation of EU law, without first having sought a preliminary ruling, as Art.267 does not force them to, hence breaching Art. 344. This has led to the prior involvement and co-respondent mechanisms after presidents Costa and Skouris suggested it. As will be seen now, the case law would not permit an agreement which might breach Art. 344.

44. The above was reiterated by the Court in Opinion 1/91 when it stated that ‘Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty’. It may be recalled from the preceding section, that according to Opinion 1/91, the creation of a system of Courts by an agreement such the one envisaged in that opinion, is not in itself contrary to the autonomy of the EU legal order. It is specifically the submission of a matter of EU law before such a court system which is incompatible, as was later clarified in The MOX Plant case.

2.4.2.2 To each their own

45. In the MOX Plant case, the UNCLOS tribunal noted that the submission before them from Ireland against the UK, raised issues regarding ‘the exclusive jurisdiction of the

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65 See appendix for text of Art. 344 TFEU
66 Joint communication from Presidents Costa (ECtHR) and Skouris (ECJ) published on 24 January 2011
69 Case C-459/03 Commission of the European Communities v Ireland [2006] ECR I-4635, para 43
Court of Justice\textsuperscript{70}. The UNCLOS tribunal further went on to note that the issues before them fell under the Legal Order of the EU and thus had to be dealt with by the CJEU. The meaning of the above is that the UNCLOS arbitral tribunal, though much more specialised to deal with the matter of the case as regards the law of the sea, nonetheless recognised that the issue involved the Legal Order of the EU and in conjunction also recognised that as was stated in \textit{Foto-Frost}\textsuperscript{71} above, that such an issue which requests the operation of the Legal Order, cannot possibly be adjudicated on by court other than the CJEU, as it is the court best equipped to make such a determination.

46. This situation is comparable to the current situation which exists with the accession of the EU to the ECHR, as it can be said that the \textit{MOX Plant} case involved a specialised court on the matter of the dispute, but without in depth knowledge of the Legal Order. In the present situation on the DAA there also exists a dynamic whereby the ECtHR is a specialised tribunal on fundamental rights which will be the issue of the disputes, which however lacks specialisation on the Legal Order. As such, under the DAA, the ECtHR should confine itself to adjudicating solely on the application of the ECHR and allow the CJEU to settle any questions pertaining to EU law.

2.4.2.3 The extent of the jurisdiction to adjudicate

47. To demonstrate the extent of the exclusive jurisdiction of the CJEU in adjudicating on matters of EU law, the \textit{Kadi}\textsuperscript{72} case may be used. On the facts of the case, \textit{Kadi} concerned measures taken against persons and entities included in a list drawn up by a body of the United Nations, which resulted in the freezing of funds and economic resources of certain individuals suspected of having links to terrorist organisations. The CJEU struck down arguments based on the claim that since the measures were drawn up by the United Nations Security Council and effected by an EU Regulation it was beyond the jurisdiction of the CJEU. The CJEU concluded that it has exclusive

\textsuperscript{70} Ibid, para 45
\textsuperscript{71} Case 314/85 \textit{Foto-Frost v Hauptzollamt Lübeck-Ost} [1987] ECR 4199
\textsuperscript{72} Joined Cases C-402/05 \textit{Kadi and Al Barakaat International Foundation v Council and Commission} [2008] ECR I-6351
jurisdiction to adjudicate on matters which include ‘[R]eview of European Union measures based on international law’. In other words, all matters falling under EU law are subject to the jurisdiction of the CJEU. Coupled with the MOX plant case, the CJEU has established a firm basis for its exclusive jurisdiction, affirming not only that matters of EU law relating to external agreements of the EU are caught by the jurisdiction of the CJEU, but also that any such matters, may not be referred to a court system other than itself for adjudication.

2.4.2.4 A knit-picking court?

48. Finally, attention is drawn to Opinion 1/00 which further stated that when the EU is to enter such a binding agreement, as is the DAA, it is vital that it foresees and predicts any possible situation at all that might arise from its wording which could have the effect of undermining the Legal Order and especially the exclusive jurisdiction of the CJEU to adjudicate on EU law. ‘The agreement must make it possible to anticipate and prevent any such undermining of the objective enshrined in [Art.344]’. The effect of this quote is very important for the purposes of this thesis as it clarifies that acceding to an agreement and then finding it incompatible with the Legal Order and EU law, is not a possibility. This excerpt from Opinion 1/00 serves as a response to any critics who might be tempted to criticise the CJEU for knit picking at the DAA and interpreting it and the explanatory report in the worst possible way for the Legal Order. Such critics may not be so haste to claim that the CJEU does not care much for the protection of fundamental rights, when in fact this has been its position in the past as regards other agreements. It must try and find any and every possible way that the DAA could be read to compromise its exclusive jurisdiction before the EU is bound by any such agreement. Indeed the co-respondent and prior involvement mechanisms try to anticipate such situations as will be seen in the upcoming chapters.

49. Moving forward to the final branch of the jurisdiction of the CJEU, which is to decide on the division of competences within the EU, as will be developed below.

74 Opinion 1/00 [2002] ECR I-3493, para 11
2.4.3 DIVISION OF COMPETENCES

2.4.3.1 The Legal Basis

50. Finally, let us explore the third branch of the exclusive jurisdiction of the CJEU, namely to determine the division of competences within the EU. The second sentence of Art. 6 (2) TEU and the first sentence of Art. 2 Protocol 8 EU, specifically refer to the preservation and non-alteration of the competences. Groussot, Lock and Pech explain that the Member States felt that Protocol No.8 EU was necessary in addition to the safeguards of Art. 6 (2) TEU, as a ‘caveat’ for not altering the division of competences between the EU and its Member States and institutions. Protocol No.8 EU was therefore added to ease the fear that the CJEU could be deprived of its exclusive jurisdiction in this area.

51. The case of Kadi was important for establishing that the internal division of competences is ‘a distinct feature of the EU legal order’, the allocation of which must not be altered by an external agreement. The case of Kadi reinforced the fact that no alteration to the division of competences in the EU is compatible with the Legal Order, in the following excerpt: ‘An international agreement cannot affect the allocation of powers fixed by the Treaties’. To ensure this, the CJEU is to have exclusive jurisdiction to interpret the Treaties which assign the competences in the EU. Kadi brings all of these considerations together by stating once more that the EU has a complete and thus exclusive legal system, which includes the CJEU as the sole arbitrator and interpreter and none other may adjudicate or interpret these with a view to producing a binding decision in that regard. The division of competences between

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76 Ibid


78 Case T-315/01 Kadi v Council and Commission [2005] ECR II-03649, para 282

79 Ibid, para 285
the EU and its Member States and institutions, falls within this interpretation of the CJEU. This is because the competences are allocated and defined in the Treaties. In order to determine this division of competences, the Treaties must be interpreted and as has been established above, no one but the CJEU may do this.

2.4.3.2 The nature of the jurisdiction to decide on competences

52. Moving on, Opinion 1/00 further clarified the nature of the jurisdiction of the CJEU, ‘Preservation of the autonomy … legal order requires…that the essential character of the powers of the [EU] and its institutions as conceived in the Treaty, remain unaltered’80. This point is of vital meaning for the DAA as shall be demonstrated in the following chapters. This is due to its implications. The meaning of this statement could be interpreted to have implications as to the division of competences between the EU and its institutions. This, falls within the exclusive jurisdiction of the CJEU81 and thus the DAA may not be permitted to alter this in any way.

2.4.3.3 Altering v Affecting competences

53. Special emphasis is placed on the word ‘alter’82 here, as Opinion 1/00 explained that on the facts of that case, it was found that though the provisions affected ‘the powers of the [EU] institutions, they did not alter the essential character of those powers and accordingly did not undermine the autonomy’. In this regard it further clarified83 that such provisions which affected but did not alter the powers of the EU and its institutions, ‘may, therefore, be regarded as compatible with the Treaty’. This will be of vital significance when assessing the DAA. What the CJEU has not explained thoroughly as regards the DAA, is whether the powers of the CJEU to determine the division of competences between the EU and its Member States, by interpreting EU law, are merely affected or altered, and this is a defining and crucial factor in determining compatibility. The affirmation of the fact that the powers of the CJEU may

80 Opinion 1/00 [2002] ECR I-3493, para 12
82 Opinion 1/00 [2002] ECR I-3493, para 21
83 Ibid, para 21
be affected, but not altered, by a binding agreement on the EU and still be compatible with the Legal Order, has been confirmed by Opinion 1/09\textsuperscript{84} in 2011. In Opinion 1/09\textsuperscript{85} the CJEU confirmed that an agreement which affects the powers of the EU will be in line with the Legal Order, as long as it has no adverse effect on it.

2.4.3.4 Agreements falling within EU competence

54. Another issue which was highlighted in the MOX Plant case, was the kind of agreement that might fall within the competence of the EU. In his opinion for the MOX Plant case, the Advocate General\textsuperscript{86} made reference to the case of Haegeman\textsuperscript{87}, where the CJEU stated that if provisions in a dispute are an integral part of EU law, which the Legal Order is and so is the division of competence between the EU and its Member States, then they fall within the scope of EU competence and thus within the exclusive jurisdiction. Haegeman was a case which affirmed that a mixed agreement falls within the CJEU jurisdiction, as was later reaffirmed in the MOX plant case\textsuperscript{88}. In the MOX Plant case, Ireland argued\textsuperscript{89} that no competence was transferred to the EU under UNCLOS. The CJEU concurred with the Advocate General and explained that for competence to have been transferred, UNCLOS must have affected measures of EU law. Accordingly it was stated that a mixed agreement which falls ‘within the scope of the [EU] external competence in matters relating to [provisions found in the Treaties, their] interpretation and application must fall within the exclusive jurisdiction’\textsuperscript{90} of the CJEU. Additionally, where there is a mixed agreement which falls ‘within the shared competence of the [EU] and the Member States’ the CJEU still has jurisdiction\textsuperscript{91}.

2.4.3.5 Nature of the jurisdiction to decide on competences

\textsuperscript{84} Opinion 1/09 [2011] ECR I-1137, para 76
\textsuperscript{85} Ibid, para 76
\textsuperscript{86} Case C-459/03 Commission of the European Communities v Ireland C-459/03 [2006] ECR I-4635, Opinion of AG Maduro, para 21
\textsuperscript{87} Case 181-73 R. & V. Haegeman v Belgian State ECR 449
\textsuperscript{88} Case C-459/03 Commission of the European Communities v Ireland [2006] ECR I-4635
\textsuperscript{89} Ibid, paras 66-67
\textsuperscript{90} Ibid, para 65
55. In the case *Commission v Ireland (2002)*\(^{92}\), the CJEU stated ‘that mixed agreements have the same status in the [EU] legal order as purely [EU] agreements, as these are provisions coming within the scope of [EU] competence’\(^{93}\). To explain the effect of this quote *Opinion 2/00*\(^{94}\) is used, where the competence of the EU was not exclusive, but shared with the Member States. Nonetheless what mattered, after establishing that the EU has competence in a mixed agreement, which the CJEU did in *MOX Plant*, is that the jurisdiction of the CJEU is absolute.

### 2.5 CONCLUSION

56. Coming to a close for this chapter, let us look to *Opinion 2/94* released in 1996, as regards the accession of the EU to the ECHR\(^{95}\). In this opinion the CJEU stated that in order for the EU to submit itself to the jurisdiction of another court, measures would need to be taken and changes would have to occur because as it stands, the EU cannot be subjected to the jurisdiction of another court, as it would likely have an adverse effect on the Legal Order. This is exactly what the DAA, and specifically the co-respondent and prior involvement mechanisms are about; finding solutions that can accommodate the Legal Order and preserve it and the characteristics of the EU, so that it may, without interference to these, submit itself to the jurisdiction of an international court, which in the present circumstances is the ECtHR\(^{96}\).
CHAPTER 3-
THE CO-RESPONDENT MECHANISM

3.1 INTRODUCTION

57. To begin with, it will be seen how well the co-respondent mechanism fits in with the previous case law of the CJEU, as well as whether the CJEU was justified in following the reasoning it did in The Opinion, given the obligation to accede and the pressure for sufficient fundamental rights protection. Lastly it will be considered whether the co-respondent mechanism could be altered, if at all and the way forward.

3.1.1 The Legal Basis

58. Firstly, let us have a look at the procedure. The co-respondent mechanism is found under Art. 3 of the DAA and contains 8 paragraphs. In the explanatory report paragraphs 36 to 64 explain the specifics of the procedure. Below Art. 3(1) is cited which explains the main idea behind the co-respondent procedure.

‘Article 3 – Co-respondent mechanism

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

97 See appendix for the full text of Art. 3 DAA
3.1.2 The reason for the co-respondent procedure

59. It must be noted that according to *Opinion 2/94*, as explained above, it is necessary for the entry of the EU into such an international agreement, as is the DAA, for some measures to be taken to ensure that the nature and characteristics of the Legal Order remain unaltered. In the Treaty of Lisbon this was enshrined in Art. 1 of Protocol No. 8 EU which requires that the specific characteristics of EU law shall be preserved. To that effect, and in order to preserve said characteristics, the drafters of the DAA introduced to co-respondent mechanism which aims to set up a system of involvement of the CJEU in cases pending before the ECtHR, so that its exclusive jurisdiction to adjudicate and interpret EU law, is not compromised. The mechanism, is a way ‘to avoid gaps in participation, accountability and enforceability in the Convention system’. It is thus a system for ensuring the proper administration of justice as regards the ECtHR, allowing responsibility to be attributed to the culpable party. Accordingly, the co-respondent mechanism has been introduced to accommodate the specific characteristics of the EU as a non-state party, in order to ensure said result.

60. Additionally, it is worth noting that the Commission and all the Member States which made submissions for the DAA hearings agreed that Article 1 (b) Protocol No. 8 EU, and so the characteristics of the EU, are preserved via the co-respondent mechanism. Yet the CJEU in the Opinion, found it to be incompatible with the Legal Order, for failing to efficiently preserve its characteristics. Let us contemplate the problems identified by the CJEU and whether such an interpretation follows in its previous case law.

3.2 WHO DECIDES WHO’S IN AND WHO’S OUT?

61. The first problem arises when a Member State or the EU request to become co-respondents as described in paragraphs (2) and (3) of Art.3 of the DAA. In such a scenario the ECtHR is to decide whether this is appropriate as per the conditions in

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*Opinion 2/13* (18 December 2014), para 117

*Draft Revised Agreement On The Accession Of The European Union To The Convention For The Protection Of Human Rights And Fundamental Freedoms*, para 36

*Opinion 2/13* (18 December 2014), para 118

Ibid, para 215
Art.3 (2) & (3). To be able to make this assessment, the ECtHR must inevitably look to the division of competences between the EU and its Member States, as it would have to decide how responsibility is to be divided and bared amongst the EU and its Member States, in order to determine whether either should appropriately join the proceedings.

62. At this point it should be noted that as explained in paragraph 45 of the explanatory report, the co-respondent will not merely be a third party to proceedings but will be jointly liable with the respondent, save for one exception. Hence the determination described, which is to be made by the ECtHR bares great importance for the Legal Order.

63. To answer the question of whether the co-respondent mechanism fits in with the Legal Order, Art. 3 (5) DAA must be considered:

‘5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met’.

3.2.1 Margin of appreciation

64. In respect of this first issue of the ECtHR deciding on the competences between the EU and its Member States in order to decide if a request to become the co-respondent to a pending case is admissible, the problem can be derived from the word ‘plausible’ in Art.3 (5) of the DAA. The reason for this is that despite the fact that the ECtHR will take the submissions of the other parties to the proceedings into account in order to make the determination, it will merely asses the reasons put forth and apply them itself to the conditions described in Art. 3 (2) & (3). This is allowed by the word ‘plausible’ as it permits a margin of appreciation to the ECtHR in deciding whether the reasons put forth are satisfied, rather than having to apply the reasoning of the parties to the proceedings.
With this in mind, attention is drawn to the *MOX Plant* case\textsuperscript{102}, where the UNCLOS tribunal noted that the matter before them concerned ‘the division of areas of competence [of] the [EU] and its Member States’ and on these grounds halted the proceedings until the CJEU had had a chance to look at the case. This was because out of respect\textsuperscript{103} the UNCLOS tribunal would not interfere with the division of competences between the EU and its Member States, as this is a matter that falls within the exclusive competence of the CJEU\textsuperscript{104}. Under Art. 3 (5) of the DAA, the ECtHR purports to do exactly that; to make a determination of the division of competences between the EU and its Member States, while keeping in mind the submissions of the parties, in order to decide with whom responsibility might lie.

Going back to Art. 6(2) TEU and Protocol No.8 EU, the ‘allocation of responsibilities defined within the Treaties’ may not be altered by an international agreement as the *MOX Plant* case had already established\textsuperscript{105}. By allowing the ECtHR to make an assessment of who might have caused a possible breach of the ECHR by carrying out an action and whose responsibility it was to ensure that action respected fundamental rights, the ECtHR will be making an interpretation of the Treaties on the division of competences between the EU and its Member States. Therefore, the DAA is changing the allocation of the responsibility to adjudicate and interpret EU law as enshrined in Art. 19 TEU. The DAA does not safeguard this as it allocates some of that responsibility on the ECtHR to decide on the division of competences between the EU and its Member States, by allowing a margin of appreciation for the ECtHR. Such an effect is contrary to the very purpose of the co-respondent procedure, as explained above.

Moreover, the case of *Kadi*\textsuperscript{106} stated that an international agreement may not affect the allocation of competences. This has the aim of ensuring the exclusive jurisdiction of the CJEU to interpret the Treaties, which is where the allocation of competences is explained. Art. 3 (5) specifically states that the ECtHR will decide if the co-respondent

\textsuperscript{102} Case C-13/00 *Commission of the European Communities v Ireland* [2002] ECR I-2943, para 43
\textsuperscript{103} Ibid, para 43
\textsuperscript{104} Ibid, para 43
\textsuperscript{105} Ibid, 123
\textsuperscript{106} Case T- 315/01 *Kadi v Council and Commission* [2005] ECR II-03649, para 282
should be accepted if an obligation of EU law caused the violation of the ECHR. So the ECtHR has to decide who has which obligation under EU law. In other words, decide how competences are allocated and as such how responsibility should be placed, contrary to what has been stated in Kadi and the MOX Plant case. Kadi further stated that it is for the CJEU to decide on the constitutional principles of the Treaties. Amongst these constitutional principles is the allocation of competences between the EU and its Member States. So in this way, the ECtHR will also be deciding on the apportionment of responsibility based on who has which competence.

3.2.2 Does Art. 3 (5) affect of alter the competences?

68. Furthermore, Opinion 1/00 supported Kadi in that the powers of the institutions cannot be altered by an agreement. By deciding on the apportionment of competences, the ECtHR will be exercising a power which under Art.19 has been vested solely in the CJEU, thus interfering with its competence to decide on the division of competences.

3.3 THE WAY FORWARD

3.3.1 Automatic mechanism

69. As regards this first issue, the Commission provides somewhat of a solution to the issue identified under Art. 3 (5), which is that the EU automatically becomes a co-respondent when a Member State is alleged to have violated the ECHR in applying EU law. In support of this view, Nanclares contents that indeed where the co-respondent procedure is voluntary rather than automatic, issues can arise hence the co-respondent procedure ought to be triggered automatically, where a Member State is brought before the ECtHR for applying EU law.

107 Ibid, para 282
109 Case T- 315/01 Kadi v Council and Commission [2005] ECR II-03649, para 282
110 Opinion 2/13 (18 December 2014), para 84
111 José Martín Y Pérez De Nanclares, 'The accession of the European Union to the ECHR: More than just a legal issue WP IDEIR' WP IDEIR nº 15 (2013), 14
70. With all due respect, this only solves half the problem, as it does not provide a solution in cases where the EU is before the ECtHR and a Member State is to be made correspondent. It cannot simply be said that all the Member States will automatically be correspondents. This is because it may not be appropriate for them to be correspondents, and to have an open invitation for 28 Member States would complicate the process dramatically, as the proceedings may be burdened and delayed with unnecessary and even inappropriate submissions, from Member States which have no reason to be involved.

71. Overall, it could be concluded that the wording of Art. 3 (5) DAA, allows sufficient discretion to the ECtHR for it to be incompatible with past case law. However, the issue is not as dramatic as it may seem upon a first examination of it. Rewording Art. 3 (5) to read that the ECtHR would decide on the acceptance of the co-respondent based solely on the submissions of the parties would most likely suffice to remove the margin of appreciation allowed. This is a very small alteration which the CJEU probably could have suggested itself. Instead the Opinion seems to be focused on everything that is wrong, with very little emphasis on how to progress and move forward with constructive suggestions.

3.4 AGREEING TO DISAGREE

72. As regards the second issue with the co-respondent procedure, according to Art. 3 (7) of the DAA, the ECtHR may decide that either the respondent or the co-respondent is solely responsible\(^\text{112}\), if the parties so agree between them.

‘7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible’.

\(^{112}\) Opinion 2/13 (18 December 2014), para 229
3.4.1 Joint Responsibility

73. This is once again a possible interference with the division of competence between the EU and its Member States\textsuperscript{113} according to the Opinion. Paragraph 62 of the explanatory report describes how Art. 3 of the DAA could adversely affect the Legal Order, as it would be assessing the distribution of competences between the EU and its Member States, by attributing responsibility amongst them at the end of the proceedings. To avoid this, Art. 3 (7) explains that the responsibility shall be attributed jointly between the respondent and correspondent. This would eliminate the possibility of deciding which party bares which power and thus responsibility, which is only for the CJEU to do, as explained in the previous section in the cases of \textit{Kadi} and the \textit{MOX Plant}. Thus Art. 3 (7) would have been successful in safeguarding what was stated in the \textit{MOX Plant} case, \textit{Kadi} and \textit{Opinion 1/00}, were it not for the last sentence of paragraph (7).

3.4.2 All parties agree

74. The last sentence of Art.3 (7), as quoted above, allows the ECtHR to hold responsible only the respondent or co-respondent, having first consulted them. To this effect, some Member States and the Commission argued that in this scenario, Art 3(7) suggests that the EU and Member States, in other words, the respondent and correspondent are to decide together on whom the responsibility will be attributed to. First let us examine why the Member States believed Art. 3 (7) to be compatible with the aims Protocol No.8 EU. The Member States and EU would be jointly responsible, unless the EU and its Member States agree to apportion responsibility between them and the ECtHR is to grant their request. Thus the ECtHR would not have to decide whether an ECHR violation is due to an autonomous Member State act or because a Member State is following EU law. Thereby, the ECtHR would not be called to interpret the division of competences between the respondent and correspondent, in keeping with the Legal Order.

\textsuperscript{113} Ibid, paras 230-231
3.4.3 Not all parties agree

75. Nonetheless, the CJEU sets this aside and states that even if it was so, this would still not guarantee no adverse effect on the autonomy\textsuperscript{114}. This is because \textsuperscript{115} the wording of Art. 3(7) cannot guarantee the above outcome. The respondent and co-respondent might in fact disagree as to whether they are jointly liable. Paragraph 62 of the explanatory report clarifies that if the responsibility is to be joint, the parties will agree on this, which is perhaps unrealistic. Let us not forget that the DAA explanatory report, according to which the parties will agree, is not binding, just an explanatory report, and so this ideal scenario without any disagreements, is just that, a scenario which might not come to be.

3.4.4 Parties agree to disagree

76. Rather more likely, is the scenario that the parties will agree that responsibility should not be joint, but disagree as to whom should bare it. What is the ECtHR to do then? The last sentence of paragraph 7, has opened up the possibility that once again, it will have to decide on the apportionment of responsibility, by deciding on the division of competences. Paragraph 7 does not clarify how the ECtHR is to act in such a scenario where the respondent and co-respondent do not agree who the responsibility should be attributed to.

77. It could be argued, that the possibility that the ECtHR will then have to decide to place responsibility on one or the other in this scenario, cannot be explicitly inferred from the phrasing of paragraph 7. This is true, yet it can be impliedly inferred, which means that it cannot be excluded. \textit{Opinion 2/94}, reminds us that if the EU is to enter into a binding international agreement, which the DAA is, it must predict all possible ways that the provisions therein might affect the Legal Order. Whether it be farfetched, unlikely, or the exceptional scenario, the above is nonetheless a plausible one with such an effect. As previously stated in \textit{Opinion 1/00}\textsuperscript{116}, powers of the EU and its institutions must remain unaltered as conceived by the Treaties, by such an

\textsuperscript{114} \textit{Opinion 2/13} (18 December 2014), para 234
\textsuperscript{115} Stian Oby Johansen ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement (Part 1 of 2)’ (Pluri Courts Blog, 18 May 2014)
\textsuperscript{116} \textit{Opinion 1/00} [2002] ECR I-3493, para 12
international agreement, and thus to allow the possibility for this scenario to exist, is contrary to previous case law on the preservation of the Legal Order.

3.4.5 Does Art. 3 (7) affect or alter the competences?

78. In regards to *Opinion* 1/00, another point is put forth. Accordingly, the DAA could be compatible, if as described above it affects the powers of the institutions, but does not alter them. In this regard it could be argued that the co-respondent mechanism alters said powers, in that the failure to safeguard exclusive jurisdiction on division of powers, means that the DAA indirectly or passively transfers power to adjudicate on division of powers from the CJEU to the ECtHR. By transferring this power to decide on competence it alters it, as it erodes the power of the exclusive jurisdiction of the CJEU.

**3.5 THE WAY FORWARD**

79. As explained above, the Commission assumes that the ECtHR, under Art. 3(7), is to decide solely on the reasons given by the respondent and co-respondent on the attribution of responsibility, which is not very realistic a scenario. France does not on the other hand believe this to be so clear. France submits that a solution to the problem under Art. 3 (7) would be to make explicit that the ECtHR is to decide on the apportionment of responsibility between the respondent and co-respondent, solely based on the reasons provided by them. This however does not provide a solution to the scenario where there is no agreement between the parties.

3.5.1 If parties cannot agree, responsibility will be joint

80. Therefore, a way forward for the co-respondent procedure, could be by amending paragraph 7, so that it states that if the parties agree that responsibility should not be joint, but disagree as to whom should bear the responsibility, then the ECtHR will have

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118 *Opinion* 2/13 (18 December 2014), para 83
119 *Opinion* 2/13 (18 December 2014), para 122
to hold them jointly responsible, so that it will not be involved in the interpretation of the Treaties on the division of competences in the EU.

3.5.2 Further collaboration between the ECtHR and the CJEU

81. Additionally another way forward might be to somehow arrange for the CJEU to be involved further in the proceedings by granting it more extensive access in this process. This is possible according to Opinion 1/92, as the CJEU may have new powers conferred upon it (provided they are compatible with the Legal Order) but it may not have powers taken away from it. In this respect, the solution would thus be that where the parties agree to disagree on who is to be held accountable, the CJEU will step in and decide, based on the ruling of the ECtHR, who is to blame for the resulting decision on whether there is a breach of the ECHR.

82. For this to be possible, yet another mechanism would have to be set up, which would clarify that the CJEU, after the ECtHR had reach a conclusion of the possible violation of the ECHR, would decide on the attribution of responsibility between the respondent and correspondent. Such a mechanism would most likely have to ensure that the CJEU would base its reasoning solely on the decision of the ECtHR. This way the decision of the ECtHR would uphold its value and the authority of the ECtHR would not be questioned.

3.6 CONCLUSION

83. Whether the ECtHR would in fact be open to such a mechanism, is itself questionable. This is because it can be considered somewhat of an insult to the authority of a court, to go through the proceedings and reach a conclusion, and have another court come in and deliver the final and often most important part of the judgement. What will be stated however is that the possibility for the ECtHR to allow this courtesy to the CJEU is much more likely than if the situation was reversed between the two courts. Concluding, this solution can be somewhat complex to realise and may cause further tensions. Rather it is argued that the best solution is that described above which would force the parties to cooperate and agree on separate attribution of responsibility, if they do not wish for joint responsibility. This could even encourage cooperation
between the respondent and co-respondent; though frankly, it seems more likely that it will encourage tensions between the respondent and co-respondent and further disagreements.
4. CHAPTER 4-
THE PRIOR INVOLVEMENT MECHANISM

4.1 INTRODUCTION

84. The prior involvement is part of the co-respondent mechanism. It aims to afford to the CJEU the opportunity to comment and interpret EU law, where it is the subject of a case pending before the ECtHR, for which the co-respondent mechanism has been triggered, if it has not done so already in the past. Accordingly, in such a case pending before the ECtHR, if it is deemed that the CJEU has not already ruled on that matter of EU law in the past, it will be afforded some time to do so, before the proceedings before the ECtHR can resume.

4.1.1 The Legal Basis:

85. The prior involvement mechanism can be found in Art. 3 (5) & (6) of the DAA and is further explained in paragraphs 65-69 of the explanatory report.

‘6. In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall
ensure that such assessment is made quickly so that the proceedings before
the Court are not unduly delayed. The provisions of this paragraph shall not
affect the powers of the Court’.

86. To begin with, as regards the prior involvement procedure, the CJEU has identified
two problematic areas which are of concern to us.

4.2 THE GAP

4.2.1 Who will decide?

87. As to the first issue which the Opinion identified in regards with the prior involvement
mechanism, it is namely that there appears to be a gap in the preservation of the Legal
Order when one asks: Who is to determine whether the CJEU has adjudicated on a
matter of EU law or not in the past. So according to the CJEU, the provision in Art. 3
(6) is not sufficiently framed to resolve this question. It seems obvious enough a
question, yet it would appear that the drafters did not consider it. The drafters of the
DAA were perhaps so keen to involve the CJEU in the proceedings to ensure that its
jurisdiction is not compromised, that they in fact left a step out of the procedure.

4.2.2 An incomplete mechanism

88. It would seem fairly evident given the lack of an answer to the above question, that
there is indeed a gap in the provision. However, it may not have to be characterised
as incompatible per se, but rather say that it is merely incomplete. This is because it
does not imply in any way who is to determine whether the CJEU has ruled on a matter
or if prior involvement will be used to enable it to comment on a matter of EU law it
has not done so in the past. Thus it can breach the Treaties by omission. Nonetheless,
the concern of the CJEU can be traced back to Opinion 1/00. In Opinion
1/00 the possibility of leaving the gate open for a non-EU body, in other words, a body
less than perfectly equipped to interpret EU law, expressly stated that any
mechanisms in the agreement at hand must ensure there is no possibility for the EU
to be bound by an interpretation of EU law other than by the CJEU120. The finding of

120 Opinion 1/00 [2002] ECR I-3493, para 11
this gap in the prior involvement mechanism is thus the result of application of previous reasoning.

4.2.3 Leaving the door open

89. Additionally, as it stands, it could be inferred from Art. 3 (6) that the ECtHR is to make the determination of whether such a ruling already exists or not. To do this, the ECtHR would have to interpret the case law of the CJEU. This, as have been seen above, is in contradiction with the Treaties. It is incompatible with Art.19 TEU which states that only the CJEU may interpret EU law. The case law of the CJEU, forms part of the *acquis communautaire* of the EU, and as such is included in the term EU law, and may not be interpreted by any court other than the CJEU. Once again, as aforementioned, per the *Opinion 2/94* of the CJEU in the past, it is the duty of the CJEU to predict and prevent any such situation, which could possibly arise from the wording of an agreement that the EU is to enter. Therefore, even if Art. 3 (7) does not explicitly allow for this to happen, it fails to explicitly exclude it and that is sufficient for the provision not to be in line with the Legal Order, as per *Opinion 2/94*.

4.2.4 A solution from the CJEU

90. In this instance, the CJEU actually makes a suggestion\(^{121}\), demonstrating a spirit of cooperation. It answers the question of whom should determine if it has adjudicated on a matter before, and its answer is, a ‘competent EU institution’. Let us explore this response.

91. To determine if the above scenario would fit with the Legal Order, *Opinion 1/00\(^{122}\)* is considered, which stated that no other court must be able to bind the EU with its interpretation of EU law. The EU as a signatory to the ECHR will have to follow the decisions of the ECtHR as according to Art. 46 ECHR they are binding on the parties to a case. If the ECtHR would decide whether the CJEU should be involved via the prior involvement mechanism, it would inevitably have to interpret EU law. This is

\(^{121}\) *Opinion 2/13* (18 December 2014), para 241

\(^{122}\) *Opinion 1/00* [2002] ECR I-3493, para 13
because the only possible way to determine if a ruling on a certain matter of law exists already, is to go through the rulings of the CJEU and decide if any of them could be interpreted in a way which answers the question of EU law pending before the ECtHR. Based on that interpretation, which the CJEU may or may not have made itself, the ECtHR will proceed to produce a binding judgement, when in fact an EU body may have made a different determination on the existence of such a prior ruling.

4.2.5 Only the CJEU may interpret EU law

92. Before moving on, it is important to address a point. Opinion 1/91 declared that such an agreement, as is the DAA, will be binding on the EU and the CJEU, as it will form an integral part of the Legal Order. Therefore, according to Opinion 1/91 it is not possible to allow such an interpretation of EU law, from a body other than the CJEU to have a binding effect on the EU. This confirms that the gap must be filled and a determination as to whom shall make the decision to trigger the prior involvement mechanism must be made before the DAA can become compatible with the Legal Order and that such a body must come from within the EU.

4.2.6 Which body is competent?

93. In the Opinion123, the CJEU very graciously provided the answer that a competent body must make the determination which will decide if the prior involvement mechanism should be triggered. It has been established that such a competent body must come from within the EU. The follow up question to that becomes, which is this competent body that will make said determination?

94. By looking at the case of Foto-Frost, which said that no institution is better equipped to rule on EU law124, it could be inferred that the CJEU is the most competent body to decide on in this situation. This seems to make sense especially when the dictum form Foto-Frost is coupled with the case of MOX Plant. The latter, in its obiter dictum

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123 Opinion 2/13 (18 December 2014), para 241
had mentioned that the CJEU should be the sole arbitrator on matters involving the Legal Order, as it is the only court which is specialised in the Legal Order. In this regard attention is also drawn to an argument made in the case *Les Verts*. Namely, that because the court of Auditors had the power to review the provisions in question, the CJEU did not. This argument was rejected as the CJEU alone has such jurisdiction to review legality of a provision, while the power of the court of Auditors is limited to the review of the legality of the budget expenditure. When taken together, the above statements from the three cases, seem to support the view that the CJEU is reluctant to allow another body of the EU, any degree of extensive powers to review EU law. Therefore, though not explicitly stated in paragraph 241 of the Opinion, it may be inferred by combining the dictum of *Foto-Frost*, *Les Verts* and *MOX plant*, that the CJEU has itself in mind for the position.

4.2.7 Too many distractions

95. A caveat should be added here. The CJEU has its hands full with preliminary rulings, actions for annulment and infringement actions, as well as delivering opinions. Add to that list the obligation for the CJEU to adjudicate on the division of responsibility under the co-respondent procedure and on whether the prior involvement mechanism should be triggered or not and a slippery slope situation could arise. The CJEU could get so extensively involved in interpreting EU law for the ECtHR in order to prevent the ECtHR from interpreting it itself and to safeguard the Legal Order, that it becomes an assistant court to the ECtHR. Given the above statements from *Foto-Frost*, *Les Verts* and the *MOX Plant* case, it is highly doubtful that such a title would sit well with the CJEU.

4.2.8 Room for exceptions?

96. One might state that at least in this regard the CJEU must back down and let a body of the CoE decide on whether the CJEU has already adjudicated on a specific matter of EU law. In this regard the opinion of the Advocate General in *Kadi* is noted. The
Advocate General in Kadi\textsuperscript{125} stated that because the EU agrees to be bound by a rule of international law, the ECHR in this case, that is not to say that the EU must bow down to that with complete obedience. This means that even where the EU is the one seeking to conclude an agreement, the rules of such an agreement may only be allowed to permeate the Legal Order under its own conditions. The effect of Kadi, according to Cruczai, is that 'no international agreement can prevail over the EU founding Treaties'\textsuperscript{126}. Coupled with the statement from the Advocate General, it appears to be that the CJEU has declared that the EU will not submit itself to any agreement that would subordinate it or require a submission of some power in order to conclude that agreement. This is a very powerful message which in fact stems from the nature of the autonomous Legal Order, in that the EU is independent when concluding agreements. As powerful a position as this is, a more compromising approach might be prudent given that the better protection of fundamental rights is at stake in the present situation.

97. It may even be suggested that an exception to the usual rules might be prudent as a sign of good will on the part of the EU to make this accession work. However, the CJEU appears to have held onto all of its cards once again, fuelling criticism that it is being defensive and not trying to work towards a solution\textsuperscript{127}. On the other hand, this could be an undermining of the uniform interpretation of EU law- one of the characteristics of EU law as stated in Opinion 2/13 itself, and also an undermining of the exclusive jurisdiction to interpret EU law under Art.19 TEU and thus of the Legal Order.

4.3 THE WAY FORWARD

98. According to Nanclares and Ritleng\textsuperscript{128}, the way to resolve the issues arising under the prior involvement mechanism, is to reform the Treaties or at the very least the statute

\textsuperscript{125} Joined Cases C-402/05 Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351, Opinion of AG Maduro, para 24

\textsuperscript{126} Jeno Cruczai, 'The autonomy of the EU legal order and the law-making activities of international organizations. Some examples regarding the Council most recent practice' Research Papers in Law European Legal Studies 3/2012, 23

\textsuperscript{127} See chapter 6

\textsuperscript{128} José Martín Y Pérez De Nanclares, 'The accession of the European Union to the ECHR: More than just a legal issue WP IDEIR' WP IDEIR nº 15 (2013) and Dominique Ritleng, 'The accession of the European Union to the
of the CJEU\textsuperscript{129}. As regards the first issue on the need for a competent body, the Treaties might have to be amended to include the possibility for the creation of such a competent body (if it is not to be the CJEU itself), or the statute of the CJEU might have to be amended to enable the CJEU to deal with this matter itself. This solution seems somewhat drastic, as opposed to amending the DAA. This is only so, if it is assumed that amending the DAA is an easy and straightforward task. Let us not forget that politics are an inherent part of agreement negotiations and that renegotiating terms can be a lengthy process, whereby compromises must be made. This goes to demonstrate that amending the DAA might prove to be similarly as complicated as amending the Treaties.

4.4 INTERPRETATION OF SECONDARY LAW

99. The second and perhaps more crucial issue when it comes to the Legal Order and the prior involvement mechanism, is that according to the CJEU, the wording of the DAA is such that ‘excludes the possibility’ of bringing before the CJEU a question on the interpretation of secondary EU law. The CJEU in the Opinion came to this conclusion by looking to the explanatory report of the DAA. In order to understand how it came to this view, paragraphs 65 and 66 of the DAA explanatory report are important:

‘Assessing the compatibility with the Convention shall mean to rule on \textit{the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies}, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments\textsuperscript{130}.

‘The CJEU having had the opportunity to do so, by ruling on, as the case may be, the \textit{validity of a provision of secondary law or the interpretation of a provision of primary law}\textsuperscript{131}.

\textsuperscript{129}José Martín Y Pérez De Nanclares, ‘The accession of the European Union to the ECHR: More than just a legal issue WP IDEIR’ WP IDEIR nº 15 (2013), 15

\textsuperscript{130}Draft Revised Agreement On The Accession On The Accession Of The European Union To The Convention For The Protection Of Human Rights And Fundamental Freedoms, para 66

\textsuperscript{131}Ibid, para 65
100. The former quote explains that the CJEU under the prior involvement mechanism shall rule on the validity of acts of EU institutions, bodies etc. and shall interpret the Treaties. The latter quote, which is in fact found in a preceding paragraph to the former quote, puts this in simpler words, explaining that the CJEU under the prior involvement mechanism shall rule of the validity of secondary law and on the interpretation of primary law. As will be demonstrated, it is the first part of this sentence which has caused the CJEU unease, as the rest seems to follow in previous case law.

4.4.1 Interpretation of Primary EU Law

101. Let us first deal with the interpretation of primary law. In the case Les Verts it was stated that ‘the Treaty established a complete system of…legal procedures’. As explained in Chapter 2 the word ‘complete’ could be interpreted to mean that no other tribunal may rule of the interpretation and validity of EU law. As regards interpretation of EU law, Opinion 1/91 is one of the main authorities, which forbade any court other than the CJEU to interpret EU law. Paragraphs 65 and 66 of the explanatory report appear to be compatible with previous case law, as they ensure that primary law will be interpreted by the CJEU under the mechanism, thus preventing the ECtHR from doing so.

4.4.2 Ruling on the validity of secondary EU law

102. As to the validity of EU law, the case of Foto-Frost established that no court other than the CJEU is better equipped or should be permitted to invalidate EU law. Furthermore, looking to Foto-Frost, it was noted that the CJEU is in the best position to make a determination on the validity of secondary acts of EU law in specific. If this is applied to the two quotes above, this point from Foto-Frost seems to be satisfied with the provisions in the DAA, as it ensures that the CJEU will rule on the validity of

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132 For comments on why it was decided to exclude the possibility to rule on the validity of primary EU law from the DAA, see: Paul Gragl "Strasbourg’s External Review after the EU’s Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?" 2012 17 Tilburg L. Rev. 32, 50-51
135 Ibid, para 18
secondary EU law, before it can appear in front of the ECtHR. Thus the ECtHR is to use the decision of the CJEU on its validity.

4.4.3 Interpretation of secondary EU law

103. Moving on to the problematic part of this provision, which relates to the interpretation of EU law. Paragraphs 65 and 66 of the explanatory report, the prior involvement mechanism does not have a provision which allows the CJEU to interpret secondary EU law. This is especially problematic, as according to Opinion 1/00136 it is against the Legal Order to allow the ECtHR to make an interpretation on secondary EU law and then give a decision based on that interpretation which is to bind the EU. To allow this, according to Opinion 1/00, would be an undermining of both Art.344 TFEU and Art.19 TEU. The former states that the CJEU has exclusive jurisdiction to interpret EU law and the latter that it has exclusive jurisdiction to adjudicate on matters of interpretation of EU law as has already been seen. In this regard, reference is made to Opinion 1/91 where the CJEU affirmed that even in an agreement to which the EU is party to, the CJEU alone has jurisdiction to interpret EU law.

104. To clarify, according to paragraphs 65 and 66 of the explanatory report, it is possible to bring a question on the interpretation of primary EU law, and on the validity of secondary EU law, but not on the interpretation of secondary EU law. This leaves the door open in cases where secondary EU legislation could have more than one possible interpretations, for the ECtHR to try and find the ‘right’ interpretation of the secondary EU law in question. This is a very real possibility, as more often than not, provisions of law can be ambiguous as to their true meaning and intention. Usually, in such a situation, the CJEU would be called to give its interpretation of such an ambiguous provision by means of a preliminary ruling under Art 267 TFEU. This it would do by looking at the intentions of the drafters, the early drafts of the provision and the character of the EU. In contrast, the ECtHR might provide an interpretation which somehow favours what it is tasked to protect, which is fundamental rights, disregarding the rest of the above considerations. The CJEU while always keeping the protection of fundamental rights in mind, as was stated in Internationale

Handelsgesellschaft, it nonetheless has to uphold the character and principles of the EU as a whole. It is therefore quite plausible that the two courts might not have provided the same interpretation of EU law. This is what is incompatible with the autonomous Legal Order; the fact that the ECtHR might be able to interpret secondary EU law. As explained in Chapter 2, it matters not of the DAA and explanatory report provisions on the prior Involvement mechanism could be interpreted in a different way which would not exclude the possibility of interpretation of secondary EU law by the CJEU under the prior involvement mechanism. What matters, is that this is the interpretation which has been given by the CJEU in the Opinion and according to Opinion 2/94, whereby an agreement is submitted to it under Ar. 218 TFEU, it must predict any and all interpretations of said agreement and declare it incompatible if they do not follow in the characteristics of the EU and the Legal Order.

4.5 THE WAY FORWARD

4.5.1 Rephrasing

105. It is argued that it would seem from the Opinion that the prior involvement mechanism is not incompatible with the Legal Order per se, but would need to become more specific and accurate in such a way that would exclude the possibility of certain scenarios from existing. So the way forward could be by rephrasing of paragraph 66 of the DAA. It seems simple enough a solution admittedly. It could be rephrased to read that the CJEU, under the prior involvement mechanism, would be allowed to rule on the interpretation of primary EU law and on the validity and interpretation of secondary EU law. On the other hand, this seemingly simple solution, might lead to a different problem.

4.5.2 Opening the floodgates

106. The CJEU is already very busy indeed with the interpretation and adjudication of EU law for matters relating to its own institutions, bodies and Member States. With all the necessary amendments for the prior involvement mechanism and indeed the DAA
overall\textsuperscript{137} to make it compatible with the Legal Order, the common denominator seems to be that the CJEU would need to be involved in an alarmingly increasing number of steps of the process, before the ECtHR could rule on the compatibility of EU law with the ECHR. This, would require a great deal of time on behalf of the CJEU adjudicating and interpreting EU law, for cases that are not even pending before it. Small and easy as these procedural amendments may seem to be on paper, in order to make the DAA compatible with the Legal Order, in reality they could prove a great and time consuming burden on the CJEU. This could have the adverse effect of negatively impairing the adjudication on internal matters of the EU. Surely this goes against the grain of acceding to the ECHR in the first place, as the result might be that the Member States and citizens of the EU end up suffering as a result of slow and lengthy adjudication proceedings. The ECHR is meant to improve the situation of Member States’ citizens by improving their fundamental rights, not to cause negative impact due to the technicalities involved.

4.6 CONCLUSION

107. Concluding, it is argued that ideally the CJEU should focus on constitutional law matters and leave the protection of fundamental rights to the ECtHR. This view is easily supported by asking a room full of people if they would rather their fundamental rights be protected by the CJEU or the ECtHR. When this question was in fact posed during a lecture, the unanimous answer was by the ECtHR. Nonetheless this is never going to be allowed due to the encroachment on the jurisdiction of the CJEU. As explained above, it could at least empower a new EU court to focus on fundamental rights. This would permit the CJEU to concentrate on adjudicating and upholding the internal market and the Legal Order, which was after all why it was established in the first instance. Thus it is argued that even if the DAA is amended as proposed above, the statute of the CJEU and the Treaties should regardless be amended to allow for another EU court, which will be solely for fundamental rights and therefore also deal with the EU as a signatory to the ECHR and any issues that might arise therein. This is because it is highly questionable whether it is possible for the CJEU to become a

\textsuperscript{137} See para 96
fundamental rights court when it carries out the functions of a constitutional court.\textsuperscript{138} The competences and legal reasoning of the CJEU in matters of fundamental rights are limited in comparison to the ECtHR. Additionally its credibility to import fundamental rights in the EU is also questionable, given that it is first and foremost a constitutional court and will most likely never allow anything to prevail over the principles of the Legal Order.

\textsuperscript{138} For the constitutional function of the CJEU see: Frank Hoffmeister and others, \textit{The Future Of The European Judicial System in a Comparative: The Constitutional Functions of the European Court of Justice Perspective} (Nomos 2006)
5.

CHAPTER 5-
PROTOCOL No.16

5.1 INTRODUCTION

108. This chapter is premised by referencing Eaton who explains that the foremost reason for the persistent insistence of the CJEU on the preservation of the Legal Order is to maintain a unified EU. In order for the EU to remain unified and function effectively, EU law has to be interpreted uniformly, which can only be achieved if all EU law is interpreted by one EU institution. This explanation encompasses the substance of this chapter, as it will be set out and explained below.

5.1.1 The Legal Basis

109. The starting point for this chapter is the following Treaty article:

Art. 19 (3):

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(…)

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

110. In October 2013, the EU committed itself to be legally bound by one of the optional protocols to the ECHR, namely Protocol No.16. Protocol No.16 could be described as a reflection of Article 267 TFEU, as it aspires to create an ‘advisory opinion’ system,

139 Lauren Eaton, 'Protecting Fundamental Rights or Autonomy? Will the European Union & Accession to the European Convention on Human Rights affect the legal autonomy of the European Union?' 2013-2014 1 Penn Undergraduate L.J. 107, 113
operating very much like Article 267. It will essentially allow courts of the member states of the CoE to seek an advisory opinion from the ECtHR as regards the interpretation and application of rights in the ECHR.

5.1.2 Art. 267 TFEU v Protocol No.16 ECHR

111. Although Protocol No.16 is very much modelled after Article 267, there are differences in their application. One key difference to point out is the discretion to seek an opinion by the courts of last resort. Unlike Article 267, Protocol No.16 may only be used by the highest courts of a member state and unlike its EU counterpart even higher courts ‘may’\textsuperscript{140} do so if they feel that it is necessary. This means that the Protocol allows absolute discretion. Moreover, the ECtHR can only deliver an advisory opinion under Protocol No.16, unlike Art. 267 which results in a binding opinion upon the referring parties. Despite these differences, it is evident in the purpose of Protocol No.16, as described above, that it is modelled after the preliminary reference mechanism in Art. 267.

5.1.3 The importance of Art. 267 TFEU

112. Given that Art.267 inspired Protocol No.16, it is unusual that there is no reference or mention made in the DAA or in Protocol No.16 of the preliminary reference mechanism of Art.267 TFEU. Especially so, as the coexistence of the two mechanisms can raise some red flags now that EU is a signatory to Protocol No.16. This is because, as the CJEU has observed in the Opinion\textsuperscript{141}, supported by Poland\textsuperscript{142}, the parallel operation of Protocol No.16 provides a mechanism in the EU, which Member States might use to circumvent the use of Art.267 TFEU. This is unacceptable as the CJEU provided in Opinion 2/13, because Art.267 is the ‘keystone’\textsuperscript{143} to the uniform interpretation of EU law. Therefore, the undermining of the preliminary reference procedure under Art. 267, could constitute a significant compromise to the ability of the CJEU to uniformly interpret EU law.

\textsuperscript{140} See appendix for the text of Protocol 16 ECHR
\textsuperscript{141} Opinion 2/13 (18 December 2014), para 198
\textsuperscript{142} Ibid, para 138
\textsuperscript{143} Opinion 2/13 (18 December 2014), para 176
113. To reiterate the importance of Art.267 let us refer to a statement from the case *Foto-Frost* which reads, ‘Divergences between courts of the Member States as to the validity of [EU] acts would be liable to place in jeopardy the very unity of the [EU] legal order and detract from the fundamental requirement of legal certainty’\(^{144}\). The above excerpt emphasises that Art. 267 is pivotal in the perseverance of EU law in order to maintain legal certainty by having a coherent and uniform interpretation of EU law. This is an increasingly challenging task, especially given the current 28 Member States. It is the mechanism of Art. 267 which provides the system and thus the bedrock for this perseverance. If it were compromised, as Protocol No.16 threatens to do, EU law might suffer inconsistencies and divergences in its meaning and interpretation that deliver a blow to the Legal Order, by lessening the meaning and credibility of EU law itself.

5.1.4 Uniformity as the key to an effective Legal Order

114. This has recently been affirmed as the CJEU has pointed out in *Opinion 2/13*\(^{145}\) that Art.267 is key for the preservation of EU characteristics and the Legal Order. This view of the CJEU is not something new, it follows from an earlier opinion. Namely, *Opinion 1/09* which concerned the creation of Unified Patent Litigation System and whether this was compatible with the Treaties. In *Opinion 1/09*\(^{146}\) it was stated that ‘The preliminary ruling mechanism thus established aims to avoid divergences in the interpretation of EU law,’ on ‘issues involving an interpretation or assessment of the validity of provisions of EU law’. Moreover, *Opinion 1/91*\(^{147}\) confirms that an agreement which the EU seeks to enter, will be incompatible with the Legal Order, if it does not preserve legal homogeneity. As has been noted in the preceding chapters, under Art. 19 TEU and as has been confirmed in the case law of the CJEU, it alone has jurisdiction under the Treaties to interpret EU law. This is why the smooth operation of Art.267 is so vital; because with 28 Member States, and the complexities of 24 different official languages, a lot of questions arise as to the interpretation of EU law.

\(^{144}\) *Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15

\(^{145}\) *Opinion 2/13* (18 December 2014), para 176

\(^{146}\) *Opinion 1/09* [2011] ECR I-1137, para 83

\(^{147}\) *Opinion 1/91* [1991] ECR I-6079, para 25
law in the Member States. Art.267 allows for these to be addressed by the CJEU rather than Member States’ courts trying to interpret them themselves, thus enabling the characteristic of the exclusive jurisdiction on interpretation of EU law by the CJEU to be preserved. Any provision in the DAA to the contrasting effect, would be grossly incompatible with the Legal Order.

115. Opinion 1/09 further testified to the significance of Art. 267 for the preservation of the uniform interpretation of EU law, by ensuring that questions on the interpretation of EU law at the national level are solely interpreted by the CJEU and to ensure that access to the CJEU is easy, so that national courts might not be tempted to interpret EU law themselves when uncertain. This accommodates the preservation of the exclusiveness of the jurisdiction of the CJEU, by discouraging Member States’ courts from interpreting EU law themselves.

5.2 COMPROMISING SCENARIOS

116. Going back to the DAA, several problematic scenarios could arise whereby a Member State had already asked a preliminary question under Art.267 and now, unsatisfied perhaps, asks for a second preliminary question under Protocol No.16. This scenario was created by Skouris and put forth in the hearings for the DAA. The parties to the proceedings tried to dismiss this as farfetched but Skouris insisted. He wanted to demonstrate how it is possible to compromise the Legal Order under Protocol No.16. To understand in what way the Legal Order would be compromised, the past case law of the CJEU is vital.

5.2.1 Picking the favourite court

117. Let us take for example the MOX Plant case. Thrartarson explains that many courts could in fact have claimed jurisdiction in that case. Yet Ireland did not go to the CJEU

149 Klemens Thrartarson ‘The MOX Plant case and why it went for various International courts’ (Academia.edu, September 2011), 8
because it predicted from its previous decisions that it would not give an opinion in its favour on the matter. So Ireland launched an application to the UNCLOS tribunal instead. This could be the situation with Protocol No.16. Let us imagine a scenario where a country does not want the interpretation of the CJEU on a matter relating to fundamental rights, basing their prediction on previous case law and attitude of the CJEU on similar matters. So instead asks a question of the ECtHR under Protocol No.16. If the prior involvement procedure is triggered the CJEU will give an interpretation of the matter of EU law involved. This interpretation, according to the prior involvement mechanism, is not binding on the ECtHR, thus this country stands a chance of getting a more favourable to them decision than they would have by the CJEU under Art.267. Thus, as affirmed in the Opinion, Protocol No.16 in cases where it triggers the prior involvement, will be a way to circumvent Art.267.

118. A valid argument against the above scenario would be that surely a Member State in possible breach of fundamental rights, will not receive a more lenient opinion under the ECtHR than it would have under the CJEU. To counter this argument, let us not forget that the ECtHR has often been criticised for allowing too wide a margin of appreciation to its member states in fear of producing decisions so controversial that they will not be implemented. It must be forgotten, after all, that the ECtHR must bear in mind when delivering opinions, albeit binding, that is lacks an enforcement mechanism. The CJEU on the other hand, may employ measures under Art. 260 TFEU to coerce Member States to comply with its decisions and hence need not depend on the willingness and readiness of Member States to accept its decisions.

5.2.2 Non-binding interpretation

119. To add insult to injury, this second scenario, if it arose under Protocol No.16, it would erode some of the authority of the opinions of the CJEU. When a Member State applies for a preliminary ruling under Art.267, it is bound by that interpretation. However, under Protocol 16 Art. 5, the preliminary ruling given by the ECtHR, will not be binding on the Member State that requests it. Furthermore, the interpretation of the CJEU under the prior involvement mechanism is also not binding on the ECtHR, it serves merely as a guiding opinion. This could mean that if a Member State does
apply for a preliminary reference under Protocol No.16, which triggers the prior involvement mechanism, that Member State will in no way be bound by an interpretation of that piece of EU legislation, from either court. This outcome somewhat negates the purpose of Art.267; this is because the purpose of Art.267 is to allow the interpretation and thus application of EU law to remain uniform across all 28 Member States. Hence its binding nature ensures that the Member States are obliged to apply that interpretation of the law. By circumventing Art.267 with the use of Protocol No.16 as described above, Art.267 loses value in its purpose due to the non-binding nature of opinions delivered under Protocol No.16.

5.2.3 Turning the opinions of the CJEU into ‘non-binding’

120. At this stage, to further stress the gravity of the non-binding nature of the interpretation of the CJEU on the ECtHR as explained in the above paragraph. As Opinion 1/91 highlighted\(^\text{150}\), to allow for any decision or interpretation of the CJEU to not have a binding effect is unacceptable as ‘this would change the nature of the function of the CJEU as referred to in the [Treaties]’. This is because it has the potential of Member States favouring a court (in this case the ECtHR) whose opinion is not binding. This effect would compromise the value and authority of the decisions of the CJEU, by creating a slippery slope, whereby more and more Member States would use the loophole of Protocol No.16 to obtain non-binding decisions from the CJEU (non-binding in the sense that decisions by the CJEU under the prior involvement mechanism are not binding on the ECtHR). Let us not forget after all, that the binding nature of the opinions and judgements of the CJEU is integral to its success, as with it, it carries the authority to implement compliance measures upon failure to comply with a binding decision. This has been a determining factor in setting the CJEU apart from most other tribunals of international or regional stature, as it has the means of compelling compliance with its opinions. Without its decisions carrying a binding status, implementation would rely on the good will of the Member States\(^\text{151}\).

\(^{150}\) *Opinion 1/91* [1991] ECR I-6079, para 61

\(^{151}\) *Opinion 1/92* [1992] ECR I-2821, para 32
5.2.4 Favouring the specialised court

121. Another argument according to the editors from the Common Market Law Review (hereinafter CMLR), is that a Member States may even feel inclined to turn to the ECtHR under Protocol No.16 for fundamental rights matters, as it is, after all, a more specialised court, thus not go through the preliminary reference procedure under Art. 267. If the case should involve EU law as well, then the co-respondent procedure could be triggered. But if not, then on a matter of fundamental rights, of which there might be an identical provision in EU law, the CJEU may not be afforded an opportunity at interpretation at all.

5.2.5 Applications by individual parties

122. An argument somewhat in favour of Protocol No.16 is that even if it was out of the picture, an individual party could still ask a question before the ECtHR, after having lost an application before the CJEU under Art.267. In such a case the co-respondent procedure might be triggered, which would afford the CJEU the opportunity to argue its part. However, in such a case the prior involvement mechanism could not be triggered as the CJEU will have already made a preliminary ruling on this question of law under Art.267. This is still a compromising position for the CJEU. Therefore it would make no difference if the EU was not a signatory to Protocol No.16, as all Member States of the EU are also member states to the CoE and signatories to the ECHR.

5.3 THE WAY FORWARD

123. It seems that the signature of the EU to Protocol No.16 is undermining of the authority of the CJEU in every possible scenario. What could be the way forward from this?

5.3.1 Withdrawing from protocol No.16
One suggestion, which is on the more drastic side, is that the EU withdraws from Protocol No.16, as it is not yet ratified. However, seen as some Member States of the EU are also signatories to Protocol No.16, albeit none have ratified it, they could all withdraw, thus upholding the integrity of Art.267 and hence a characteristic of the EU.

5.3.2 Making Protocol No.16 binding

An interesting decision to look at in regards to finding a way forward is Opinion 1/92. This is because after the CJEU opined that the EFTA agreement was incompatible with the Legal Order as it pertained to the creation of the EEA and its specific functions, in Opinion 1/92 it found that the amendments made after its original findings, rendered the agreement compatible. It is thus worth having a look at in hope of applying some of those amendments to the present situation. One such amendment that was made was to make the decisions of the EEA court binding. In such a case the CJEU would be giving a binding interpretation of EU law upon the ECtHR under the prior involvement mechanism, and not merely ‘expressing’152 itself. This is a possible option as regards Protocol No.16, as it would resolve the problem described above. Nonetheless, whether it is realistic or not is a different matter. Let us not forget after all, that this is a Protocol and not the DAA which can be modified by the drafters. So such an amendment might in fact be in the form of a reservation, which itself would in fact be a clarification to bind the Member States of the EU if they were to request a preliminary ruling under Protocol No.16, which involves a matter of EU law.

5.4 CONCLUSION

Concluding, it is argued that in fact both of the aforementioned solutions might be more trouble than they are worth, given that there have been no ratifications of Protocol No.16 and all of the speculative scenarios described in this chapter may never come to be. Of course, this has not deterred the CJEU from declaring it damaging to the Legal Order, based on the reason that it must predict and preclude such future possibilities. On the other hand, even if all the necessary amendments for the DAA to be compatible with the Legal Order were made and accession materialised, Protocol

No.16 affecting the uniformity of EU law might be the least of the problems of the CJEU. This is because, if the CFR is any indication, the DAA may very well spark a proliferation of opt-outs from the DAA. This goes against uniformity of EU law, as the accession itself might turn out to be a catalyst for divergences in the application of EU law. This somewhat trivialises the concerns of the CJEU as to possible divergences in interpretation of EU under Protocol No.16. Whilst the latter is a possibility in case of ratification, the accession is a very imminent reality. Therefore, whilst the effect of Protocol No.16 on Art.267 is not itself trivialised, it may pale when looking at the bigger picture.
6.

CHAPTER 6-
CONCLUSION

6.1 WHAT NEXT?

Based on the above assessment of the case law of the CJEU on the Legal Order and agreements the EU has sought to enter, the decision of the CJEU on the DAA should not have been unexpected. Yet the Commission and all the Member States who made submissions during the hearings were confident that the DAA did not present any significant problems that might halt the accession process in its tracks. So what went wrong? Did the drafters not bother to look at the past case law, or were they overly optimistic that the CJEU would make an exception\textsuperscript{153}. Or is it perhaps that the CJEU is nit-picking. Before attempting to answer some of these questions as to what went wrong, it can be noted that the Opinion will, at best, very likely stall accession\textsuperscript{154}. It could be questioned if accession should continue based on Opinion 2/13, or if the EU needs to take a different route than usual and disregard it, in order for accession to materialise.\textsuperscript{155} Opinions of the CJEU, as has been noted above, are binding and not merely advisory in nature, thus drafters are in fact forced to take its findings into consideration. Hence the team of drafters of the DAA will have to move forward, taking into account the Opinion of the CJEU\textsuperscript{156}, as accession is a binding obligation under Art. 6 (2) TEU.

\textsuperscript{153} ‘Court of Justice Rejects draft agreement of EU accession to ECHR’ (Euractiv, 19 December 2014)
\textsuperscript{154} Steve Peers ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’ (EU Law Analysis, 18 December 2014)
\textsuperscript{155} Ibid
\textsuperscript{156} Editorial Comments, ‘The EU’s Accession to the ECHR – a “NO” from the ECJ!’ 2015 Common Market Law Review 52: 1–16, 13
6.1.1 A matter of procedure

128. Johansen agrees that the issues which arise from the Opinion are only procedural in nature\textsuperscript{157}. Arguably, as these are procedural issues as per Johansen, they may in fact not be so hard to work with, fix them and move on. The editors of the CMLR further concur that as regards Art.267, the solutions should be straightforward calling these notes of the CJEU for the co-respondent and prior involvement procedures ‘formalistic’\textsuperscript{158}. So the solution as regards these matters of autonomy should be easy and straightforward it seems\textsuperscript{159}. CMLR editors believe that the only possible way forward is by Treaty amendments. Perhaps Protocol No.8 should be amended specifically to allow for some flexibility in dealing with autonomy, as this may be easier than amending the main Treaties. But this is not likely a realistic option regardless\textsuperscript{160}.

129. Moreover, according to critics, the Opinion gives the impression that the CJEU has assumed a defensive stance towards accession\textsuperscript{161}. It is claimed that while the Advocate General’s opinion seemed to be positive towards accession, the opinion of the CJEU seems to hold a negative attitude towards it\textsuperscript{162}. He further states that as the opinion stands, there are now ten more amendments to be made\textsuperscript{163}. He perceives this as a very hard if at all possible negotiation\textsuperscript{164}. An alternative could be to proceed with the accession by making reservations to safeguard the points of concern of the CJEU. However it is highly doubtful that these would be able to both appease the CJEU and keep the ECtHR satisfied that the purposes of the ECHR are not eroded\textsuperscript{165}.

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6.2 EXAGGERATING

\textsuperscript{157} Stian Oby Johansen ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement (Part 2 of 2)’ (Pluri Courts Blog, 18 May 2014)
\textsuperscript{158} Editorial Comments, ‘The EU’s Accession to the ECHR – a “NO” from the ECJ!’ 2015 Common Market Law Review 52: 1–16, 11
\textsuperscript{159} Ibid, 12
\textsuperscript{160} Ibid, 14
\textsuperscript{161} Ibid, 14
\textsuperscript{162} Ibid, 1
\textsuperscript{163} Steve Peers ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’ (EU Law Analysis, 18 December 2014)
\textsuperscript{164} Ibid
\textsuperscript{165} Ibid
6.2.1 Limited application

130. A different view on the Opinion is that everyone who seems to be troubled with the Opinion is merely exaggerating, given that according to the Gragl\textsuperscript{166}, the corespondent mechanism, if it already existed, would have only been applied in three cases\textsuperscript{167}. Therefore claiming that even though the DAA as it stands is incompatible with the Legal Order, it is not of great significance, as its application would be so minimal in the future that it would not be sufficient to erode the Legal Order. However it must be noted in regards to this point, that this does not mean that it will not be used in a much greater number of cases in the future\textsuperscript{168}.

6.2.2 Limited impact

131. All of these authors seem to be in support of the UK’s position, in that the judgements of the ECtHR, being declaratory in nature, need not be exaggerated as to their impact on the legal order. They maintain that the EU will be able to assess and apply the judgements of the ECtHR, thus further minimising their impact on the Legal Order\textsuperscript{169}. This exemplifies the point that control of the assessment of EU law would remain with the CJEU. Johansen concludes that legal autonomy is not threatened by the power of the ECtHR to decide on applications to become corresponded\textsuperscript{170}, because as the UK government claimed, under Art. 3(5) the ECtHR will not be assessing EU law itself, but merely the arguments provided by the parties\textsuperscript{171}. In support of this view, Groussot, Lock and Pech call the impact of the accession on the CJEU ‘exaggerated’ as accordingly the ECtHR has made it clear that the CJEU will enjoy the same position

\textsuperscript{166} Paul Gragl ‘Strasbourg’s External Review after the EU’s Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?’ 2012 17 Tilburg L. Rev. 32
\textsuperscript{167} Namely: Matthews v. The united kingdom App no 24833/94 (ECtHR, 18 February 1999), Bosphorus hava yollari turizm ve ticaret anonim şirketü v. Ireland App no 45036/05 (ECtHR, 30 June 2005) and Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij van de Nederlandse Kokkelvisserij van The Netherlands App no 13645105 (ECtHR, 2o January 2009)
\textsuperscript{168} Christina Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76(2) MLR 254–285, 267
\textsuperscript{170} Stian Oby Johansen ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement (Part 1 of 2)’ (Pluri Courts Blog, 18 May 2014)
\textsuperscript{171} Ibid
as the highest national courts. Perhaps herein lies the problem\textsuperscript{172}. Though the authors’ statement was meant to ease concern, it might in fact fuel it for the reasons explained in the following section.

\textbf{6.3 THREATENED}

6.3.1 Lack of adequate reasoning

132. This section begins with a statement made by Johansen, who claims that the CJEU has been using the Legal Order and the discretion it enjoys in defining it, as a cover and excuse to reject any agreement which it does not like, without proper cause and reasoning\textsuperscript{173}. This is a very strong statement indeed and it points the finger at the CJEU as dismissing the DAA on a caprice because it feels that its power is threatened, without sound basis for its reasoning. Though this statement may not be completely misguided in making this accusation, the fact that the Opinion appears to be based on and directly follow in the line of arguments established by previous case law, as demonstrated in the previous chapters, must not be disregarded. Furthermore, the CJEU has in some ways provided a checklist of amendments to be made on the seven problematic areas identified. It is true that it has not provided actual solutions for most of these problems, but let us not forget that as with preliminary references, the role of the CJEU is to guide, not provide the answers\textsuperscript{174}.

133. Where the above considerations become alarmingly worrying, is if it is considered that albeit the CJEU has based the Opinion on its previous case law, is the idea that perhaps all of its case law is based on the unwillingness to risk compromising its powers\textsuperscript{175}. Let us not forget however, that though the Legal Order is not defined in the

\begin{itemize}
\item \textsuperscript{173} Stian Oby Johansen ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement (Part 2 of 2)’ (Pluri Courts Blog, 18 May 2014)
\item \textsuperscript{174} Steve Peers ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’ (EU Law Analysis, 18 December 2014)
\item \textsuperscript{175} Ibid
\end{itemize}
Treaties, the legal foundations on which it is based are\textsuperscript{176} and it is on these that the CJEU is basing its decisions.

6.3.2 Equal, not superior

134. Once accession has taken place there will also be a degree of risk that the CJEU may find its status as “final arbiter” of the supranational legal order of the EU eroded\textsuperscript{177}. In following with the above argument, Nanclares states that the CJEU will be on equal basis as the national courts of the member states to the ECHR. Thus the CJEU will find itself in the very position in which it has put the national courts in, which is inferior to another court. In support of this view is the quote, ‘The CJEU would be placed in a position which was fairly similar to that in which national constitutional courts found themselves as a result of the role of the [CJEU]…’\textsuperscript{178}. This would lead to a ‘sandwich effect’, where the CJEU would be subject to both internal and external scrutiny\textsuperscript{179}. The former comes from the national courts of Member States, as was demonstrated in cases such as \textit{Solange I}, while the latter would come from the ECtHR. In this regard, the hardest amendments to the DAA would be those insisting on primacy of the CJEU over the ECtHR and of EU law over the ECHR because the CJEU is essentially unwilling to drink its own medicine\textsuperscript{180} and subject itself to the jurisdiction of another court.

6.4 STRIKING A BALANCE

135. To premise this section, let us go back to the reason for the accession, thus coming full circle. As might be recalled from chapter one, the need for better fundamental

\textsuperscript{176} See Art. 19 TEU, Art. 344 TFEU, Art. 267 TFEU, Art. 6(2) TEU and Protocol No. 8 EU.
\textsuperscript{177} Jeno Czuczai, ‘The Autonomy of the EU Legal Order and the Law-making Activities of International Organizations. Some Examples Regarding the Council’s most Recent Practice’ 2012 Yearbook of European Law, Vol. 31, No. 1 (2012), 16
\textsuperscript{178} José Martín Y Pérez De Nanclares, ‘The accession of the European Union to the ECHR: More than just a legal issue WP IDEIR’ WP IDEIR nº 15 (2013), 16
\textsuperscript{179} Ibid, 16
\textsuperscript{180} Steve Peers ‘The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection’ (EU Law Analysis, 18 December 2014)
rights protection became imminent with the case of *Solang* 1. Accordingly, it was deemed necessary for the EU to accede to the ECHR in order to externally review and reprimand the EU and the Member States for shortcomings in fundamental rights protection. The crucial question in this regard is whether, the price to be paid should be that the Legal Order and the characteristics of the EU should be compromised to some extent\(^{181}\).

6.4.1 Different perspectives

136. The CJEU and the ECtHR have different perspectives which lead to a problem. The former is aimed solely at the protection and upholding of fundamental rights and so that is the sole perspective of the ECtHR. The EU on the other hand, is very much centred on the internal market. Protection of fundamental rights is something to be upheld alongside the building of the internal market. It is thus not the primary objective of the EU, but a consideration amongst many others. Therefore the CJEU seeks to uphold the principles of the EU, one of which but not the only one is the protection of fundamental rights. It has therefore been argued that Strasbourg should afford the EU ‘a certain margin of appreciation’ to allow a balance to be struck between fundamental rights and other EU interests\(^{182}\).

6.4.2 Fundamental rights above all

137. On the other side of the scales are those who place the importance of upholding fundamental rights higher than the rest of the goals of the EU. One such claim is that whilst the Legal Order must be upheld during accession negotiations, the extent at which it should be upheld should not be absolute given that fundamental rights are ‘at stake’\(^{183}\). Therefore, the DAA must afford the necessary weight to the protection of fundamental rights and not disregard them in efforts to preserve the Legal Order\(^{184}\).

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\(^{182}\) Ibid, 17

\(^{183}\) Lauren Eaton, ‘Protecting Fundamental Rights or Autonomy? Will the European Union & Accession to the European Convention on Human Rights affect the legal autonomy of the European Union?’ 2013-2014 1 Penn Undergraduate L.J. 107, 114

\(^{184}\) Ibid, 114
After all, the purpose of accession is to breach the current gap in fundamental rights protection in the EU. Eaton goes on to argue that the protection afforded to the Legal Order and fundamental rights respectively, should reflect their importance, reaching the conclusion that fundamental rights are more important\(^{185}\). This view might be deemed somewhat controversial for the EU, as it was first and foremost founded to be an economic community and not a fundamental rights instrument like the ECHR. In fact, insistence on the protection of fundamental rights to the degree that is demanded by Eaton, might have the opposite to desirable effect. This is explained by Eaton as she believes that the pressure would lead to the EU to negotiate terms with view of shielding itself against as many possible claims for fundamental rights as possible, thus compromising their protection in the process\(^{186}\). It would therefore seem like the CJEU is more concerned with the protection of the Legal Order than with that of fundamental rights which is what has brought about the current situation.

6.4.3 Compromise

138. The Commission, during hearings, emphasised that the fact that this is an agreement means that negotiations will happen, inherently implying that perhaps both sides will have to make concessions. In other words the CJEU may not get everything it wants. Is it prudent for the CJEU to make exceptions and compromise\(^{187}\)? Parties in hearings for the DAA argued that Art. 6(2) TEU warrants ‘an exception from the EU’s legal autonomy- if necessary’. This is disagreed with as Art. 6 (2) in fact states the opposite\(^{188}\). Nonetheless, in support of that view, Germany seemed to think that the EU should accede on an ‘equal footing’ as the other signatories, in other words, make concessions\(^{189}\).

139. Coming back to the arguments that the CJEU is to make concessions as regards the accession, the case of Kadi stated that the EU Legal Order will only be bound on its

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\(^{185}\) Ibid, 114

\(^{186}\) Stian Oby Johansen ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR accession agreement (Part 2 of 2)’ (Pluri Courts Blog, 18 May 2014)

\(^{187}\) Ibid

\(^{188}\) Ibid

\(^{189}\) Ibid
own terms. Accordingly the CJEU was not being against fundamental rights when deciding on the compatibility of the DAA with Art. 6 (2) and Protocol 8 EU, but it followed the reiteration of the Advocate General in Kadi that the EU will only be bound by the ECHR, in the way that is compatible with the EU legal order. Thus, a measure of international law will only be accorded primacy over the Legal Order, if the Legal Order itself so permits. Kadi seems to have been affirmed on this point in the Opinion which emphasised that as per the jurisprudence of the CJEU, EU law precedes an international agreement in hierarchy. This highlights the fact that the DAA is just an international agreement and should not be treated as more special to any other international agreement that the EU has sought to enter. Perhaps it is this perception that might need to change given the impact the DAA aims to have on the protection of fundamental rights. Otherwise, not only are fundamental rights not accorded equal importance to the Legal Order, but in fact less. With this mind view, it will be very challenging indeed to achieve a version of the DAA which does not strip it of its fundamental purpose.

6.5 FINAL REMARKS

140. It has been stated that the three issues that are dealt with in this paper are in principle not the hardest to overcome. As has been demonstrated, their resolution will regardless be challenging. Nonetheless, it might be worth briefly mentioning which of the seven problematic areas identified in the Opinion will be the most challenging to resolve. This according to the editors of the CMLR is the judicial review in the area of CFSP by the ECtHR.

141. In this regard, the CJEU has found the ability of the ECtHR to review matters of CFSP to be incompatible with the Legal Order, essentially for breaching Art. 344 TFEU. This according the Opinion is because the CJEU does not have jurisdiction to review all

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191 Ibid, 25
192 Opinion 2/13 (18 December 2014), para 3
193 Editorial Comments, 'The EU’s Accession to the ECHR – a “NO” from the ECJ!' 2015 Common Market Law Review 52: 1–16, 12
matters falling within the CFSP, which would mean that for those areas, the review EU law will be submitted for a body other than the CJEU. This is contrary to Art. 344 TFEU as explained in Chapter 2\textsuperscript{194}.

142. Contrary to the view of the CJEU, Advocate General Kokkot, the Commission, some of the Member States and the Legal Service, support that the EU will be able to provide sufficient judicial review of all CFSP matters, albeit not exclusively by the CJEU and that is sufficient for the EU to meets its obligations under the ECHR. This view is explained below.

143. Firstly, as Advocate General Kokott explains, given the lack of jurisdiction of the CJEU in the area of CFSP, the CJEU may not be able to satisfy the demands of Art. 6 and 13 RCHR\textsuperscript{195}. Art. 6 and 13 ECHR require the EU to respect fundamental in all areas, including the CFSP\textsuperscript{196}. This contradicts with the fact that the CJEU, save for two exceptions, does not have jurisdiction to review actions under the CFSP\textsuperscript{197}. Yet it is supported that this is overcome. To understand why, we look to the types of Council decisions under CFSP. There are mainly two types of Council decisions under CFSP. These are decisions on restrictive measures and on crisis management operations\textsuperscript{198}.

144. In this respect, it is reiterated that the CJEU has jurisdiction in the area of CFSP under Article 275 (2) TFEU which gives the CJEU jurisdiction to review the ‘legality of [CFSP Council] decisions providing for restrictive measures against natural or legal persons’\textsuperscript{199}. Additionally the CJEU has jurisdiction ‘to “monitor compliance with Article 40 [TEU]”’, which accordingly means that the CJEU has full jurisdiction to review restrictive measures if based on Art.215\textsuperscript{200}. The Commission in its submissions in the Opinion, agreed that the above jurisdiction affords adequate protection on behalf of the CJEU in CFSP matters\textsuperscript{201}. This would mean that one of the two branches of

\textsuperscript{194} Opinion 2/13 (18 December 2014), para 255
\textsuperscript{195} Opinion 2/13 (13 June 2014), Opinion of AG Kokott, papa 82
\textsuperscript{196} Ibid, para 83
\textsuperscript{197} Ibid, para 84
\textsuperscript{198} Partly declassified document on the Opinion of the Legal Service (March 2013) 7682/13 EXT 1, para 14

\textsuperscript{199} Partly declassified document on the Opinion of the Legal Service (March 2013) 7682/13 EXT 1, para 16
\textsuperscript{200} Partly declassified document on the Opinion of the Legal Service (March 2013) 7682/13 EXT 1, para 17
\textsuperscript{201} Opinion 2/13 (13 June 2014), Opinion of AG Kokott, para 87
Council decisions under CFSP are in fact able to be reviewed by the CJEU, thus preserving its exclusive jurisdiction to adjudicate under Art.344.

145. Moving on the second branch, according to the opinion of the Legal Service Tribunal, the CFR in Art.51 requires that fundamental rights must be respected in all areas within the EU and that CFSP is no exception\textsuperscript{202}. It must be noted that ‘the system of legal protection established by the Treaties rests on two pillars, one of which is based on the Courts of the EU and the other on national courts and tribunals’\textsuperscript{203}. This would mean that in any situation (except the instances covered above), the judicial protection of matters under CFSP must fall to the national courts of the Member States. Based on this, Kokott concludes that overall matters of CFSP will receive effective judicial protection in the EU, partly by the CJEU and partly by the national courts of Member States, thus the EU will be able to comply with its obligations under Art. 6 and 13 of the ECHR\textsuperscript{204}.

146. With all due respect, this does not provide for a solution to the possible infringement of Art. 344, as the Opinion rightly stated\textsuperscript{205} as EU law would be submitted for judicial review to a body other than itself\textsuperscript{206}. Additionally, according to the CJEU\textsuperscript{207}, if EU law is to be challenged before the ECtHR, the CJEU must have had the opportunity to review it beforehand. This is linked to the prior involvement mechanism and the reasons for its existence. In areas not falling within the two exceptions under which the CJEU is able to review CFSP, this will not be feasible and the prior involvement mechanism will not be applicable. The irony in this, is that if the CJEU were allowed full jurisdiction in the CFSP, there would be no issue arising under the DAA. In fact it would mean that EU citizens would be afforded protection of fundamental rights in a wider scope. Yet the Member States chose to exclude, for the most part, the CJEU from the area of CFSP and at the same time, allow the ECtHR to have review in this area in the DAA. This has created an oxymoron situation. This issue will be very

\textsuperscript{202} Partly declassified document on the Opinion of the Legal Service (August 2014) 7682/13 EXT 2, para 11
\textsuperscript{203} Opinion 2/13 (13 June 2014), Opinion of AG Kokott, para 96
\textsuperscript{204} Ibid, para 103
\textsuperscript{205} Opinion 2/13 (18 December 2014), para 255
\textsuperscript{206} Editorial Comments, 'The EU’s Accession to the ECHR – a “NO” from the ECJ!' 2015 Common Market Law Review 52: 1–16, 11
\textsuperscript{207} Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2010)
challenging to overcome indeed, but as it is not the focus of this paper, this is not the place to engage in a prolonged discussion of the matter. It has merely been brought up as a point of interest in regards to the discussion of the ability of the accession process to move on from Opinion 2/13. Perhaps a future paper would be prudent to develop this issue fully.

147. Finally it is worth reiterating that the DAA may not enter into force unless the Treaties are revised or it is amended. Given the likelihood that the Treaties will be revised, the DAA will have to be amended, which will not in itself be an easy task. The caveat which the drafters would need to keep in mind would be that the DAA could be amended so much to be in line with the Legal Order that the purpose behind accession loses its value. The Opinion and the DAA have created a mess for which there is currently no satisfactory solution. If the remarks from the Opinion are all amended in a way that would satisfy the CJEU, it will probably mean that the ECtHR will most likely not be happy with it. On the other hand, the CJEU will never give its blessing to a version of the DAA which stands even the slightest chance of compromising its jurisdiction.

148. To add insult to injury, the CJEU seems unconcerned with the external impact of its rulings. Let us not forget that the rulings of the CJEU can have an external impact on the ENP countries and the neighbours of the neighbours. Yet the CJEU pretends to exist in a bubble where its rulings should not be concerned with the impact they have outside the EU. This limits the significance of the rulings despite their increasing impact.

149. It could be claimed that the judgements of the CJEU are obsessed with and centred on autonomy\textsuperscript{208}. Thus the DAA, as demonstrated in the above chapters, is not compatible with Art. 6(2) TEU and Protocol No.8 EU, but that is because the judgements have always been focused on preserving autonomy. By placing so much emphasis on its autonomy, the CJEU ‘is missing the opportunity to improve the quality and fairness of its judgements, and strengthen their legitimacy’\textsuperscript{209}


\textsuperscript{209} Ibid, 17
THE TREATY ON THE EUROPEAN UNION

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

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

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

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The judges and the Advocates-General of the Court of Justice and the judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 223 and 224 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

Declaration No.17

17. Declaration concerning primacy The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Article 218

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

(...) 

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Article 260

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be
paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 267
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 344
Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.
PROTOCOL (No 8) to the TEU

Article 1

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ‘European Convention’) provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;

(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

Article 3

Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

EUROPEAN CONVENTION OF HUMAN RIGHTS

Article 59
1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

(...) Protocol No.16 to the ECHR

Article 1

1 Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

2 The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

3 The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.

Article 2

1 A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request.

2 If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion.

3 The panel and the Grand Chamber, as referred to in the preceding paragraphs, shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

Article 3

The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit
written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing.

Article 4

1 Reasons shall be given for advisory opinions.

2 If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3 Advisory opinions shall be communicated to the requesting court or tribunal and to the High Contracting Party to which that court or tribunal pertains.

4 Advisory opinions shall be published.

Article 5

Advisory opinions shall not be binding.

Article 6

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7

1 This Protocol shall be open for signature by the High Contracting Parties to the Convention, which may express their consent to be bound by:

a signature without reservation as to ratification, acceptance or approval;

or

b signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2 The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8
1 This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2 In respect of any High Contracting Party to the Convention which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Protocol in accordance with the provisions of Article 7.

Article 9

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 10

Each High Contracting Party to the Convention shall, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner.

Article 11

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the other High Contracting Parties to the Convention of:

a any signature;

b the deposit of any instrument of ratification, acceptance or approval;

c any date of entry into force of this Protocol in accordance with Article 8;

d any declaration made in accordance with Article 10; and

e any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.
DRAFT REVISED AGREEMENT ON THE ACCESSION ON THE ACCESSION OF THE EUROPEAN UNION TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 3 – Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:

a. the heading of Article 36 of the Convention shall be amended to read as follows: “Third party intervention and co-respondent”;

b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

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

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law.
3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by
the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

8. This article shall apply to applications submitted from the date of entry into force of this Agreement.
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