



Between lights and shadows. Towards a new Opinion of the Court of Justice on the accession of the Union to the ECHR

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1. Introduction

On 21 November 2025, the European Commission lodged a request for an Opinion with the Court of Justice, pursuant to Art. 218(11) TFEU, concerning the draft Agreement on the accession of the European Union to the ECHR. The Commission's intention to proceed in this direction had already emerged in the previous July, when a note of the Commission's Legal Service announced the adoption of the decision relating to that request. After several months of silence, the request for an Opinion was filed with the Registry of the Court of Justice, without any details being made public. Meanwhile, the agenda for the meeting of Coreper II of 9 January indicated, among the items for discussion, a request for authorisation to intervene in the proceedings before the Court of Justice. The [question](#) submitted by the Commission was finally published in the Official Journal of the European Union on 26 January, making it possible to offer a first reflection on the future that may await the process of the Union's accession to the ECHR.

Below, after briefly reconstructing the steps that led to the adoption of the new draft [Agreement of 18 March 2023](#) (the 2023 draft Agreement, hereinafter), the contribution seeks to outline the developments that occurred in the almost three years that followed and then discusses the content of the request submitted by the Commission. At least at first sight, the issue appears rather nebulous, to the point of potentially affecting the admissibility of the request for an Opinion itself. Next, assuming admissibility, the analysis focuses on a brief reflection on the compatibility of the 2023 draft Agreement with the Treaties, placing particular emphasis on the issue of the ECtHR's review of acts adopted in the field of the CFSP. In conclusion, some general considerations are drawn on the possible developments of the formal and informal relationship between the Union and the ECHR.

2. From Opinion 2/13 to the draft Agreement of 18 March 2023

Following the controversial [Opinion 2/13](#), negotiations on the Union's accession to the ECHR halted for around nine years. It was only in autumn 2019 that the Union [informed](#) the



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Council of Europe that it was ready to resume the [negotiations](#), which took place regularly from October the following year. These negotiations comprised eighteen formal meetings and led the ad hoc '46+1' Group to adopt the new 2023 draft Agreement.

The *ad hoc* Group took the shortcomings identified in Opinion 2/13 as its starting point, dividing them into four main categories, which can be summarised as follows: (i) specific mechanisms to adapt the individual application procedure before the European Court of Human Rights (ECtHR) to the Union's specific features; (ii) the functioning of inter-state applications and requests for advisory opinions under Protocol No. 16 to the European Convention on Human Rights (ECHR), in relation to the Union's Member States; (iii) the principle of mutual trust between the Union's Member States; (iv) acts of the Union falling within the Common Foreign and Security Policy (CFSP), which are excluded from the jurisdiction of the Court of Justice of the European Union. In addition, the negotiators examined the relationship between Art. 53 ECHR and Art. 53 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the "Charter"), which was also raised in Opinion 2/13. They also considered issues concerning Articles 6, 7 and 8 of the 2013 draft Accession Agreement. The latter is devoted to the Union's participation in the Council of Europe's organs when dealing with matters relating to the ECHR system of protection.

As stated in the latest report of the *ad hoc* Group to the CDDH of the Council of Europe, the draft agreement reflects the provisional unanimous consensus reached on the issues under baskets 1, 2 and 3 regarding Arts. 6, 7 and 8 of the 2013 draft accession agreement, as well as Art. 53 ECHR.

Regarding basket 4, at the last meeting of the ad hoc group, the commission announced the union's intention to internally resolve the issue relating to the CFSP and then negotiate amendments to the draft agreement at a later stage. At the same meeting, the *ad hoc* group noted the need to inform all negotiating parties of how the basket 4 issue would be resolved, to enable a thorough review before taking a final position on the instruments required for the Union's accession. The Commission undertook to periodically inform the CDDH of the



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Council of Europe on the progress of the internal discussions in this respect. This information is included in the *ad hoc* Group's report to the CDDH, dated 30 March 2023. On 4 April 2023, the CDDH decided not to approve the revised "package" of accession instruments for the Union at that stage, but rather to transmit the report, together with all the relevant documents, to the Committee of Ministers for information purposes. At that meeting, the CDDH stated that it would reconsider the approval of the revised "package" once the Union had informed it of the internal solution reached on basket 4 relating to the CFSP. There have been no further official updates on the progress of the negotiations since that date. The only references to this matter, which are sporadic at best, can be found in certain documents published by the Union institutions. These documents reaffirm the intention to pursue accession to the ECHR, which is sometimes described as a political priority for the Union.

3. The shadows over the admissibility of the Commission's request for an Opinion before the Court of Justice

As expected, the latest official news only covers the Commission's decision to submit a new request for an opinion to the Court of Justice regarding the Union's accession to the ECHR. Regarding the Commission's decision to proceed in this way, the subject matter of the request immediately raises questions.

The question raised by the Commission is apparently simple: is the revised draft Accession Agreement compatible with the Treaties? However, as noted above, there is still some uncertainty regarding the content of the revised draft Agreement. It is worth noting that if the revised draft agreement referred to in the Commission's request under Art. 218(11) TFEU is that of 18 March 2023, then it would appear that the institution has submitted an incomplete draft to the Court of Justice.

The Court of Justice has held [in past](#) that the absence of the precise content of a proposed agreement does not necessarily affect the decision on the admissibility of a request for an



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opinion, as was also the case in relation to the first request for an [Opinion](#) on the accession of the European Community to the ECHR. However, Opinion 2/94 clarifies that where the question concerns the compatibility of the provisions of a proposed agreement with the Treaty rules, the admissibility of the request depends on the availability of sufficient information regarding the precise content of the agreement in question. As is well known, on that occasion, the Court of Justice found that it lacked sufficient information on how the Community would be subject to the current and future judicial control mechanisms established by the Convention and was therefore unable to provide an opinion.

Turning to the 2023 draft Agreement, it may be asked whether it is sufficiently detailed for the Court of Justice to rule on its compatibility with the Treaties. Clearly, apart from any adjustments relating to the CFSP, the draft Agreement in question is almost final. Therefore, the hypothesis that the Court of Justice might decline to rule on the Union's accession to the ECHR on the grounds that the available information is insufficient appears unlikely. Nevertheless, this circumstance raises questions about the intentions and expectations that led the Commission to proceed with the request. Indeed, it must be acknowledged that there is a real risk that the Court of Justice will not consider the 2023 draft Agreement to be fully compatible with the Treaties. Taking a functionalist approach inspired by the principle of sincere cooperation, the Court of Justice could take this opportunity to clarify any parts of the draft agreement that need refining to ensure full compatibility with the treaties. Like what happened with Opinion 2/13, but hopefully with a less "demolition" approach, the future Opinion 1/25 could suggest amendments for the Commission to propose to the *ad hoc* group to finalise the draft Agreement, particularly regarding CFSP acts. Furthermore, as there are no formal limits on submitting a further request for an opinion, the Commission could submit the final version of the draft agreement (or even just part of it) to the Court of Justice for a [final review](#).

Of course, the scenario outlined here suggests an even longer and more uncertain timeline for concluding the definitive Accession Agreement draft, not to mention the risk of a further negative opinion from the Court of Justice. Nevertheless, a draft Accession Agreement that is not fully compatible with the Treaties regarding such an important issue as the scope of



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the ECtHR's judicial review of CFSP acts would be unacceptable. One possible alternative, though not supported by any evidence, is that a finalised version of the draft Agreement has been prepared since 18 March 2023 but has not yet been made public. In that case, the "revised" draft Agreement referred to by the Commission in its request for an opinion would not correspond to the text currently known, but to a subsequent version incorporating the CFSP-related adjustments.

Pending further clarification as to the subject matter of the request for an opinion, the following section highlights the main innovative aspects of the 2023 draft Agreement as compared with the previous text, which may lead to a different assessment by the Court of Justice.

4. The compatibility of the draft Agreement of 18 March 2023 with the Treaties: several lights but still some shadows

The 2023 draft Agreement comes with a "package" of documents, including the draft Explanatory Report, which the *ad hoc* Group has described as forming part of the context underpinning accession and therefore being necessary for that purpose. The draft Explanatory Report is particularly relevant because it provides useful interpretative guidance, which is sometimes necessary for interpreting the content of the draft Agreement in a manner that is fully compatible with the Treaties. As specified in point 19 of the report, the ECtHR uses explanatory reports as an interpretative tool for the agreements to which they are attached. The legal effect of such documents is therefore not comparable to that of an international agreement.

Within the Union legal order, therefore, it is the Accession Agreement that must be fully compatible with the Treaties. While the case-law of the Court of Justice confirms the rigidity of this premise, it appears to have been somewhat tempered by the references contained in Opinion 2/13 to the previous draft Explanatory Report. However, it should be noted that the Commission's latest request for an opinion exclusively concerns the revised draft agreement



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and makes no reference to the ‘package’ of accompanying instruments.

Turning to the content of the 2023 draft Agreement, the opening provision is similar to that in the previous version. Under this provision, the Union accedes to the ECHR and Protocols Nos. 1 and 6. Regarding the scope of accession, Opinion 2/13 revealed no shortcomings, so there is no reason for the Court of Justice to change its position in the forthcoming opinion. As will be recalled, to ensure full compatibility of this part of the draft Agreement with Art. 2 of Protocol No. 8, which is annexed to the Treaties, the negotiators deemed it appropriate to limit the Union’s accession to the additional ECHR Protocols that have been ratified by all Member States, while retaining the option of ratification.

By contrast, one aspect had raised incompatibility issues with the Treaties and with Art. 2 of Protocol No. 8 annexed thereto, was the issue of reservations. Art. 2(3) of the 2023 draft Agreement stipulates that any reservations made under Art. 57 of the ECHR, made by a Contracting Party, will retain their effect even if that Party becomes a co-respondent in proceedings before the ECtHR. Art. 3(8) of the 2023 draft Agreement confirms that where the ECtHR finds a violation, both the respondent and the co-respondent will be declared jointly responsible. The final paragraph of Art. 3 of the previous draft Agreement, which allowed the ECtHR to attribute responsibility to one Party only upon that Party’s request, has been removed. The Court of Justice had interpreted that provision as carrying the risk that the ECtHR could indirectly rule on the division of competences between the Member States and the Union. The deletion of this paragraph should make the 2023 draft Agreement compatible with the Treaties. Any reservation will only be relevant internally when responsibility is allocated for the purposes of executing the judgment.

The second set of adjustments concerned changes to the system of individual applications before the ECtHR. The 2023 draft Agreement maintained the general attribution clause. Under this clause, the actions, measures or omissions of a Member State of the Union, or of a person acting on its behalf, shall be attributed to that State, even if they result from the implementation of a provision of Union law (including decisions taken under the TEU and the TFEU). See section 4.1 below for the implications concerning the CFSP.



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As is well known, the co-respondent mechanism was designed to ensure the correct attribution of responsibility for a potential violation of the ECHR by the Union and its Member States. Under this mechanism, when a Member State is named as the respondent in proceedings before the ECtHR, the Union may join the proceedings either at its own initiative or at the invitation of the Strasbourg Court. If a violation of the ECHR is found, the Union may be declared co-responsible. Conversely, Member States may join the Union in proceedings before the ECtHR where the Union is the principal respondent, in which case they may also be declared co-responsible for any violation.

From a procedural standpoint, the 2023 draft Agreement no longer stipulates that the entry of a potential co-respondent is subject to a decision by the ECtHR. According to the Court of Justice, prior verification by the ECtHR of compliance with the substantive conditions for triggering co-respondent participation would have required that Court to rule on the division of competences between the Union and the Member States, which would be contrary to Art. 2 of Protocol No. 8, which is annexed to the Treaties. Art. 3(5) of the 2023 Draft Agreement states that the ECtHR «*shall admit a co-respondent by decision if a reasoned assessment by the European Union demonstrates that the conditions in paragraphs 2 and 3 of this Article are met*». The use of the verb “shall”, together with the requirement that the Union submit a reasoned statement, should ensure that the ECtHR will not carry out any assessment of the division of competences between the Union and the Member States. This interpretation is also supported by the revised draft Explanatory Report, which states that the ECtHR must consider the reasoned assessment submitted by the Union as “determinative and authoritative”. Furthermore, to avoid indirect rulings on the division of competences between the Union and the Member States, Art. 3(1) of the 2023 draft Agreement provides that «*the admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings*».

The 2023 draft Agreement significantly limits the ECtHR’s ability to rule on the admissibility of an application *ratione personae* by doing this. Similarly, even if the Union or the Member States decide to refuse to join the proceedings following an invitation by the ECtHR, the ECtHR would have no means of “forcing” their participation. Moreover, a different



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conclusion would have allowed the ECtHR to rule on the division of competences, thereby undermining the autonomy of Union law.

With regard to the substantive requirements for the Union's participation as co-respondent, Art. 3(2) of the 2023 draft Agreement states that the Union shall participate as co-respondent *«if it appears that an allegation calls into question the compatibility of a provision of EU law, including decisions taken under the TEU and the TFEU, with the rights defined in the Convention or the Protocols to which the EU has acceded, where disregarding an obligation under EU law would be the only way to avoid that violation»*. Conversely, Art. 3(3) states that *«one or more Member States may join proceedings at the ECtHR in which the Union is the principal respondent if it is deemed that the allegation calls into question the compatibility of a provision of the TEU, the TFEU, or any other provision with the rights defined in the Convention or the Protocols to which the EU has acceded, particularly if disregarding an obligation under these instruments is the only way to avoid the violation»*. The 2023 draft Agreement retains the formulas used in the previous draft, with respect to which the Court of Justice did not identify any incompatibility. Consequently, it may be assumed that the future Opinion 1/25 will not revisit these issues.

By contrast, the prior involvement procedure will also be of considerable relevance in the forthcoming Opinion of the Court of Justice. As is well known, this refers to the possibility of involving the Court of Justice during the proceedings of an individual application before the ECtHR where the Court of Justice has not yet had the opportunity to rule through a reference for a preliminary ruling - under Art. 267 TFEU - on the interpretation or the validity of the act of EU law from whose implementation the alleged violation of the ECHR arose.

The prior involvement rules contained in the previous draft Agreement failed the Court of Justice's compatibility test due to two shortcomings relating to procedural and substantive aspects respectively. Opinion 2/13 states that the Accession Agreement must ensure that only the Union (presumably the Court of Justice) can determine whether a decision on an identical point of law already exists and, consequently, decide whether a further ruling by



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the Court of Justice is necessary. To this end, Opinion 2/13 emphasises the importance of the Union receiving timely, complete and systematic information in every case pending before the ECtHR, to enable the Court of Justice to decide how to proceed. Regarding the substantive aspect, Opinion 2/13 clarified that the Court of Justice must be able to rule on the validity of secondary Union acts, as well as on their interpretation and that of primary law provisions, through prior involvement.

Despite the above indications, Art. 3(7) of the 2023 draft Agreement remained unchanged. It states that, *«in proceedings involving the EU as a co-respondent, if the Court of Justice of the EU has not yet assessed the compatibility of the provision of EU law with the rights defined in the Convention or in the Protocols to which the EU has acceded, as set out in paragraph 2 of this article, the Court shall allow sufficient time for the Court of Justice of the EU to conduct such an assessment. Thereafter, all parties shall be given the opportunity to submit observations to the Court»*.

However, the procedural shortcomings identified by the Court of Justice have been addressed in the revised draft Explanatory Report, as well as in part in Art. 3(2) of the 2023 draft Agreement. Specifically, the draft Explanatory Report clarifies that the decision to initiate the prior involvement of the Court of Justice depends on an assessment by the Union. This assessment will be considered definitive and authoritative, in the same way as the decision that triggers the co-respondent mechanism. To enable the Court of Justice to take a position, the final sentence of Art. 3(2) of the 2023 draft Agreement states that *«the ECtHR shall make available to the EU information concerning all such applications communicated to its member states»*. Regarding the substantive requirement, the draft Explanatory Report states that the term *«assessing the compatibility with the Convention»*, as used in Art. 3(7) of the 2023 draft Agreement *«shall mean ruling on the validity or interpretation of a legal provision contained in the acts of EU institutions, bodies, offices or agencies, or ruling on the interpretation of a provision of the TEU, TFEU or any other provision with the same legal value under those instruments»*.

Clearly, the revised draft Explanatory Report adequately addresses the criticisms raised by



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the Court of Justice in Opinion 2/13. However, it remains to be seen whether the *ad hoc* group's decision to address such a sensitive issue through the Explanatory Report rather than a specific provision in the Agreement will withstand the Court of Justice's scrutiny. In Opinion 2/13, the Court of Justice considered the previous draft Explanatory Report regarding the prior involvement procedure and found that it was also deficient. If the Court of Justice's assessment on this point will be positive, this will mean that it recognises and endorses the *ad hoc* Group's approach to the CDDH in the report on the relevance of the 'package' of instruments accompanying the draft Agreement. It will also mean that the Court of Justice attributes the same weight to the draft Explanatory Report as the ECtHR does to such instruments.

One remaining issue is the internal effects to be attributed to the judgment delivered by the Court of Justice following the prior involvement procedure. Although Opinion 2/13 did not consider the absence of external effects of such a judgment to be problematic, the internal effects will necessarily have to be clarified by the Accession Agreement's internal implementing rules. This is essential to ensure that accession to the ECHR does not affect the powers of the Court of Justice as defined by the Treaties.

The final amendment to the individual application relates to the attribution of responsibility for any violations identified by the ECtHR in cases where the EU or one or more Member States are involved as co-respondents. As mentioned above, following the deletion of the final paragraph of Art. 3 of the previous draft Agreement, the ECtHR must always declare both the principal and secondary respondents jointly responsible for any violation. This rule, set out in Art. 3(8) of the 2023 draft Agreement, is fully in line with Opinion 2/13 because it prevents the ECtHR from interpreting the division of competences between Member States and the Union in any way.

Regarding inter-party applications, Art. 4(3) of the 2023 draft Agreement explicitly excludes the Union and the Member States from availing themselves of the inter-party application mechanism in their relations with one another. Furthermore, the Member States will not use it to resolve disputes concerning the interpretation or application of Union law. The



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following paragraph provides a safeguard clause whereby, if requested by the Union, the ECtHR must grant the Union time to assess whether pending inter-party applications between Union Member States concern the interpretation or application of Union law.

Like the draft Explanatory Report, the draft Agreement does not define the consequences of the Union's determination, nor does it specify which Union institution will carry out the assessment. Clearly, a Union decision that an application to the ECtHR concerns the interpretation and application of Union law should induce the Member States to withdraw the application, in compliance with the principle of sincere cooperation. Furthermore, submitting such an application would constitute a breach of the Accession Agreement to the ECHR by the applicant Member State. This breach would have internal consequences in the relations between the Union and the Member State concerned, as the Accession Agreement would form an integral part of Union law. By contrast, as regards the ECtHR, the 2023 draft Agreement does not oblige it to declare the application inadmissible, although it should reach that conclusion to ensure compliance with the Accession Agreement. Taking everything into account, the amendments introduced to the previous draft Agreement, which failed the compatibility test in Opinion 2/13, seem to render the new 2023 draft Agreement compatible with Art. 3 of Protocol No. 8, annexed to the Treaties, which states that the Accession Agreement must not affect Art. 344 TFEU. After accession, the only inter-party applications admissible would be those between Member States concerning matters outside Union law.

As will be recalled, Opinion 2/13 also identified additional gaps in the previous draft Agreement that needed to be addressed to ensure full compatibility with the Treaties upon accession. The *ad hoc* group considered the criticisms raised by the Court of Justice and made certain adjustments to the 2023 draft agreement to address the identified shortcomings.

Firstly, the draft Agreement for 2023 provides for coordination between the preliminary ruling procedure under Art. 267 TFEU and the advisory opinion mechanism established by Protocol No. 16 to the ECHR. In Opinion 2/13, the Court of Justice highlighted the risk that



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Member State courts could improperly use requests for advisory opinions to the ECtHR to the detriment of the preliminary ruling mechanism, thereby compromising the autonomy of Union law. Protocol No. 16 introduces a mechanism whereby the highest courts and tribunals of the States Parties may request advisory opinions from the ECtHR on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its Protocols. Clearly, this mechanism serves a different function to the preliminary ruling procedure, and the effects of the decision issued by the ECtHR under this mechanism are not comparable to the effects of a judgment delivered by the Court of Justice in the context of a preliminary ruling. Nevertheless, to avoid possible misunderstandings, Art. 5 of the 2023 draft Agreement excludes the possibility of courts or tribunals of a Member State that has ratified Protocol No. 16 availing themselves of the advisory opinion mechanism where the question arising in the pending case falls within the field of application of Union law, using rather controversial wording. In such circumstances, the only available mechanism for national courts or tribunals is a reference for a preliminary ruling to the Court of Justice, even if the state has ratified Protocol No. 16. The Court of Justice will therefore be able to provide an interpretation of the ECHR (and the ratified protocols) as part of Union law, which will be binding on both the referring court and the courts of the other Member States.

Unlike inter-party applications, the 2023 draft Agreement does not allow for the Union to be involved in assessing the content of a request for an advisory opinion made by a Member State court. It also does not clarify what conclusions the ECtHR should draw if it considers that a request concerns a dispute within the scope of Union law. Indeed, such a decision by the ECtHR could be perceived as an indirect interpretation of the division of competences between the Union and the Member States, which is incompatible with the autonomy of Union law. Despite this aspect that could be improved, the rules introduced in the 2023 draft Agreement on coordination between advisory opinions and preliminary rulings could be considered adequate for protecting the autonomy of Union law and the role of the Court of Justice.

From the perspective of relations between the Union and the Member States, any request to



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the ECtHR for an advisory opinion concerning disputes within the scope of Union law would constitute conduct contrary to the principle of sincere cooperation and a breach of the Accession Agreement by the relevant Member State. The internal implementing rules may further clarify these aspects.

A further incompatibility identified in Opinion 2/13 was the absence of a safeguard clause for the principle of mutual trust between Member States in the previous draft Accession Agreement. In response to this criticism, Art. 6 of the 2023 draft Agreement states that *«accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union»*. The second paragraph of Art. 6 states that, in this context, the protection of human rights guaranteed by the Convention shall be ensured. As indicated in the draft Explanatory Report, the provision seeks to reconcile two potentially conflicting requirements: respect for the principles of mutual recognition and mutual trust between Member States, and respect for fundamental rights. The first paragraph appears to be addressed to the Member States, reiterating their duty to apply Union law in accordance with the principles of mutual recognition and mutual trust, even after the Union's accession to the ECHR. Where tensions arise between these principles and fundamental rights, the national court should refer the matter to the Court of Justice through the preliminary ruling procedure and comply with its decision. At the same time, the paragraph also addresses the ECtHR, inviting it to consider the relevance of mutual trust when conducting its assessment. The second paragraph, by contrast, concerns all parties involved, reaffirming that respect for fundamental rights must be ensured in any event.

In Opinion 2/13, it was deemed necessary to include a provision in the Accession Agreement that would allow Member States, in their mutual relations governed by Union law, to waive the requirement to verify, on a case-by-case basis, the observance of fundamental rights by another Member State. As drafted, Art. 6 of the 2023 draft Agreement appears suitable for preserving the balance on which the Union is founded: mutual trust and mutual recognition among Member States, together with the autonomy of Union law. If the application of mutual recognition among Member States were to result in behavior deemed incompatible



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with the ECHR by the ECtHR, it would be the responsibility of the Union institutions (and the Member States) to determine how to address the specific violation and, if necessary, how to intervene in the act that led to the violation. Moreover, if the Court of Justice had not already ruled on the matter through a preliminary ruling, it should be given the opportunity to do so through prior involvement. Through its decision in that procedure, the Court of Justice could most likely provide useful interpretative guidance to prevent further violations of fundamental rights or identify grounds of invalidity in the secondary law act whose application resulted in the ECHR violation. In that case, as noted above, the internal implementing rules of the Accession Agreement will have to clarify the effects to be attributed to such a decision.

Another criticism in Opinion 2/13 concerned the absence of a coordination clause between Art. 53 of the ECHR and Art. 53 of the Charter. According to the Court of Justice, Art. 53 ECHR allows the Contracting Parties to provide a higher standard of fundamental rights protection than that guaranteed by the Convention, it is necessary to ensure that Member States limit the possibility, with regard to Charter rights corresponding to rights guaranteed by the ECHR, to what is necessary to avoid compromising the level of protection provided by the Charter itself, as well as the primacy, unity and effectiveness of Union law.

To this end, the *ad hoc* Group introduced paragraph 9 of the 2023 draft Agreement. 1 of the 2023 draft Agreement. This states that «Art.53 of the Convention shall not be construed as preventing High Contracting Parties from jointly implementing a legally binding common level of protection for human rights and fundamental freedoms, provided it does not fall short of the level of protection guaranteed by the Convention and, where applicable, its Protocols, as interpreted by the European Court of Human Rights». The draft Explanatory Report clarifies that this agreement may be derived from forms of international or European cooperation, such as Union law. In the draft Explanatory Report, the *ad hoc* Group also expressly recalled that the ECtHR has already held that the ECHR does not require Contracting Parties to provide more extensive protection than that guaranteed by the Convention. Beyond the content of the Explanatory Report, Art. 6 of the 2023 draft Agreement appears to adequately address the criticism raised by the Court of Justice in



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Opinion 2/13 and is likely to pass the forthcoming compatibility review.

Finally, Arts. 7, 8 and 9 of the 2023 draft Agreement address the following: the Union's participation in the work of the Council of Europe bodies when they adopt decisions relating to the European Convention on Human Rights (ECHR) system of protection (it should be noted that the Union only acceded to the Convention, rather than becoming a member of the Organisation); the election of an ECtHR judge representing the European Union; and the Union's participation in financing the Convention's expenses. This part of the 2023 draft Agreement reflects the corresponding provisions of the previous draft. As Opinion 2/13 contains no critical remarks regarding the compatibility of these provisions with the Treaties, it can be assumed that the Court of Justice will not reconsider them in future.

4.1 The crucial issue of extending the ECtHR's jurisdiction over CFSP acts

Among several shortcomings identified in Opinion 2/13 regarding the compatibility of the previous draft Accession Agreement with the Treaties, the most difficult to overcome was probably the issue of extending the ECtHR's judicial review over CFSP acts. The Court of Justice stated that *«the competence to carry out judicial review of the Union's acts, actions or omissions, including in relation to fundamental rights, cannot be conferred exclusively on an international court outside the Union's institutional and judicial framework»*. Had the previous draft Agreement been ratified, the ECtHR would have been entitled to rule exclusively on the compatibility of CFSP acts with the ECHR, over which the Court of Justice has no jurisdiction under the Treaties. Therefore, the previous draft Agreement would have undermined the specific characteristics of Union law regarding judicial review of Union acts, actions, and omissions in the CFSP field.

Following Opinion 2/13, the obstacle identified by the Court of Justice appeared to be able to be overcome in one of two ways: (i) amending the Treaties to extend the Court of Justice's judicial review to Union acts, actions and omissions in the CFSP field; or (ii) excluding the ECtHR's competence in the CFSP field altogether. Clearly, a general reservation in the



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CFSP field would not be compatible with the regime of reservations to human rights treaties and Art. 57 of the ECHR, as interpreted by the ECtHR in its case law. On the other hand, although a Treaty amendment would be desirable, it has evidently not yet occurred.

As noted at the outset, the CFSP issue remained unresolved in the negotiations that led to the adoption of the 2023 draft Agreement, and it is not known whether any developments have occurred in the meantime to resolve this issue. Assuming that the revised draft Agreement referred to by the Commission in its recent request for an opinion is the 2023 version, it would be worthwhile reflecting on the scope of the ECtHR's judicial review of Union law as set out in the draft Agreement. This should be considered in light of the Court of Justice's case law since Opinion 2/13 on interpreting the limits of its judicial review in the CFSP field.

About the first aspect, it should be noted that Art. 1(4) of the 2023 draft Agreement establishes the general attribution clause and provides that acts, measures and omissions carried out to implement decisions based on the TEU, among other things, shall be attributed to the Member State. In line with this provision, Art. 3(2) sets out the conditions for the Union to participate as a co-respondent and provides that an alleged violation of the ECHR (or the Protocols to which the Union has acceded) attributed to a respondent Member State must call into question the compatibility of a provision of Union law with the ECHR. The revised draft Explanatory Report contains no reference to the CFSP or the CSDP.

If the Union were to accede to the ECHR under the terms envisaged by the 2023 draft Agreement, the ECtHR would have full jurisdiction over conduct falling within the CFSP, including conduct falling under the CSDP. However, this interpretation contrasts sharply with Opinion 2/13.

Given this, it is necessary to consider whether recent developments in the Court of Justice's case law nevertheless allow the limitations identified by the Court itself in the controversial opinion regarding external jurisdiction over CFSP acts to be overcome. In particular, reference is made to the judgment in [KS and KD](#), in which the Court of Justice held that «where the acts and omissions falling within the CFSP and the CSDP are not directly linked



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to [...] political or strategic choices of the Union, the Court of Justice of the European Union has jurisdiction to review the lawfulness of such acts or omissions or to interpret them». However, the assessment of the lawfulness or interpretation of acts or omissions directly connected with the conduct, definition or implementation of the CFSP and the CSDP remains outside its jurisdiction. The Court lacks the power to identify the Union's strategic interests, define the actions to be taken and the positions to be adopted by the Union, and establish the general guidelines of the CFSP pursuant to Arts. 24 to 26, 28, 29, 37, 38, 42 and 43 TEU.

The *KS and KD* case law established the general criterion by which — without amending the Treaties — the limits of the Court of Justice's judicial review in the CFSP and CSDP under Art. 275(1) TFEU, may be interpreted as narrowly as possible. Should the Union accede to the ECHR under the aforementioned terms, it could be summoned before the ECtHR for alleged violations of the ECHR arising from the implementation of CFSP (or CSDP) acts. This would be subject to an assessment of whether domestic remedies had been exhausted, which an individual would have to pursue before approaching the ECtHR. Having assessed the admissibility of the action considering the *KS and KD* criterion, the Court of Justice of the European Union would then be able to rule in the first instance on the alleged violation of fundamental rights.

Conversely, if an individual believed that their rights or fundamental freedoms had been violated by a Member State when implementing a CFSP (or CSDP) decision, they would have to initiate legal proceedings in a competent national court. If there were any doubts about the interpretation, the court would have to refer the matter to the Court of Justice for a preliminary ruling. After assessing compliance with the *KS and KD* criterion, the Court of Justice would rule on the interpretative question or on validity. If the individual was not satisfied with the outcome of the national judicial proceedings and decided to apply to the ECtHR, they would have to lodge an application against the Member State, while the Union would consider joining the proceedings as a co-respondent. If the national court had not referred the matter to the Court of Justice during the domestic proceedings, the Court of Justice would have to be involved through the prior involvement procedure. In this situation,



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the Court of Justice would also first have to assess compliance with the *KS and KD* criterion.

Assuming this reconstruction is correct, the 2023 draft Agreement could pass the compatibility review with the Treaties despite the apparent contradiction with the Court of Justice's ruling in Opinion 2/13. However, the situation in which the Court of Justice may deem itself unable to rule due to a failure to satisfy the *KS and KD* criterion remains unclear. In that case, it would be preferable for the ECtHR to refrain from ruling as well. This would ensure the autonomy of Union law is fully protected. While it is difficult to translate this expectation into a provision of the Accession Agreement, it would have been appropriate to clarify this point.

5. Concluding remarks

Compared to the shortcomings highlighted in Opinion 2/13, the 2023 draft Agreement shows significant progress regarding the co-respondent mechanism and the protection of the autonomy of Union law. However, the issue of jurisdiction over CFSP acts remains decisive; the outcome of Opinion 1/25 may depend on the Court of Justice's assessment of whether the *KS and KD* criterion adequately ensures the Court's ability to rule on the compatibility of acts adopted in the CFSP field with fundamental rights, both through an action for annulment and through a reference for a preliminary ruling on interpretation or validity. This would reconcile the need to preserve the autonomy of Union law and the Union itself with the equally important need to ensure external judicial review of such acts.

The Commission's request for an opinion has finally brought the accession process back to the center of the debate, after the draft agreement of 18 March 2023 had been somewhat overlooked. If the future Opinion 1/25 were positive, it would pave the way for the Union to complete its accession to the ECHR. According to Art. 11(3) of the draft Agreement, the Agreement will enter into force on the first day of the month following the expiration of a period of three months after the date on which all the High Contracting Parties to the Convention — including Council of Europe member states and the Union's member states —



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have expressed their consent to be bound by the Agreement, in accordance with the preceding paragraphs' provisions. To this end, regarding the Union, Art. 218 TFEU stipulates that the Council must unanimously approve the decision to authorise the Commission to sign the Agreement, followed by the decision to conclude the Agreement. The latter decision must be adopted after obtaining the consent of the European Parliament. For the Agreement to enter into force, it will also require approval by the Member States in accordance with their respective constitutional requirements.

Conversely, if Opinion 1/25 were negative, it could nevertheless serve an 'orienting' function by indicating the adjustments necessary for the 2023 draft Agreement to fully meet the requirements set out in the Treaties.

Regardless of the outcome, Opinion 1/25 will mark a turning point: either a resumption of the accession process will be credible, based on a normative framework fully compatible with the Treaties; or the process will be further postponed, which would consolidate the Union's "substantive accession" to the ECHR even further, notwithstanding the obligation laid down in Art. 6(2) TEU.