

## May the Other Side Also be Heard? Some Remarks Regarding the Chances for a Response to *Opinion 2/13* From the ECtHR on the Awakening of the EU Accession to the ECHR Process

Władysław Józwicki

Special Issue, December 2020

70 ans de la *Convention européenne des droits de l'homme* : L'Europe et les droits de la personne

URI: <https://id.erudit.org/iderudit/1078551ar>

DOI: <https://doi.org/10.7202/1078551ar>

[See table of contents](#)

### Publisher(s)

Société québécoise de droit international

### ISSN

0828-9999 (print)

2561-6994 (digital)

[Explore this journal](#)

### Cite this article

Józwicki, W. (2020). May the Other Side Also be Heard? Some Remarks Regarding the Chances for a Response to *Opinion 2/13* From the ECtHR on the Awakening of the EU Accession to the ECHR Process. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 501–516. <https://doi.org/10.7202/1078551ar>

### Article abstract

This paper takes up a question whether there exists a possibility for the European Court of Human Rights (ECtHR) to take a stand on the (in)famous *Opinion 2/13* by the Court of Justice of the European Union (CJEU), and to address contained in it argumentation from the perspective of the Strasbourg system's conditions for accession. Particularly, it will focus on the question whether the *Convention* system provides for an appropriate procedure. The paper will not engage into a discussion on how the contentious issues should be addressed by the ECtHR, but will focus on answering whether it at all may have a chance to address them in the current legal setting through advisory procedures with which the *European Convention on Human Rights (ECHR)* system is equipped. The text will argue that even if both the Articles 47-49 of the *Convention* advisory procedure as well as the *Protocol 16* to the *Convention* advisory procedure for the sake of their function and scope could not be applied to directly, holistically and systematically tackle *Opinion 2/13*, then at least the latter could provide a forum to do that in a limited scope and in an indirect way. While the mechanism has been designed with a completely different purpose, some of the features of the *Protocol 16* advisory procedure may even seem to incite such a use, especially in the context of the increasingly turbulent relations between the CJEU and the European Union (EU) Member States' highest courts and tribunals in the field of fundamental rights.

**MAY THE OTHER SIDE ALSO BE HEARD?**

**SOME REMARKS REGARDING THE CHANCES FOR A  
RESPONSE TO *OPINION 2/13* FROM THE ECtHR ON THE  
AWAKENING OF THE EU ACCESSION TO THE ECHR  
PROCESS**

*Władysław Józwicki\**

This paper takes up a question whether there exists a possibility for the European Court of Human Rights (ECtHR) to take a stand on the (in)famous *Opinion 2/13* by the Court of Justice of the European Union (CJEU), and to address contained in it argumentation from the perspective of the Strasbourg system's conditions for accession. Particularly, it will focus on the question whether the *Convention* system provides for an appropriate procedure. The paper will not engage into a discussion on how the contentious issues should be addressed by the ECtHR, but will focus on answering whether it at all may have a chance to address them in the current legal setting through advisory procedures with which the *European Convention on Human Rights (ECHR)* system is equipped. The text will argue that even if both the Articles 47-49 of the *Convention* advisory procedure as well as the *Protocol 16* to the *Convention* advisory procedure for the sake of their function and scope could not be applied directly, holistically and systematically tackle *Opinion 2/13*, then at least the latter could provide a forum to do that in a limited scope and in an indirect way. While the mechanism has been designed with a completely different purpose, some of the features of the *Protocol 16* advisory procedure may even seem to incite such a use, especially in the context of the increasingly turbulent relations between the CJEU and the European Union (EU) Member States' highest courts and tribunals in the field of fundamental rights.

Cet article vise à s'interroger sur la possibilité pour la Cour européenne des droits de l'homme de prendre position sur l'*Avis 2/13* de la Cour de justice de l'Union européenne et d'ainsi contenir son argumentaire dans le contexte requis par la perspective des conditions à l'adhésion du système de Strasbourg. Plus particulièrement, il se penchera sur la question de savoir si le système de la *Convention* prévoit une procédure appropriée. L'article n'entamera pas une discussion sur la façon dont les questions litigieuses devraient être adressées par la Cour, mais tâchera plutôt de déterminer s'il existe une chance de les aborder dans le contexte juridique actuel par les procédures consultatives en place au sein du système. Le texte avance l'argument que, même si les articles 47-49 de la procédure consultative de la *Convention* ainsi que le *Protocole n° 16* de la *Convention*, dans l'intérêt de leur fonction et de leur portée, ne pouvaient s'appliquer pour directement, holistiquement et systématiquement aborder l'*Avis 2/13*, ce dernier pourrait

---

\* Assistant professor at Constitutional Law Chair at Adam Mickiewicz University in Poznań, where he teaches mainly Constitutional law and Human Rights Law. In 2019/2020 “re:constitution” Visiting Fellow at the Max Planck Institute for Comparative Public Law and International Law. In 2018/2019 a Visiting Fellow at iCourts (The Danish National Research Foundation’s Centre of Excellence for International Courts). PhD in Law from Adam Mickiewicz University in Poznań (2018, with distinction). MA in Law degree (2011, first class) therein. MA in Political Sciences from University of Warsaw (2009, summa cum laude). BA in Political and International Studies with Joint Degree from Middlesex University in London (2006, First Class Honours). Graduate from EIUC Venice Academy of Human Rights (2016 and 2017) as well as from the EUI Summer Academy in EU law (2013), in Human rights law (2013) and the EUI Law and Logic Summer School (2019). Member of European Commission founded (FP-7) large scale research project coordinated by Leuven Centre for Global Governance Studies on: “Human rights in EU external relations and internal policies” as well as Polish National Centre for Science research project on Commentary to the ICESCR. Constitutional law expert at the Chancellery of the President of the Republic of Poland (2015). Member of the Polish Association of Constitutional Law. ORCID : <https://orcid.org/0000-0002-0674-0814>.

minimalement constituer un forum pour ce faire dans une portée limitée et de façon indirecte. Tandis que le mécanisme a été pensé avec un but complètement différent, certaines caractéristiques de la procédure consultative du *Protocole n° 16* semblent inciter un tel usage, notamment dans le contexte des relations de plus en plus turbulentes entre la CJUE et les plus hautes cours et tribunaux des États membres de l'Union européenne dans le domaine des droits fondamentaux.

Este artículo se plantea la cuestión de si existe la posibilidad de que la Corte europea de derechos humanos (CEDH) se pronuncie sobre el infame *Dictamen 2/13* de la Corte de justicia de la Unión europea que contiene un argumento en el contexto requerido desde la perspectiva de las condiciones de adhesión del sistema de Estrasburgo. En particular, examinará si el sistema del Convenio prevé un procedimiento adecuado. El artículo no entrará en un debate sobre la forma en que la CEDH debe abordar las cuestiones polémicas, sino que se centrará en si tiene alguna posibilidad de abordarlas en el marco jurídico actual, a través de los procedimientos consultivos con los que está dotado el sistema de la CEDH. El artículo argumentará que, aunque los artículos 47 y 49 del procedimiento consultivo del Convenio, así como el *Protocolo n° 16* del procedimiento consultivo del *Convenio*, en aras de su función y alcance, no puedan aplicarse para abordar directa, holística y sistemáticamente el *Dictamen 2/13*, por lo menos este último podría servir de foro para hacerlo con un alcance limitado y de forma indirecta. Si bien el mecanismo fue concebido con una finalidad completamente diferente, ciertas características del procedimiento consultivo del *Protocolo n° 16* parecen alentar su uso, especialmente en el contexto de las relaciones cada vez más turbulentes entre el CJEU y los más altos tribunales de los Estados miembros de la UE en el ámbito de los derechos fundamentales.

As it is well known the long-lasting process<sup>1</sup> of the European Union's (EU) accession to the *European Convention on Human Rights*<sup>2</sup> (ECHR or *Convention*) has been halted by the Court of Justice of the EU's (CJEU) *Opinion 2/13*<sup>3</sup> (*Opinion*) on the incompatibility with EU law of accession instruments (*Draft Accession Agreement* – further: DAA).<sup>4</sup> The *Opinion* has been welcomed with a “great disappointment” both at the European Court of Human Rights (ECtHR), as expressed *inter alia* by its then President Dean Spielmann,<sup>5</sup> but also by human rights practitioners and academia.<sup>6</sup> Some of the commentators referred to it as to a “bombshell”<sup>7</sup> or as to a “clear and present danger to human rights protection” in Europe.<sup>8</sup> Other critics were a bit more nuanced and were pointing out to some mitigating circumstances.<sup>9</sup>

<sup>1</sup> For a summary, see e.g. Anna-Luise Chané et al, *EU engagement with other European regional organisations, Fostering Human Rights Among European Policies*, Large-Scale FP7 Collaborative Project GA No. 320000, 30 April 2016 at 58-80, online (pdf): <[www.fp7-frame.eu/frame-reps-5-2/](http://www.fp7-frame.eu/frame-reps-5-2/)>; for more see especially Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Hart, 2013); Fisljik Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (New York: Springer, 2015); Vasiliki Kosta, Nikos Skoutaris & Vassilis P. Tzevelekos, eds, *The EU Accession to the ECHR* (Oxford: Hart, 2015).

<sup>2</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>3</sup> *Opinion 2/13 pursuant to Article 218(11) TFEU*, O-2/13 [*Opinion 2/13*].

<sup>4</sup> Council of Europe, *Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and The European Commission on the Accession of the European Union to The European Convention on Human Rights. Final report to the CDDH*, (2013).

<sup>5</sup> ECHR & Council of Europe, *Annual Report 2014 of the European Court of Human Rights*, Registry of the ECHR, 2015 at 6, online (pdf): <[www.echr.coe.int/Documents/Annual\\_Report\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf)>.

<sup>6</sup> See e.g. Leonard F M Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13" (December 23 2014), online: *Verfassungsblog* <[www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213](http://www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213)>; Pieter Jan Kuijper, "Reaction to Leonard Besselink's ACELG Blog" (6 January 2015), online: *Amsterdam Centre for European Law and Governance Blog* <[www.acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks-s-acelg-blog](http://www.acelg.blogactiv.eu/2015/01/06/reaction-to-leonard-besselinks-s-acelg-blog)>; Walter Michl, "Thou Shalt Have No Other Courts Before Me" (23 December 2014), *Verfassungsblog*, <[www.verfassungsblog.de/en/thou-shalt-no-courts](http://www.verfassungsblog.de/en/thou-shalt-no-courts)>. These instant blog reactions have been later followed by more developed academic analysis, see e.g. Piet Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?" (2015) 38:4 *Fordham Intl LJ* at 955; Paul Gragl, "The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR" (2015) 15 *European YB on Human Rights* at 27; Jed Odermatt, "A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights" (2015) 47:4 *NYUJ Intl L & Pol* at 783-798; Steve Peers, "The EU's Accession to the ECHR: The Dream Becomes a Nightmare" (2015) 16 *German LJ* at 213.

<sup>7</sup> Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas Bombshell From the European Court of Justice" (24 December 2014), online: *UK Constitutional Law Blog* <[ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/](http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/)>.

<sup>8</sup> Steve Peers, "The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection" (18 December 2014), online: *EU Law Analysis Blog* <[eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html](http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html)>.

<sup>9</sup> See e.g. Daniel Halberstam, "It's the Autonomy, Stupid! A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward" (2015) 16 *German LJ* at 105; Martin Scheinin, "CJEU Opinion 2/13 – Three Mitigating Circumstances" (26 December 2014), online: *Verfassungsblog* <[www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances-2](http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances-2)>.

The *Opinion* seemed to have created a hard to overcome deadlock. Nevertheless, as of late, five years after the *Opinion* had been launched, the issue of accession has resurfaced in the EU agenda.<sup>10</sup> The initiative has been welcomed by the Council of Europe (CoE).<sup>11</sup> On June 22nd 2020, the first informal meeting of the Steering Committee for Human Rights (CDDH) *ad hoc* negotiation group (“47+1 Group”) resuming the negotiations took place virtually. Negotiations will formally continue with the sixth negotiation meeting of the Group, which has been tentatively planned for September 29th to October 2nd 2020 in Strasbourg.<sup>12</sup> At the moment, however, due to the COVID-19 situation, which already led to the postponing of the process, but even more importantly in the light of how turbulent and time demanding the whole process turned out to be in previous stages, the accession seems not to be very likely to happen in the nearest future.

Thanks to *Opinion 2/13*, we have had a chance to get to know in detail the standpoint of the CJEU on the matter. At the same time, we have had a limited opportunity to get to know anything from its counterpart—the ECtHR. Back in 2011 both the Presidents of the ECtHR and the CJEU issued an aimed at enhancing the accession process, but limited in scope joint communication.<sup>13</sup> In 2014, as mentioned above, the then President of the ECtHR expressed his disappointment with the *Opinion* and pointed out the primary victims of non-accession: “those citizens whom this opinion [...] deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each Member State”.<sup>14</sup> In the *Annual Report* from 2019, the then-President of the ECtHR Linos-Alexandre Sicilianos welcomed the relaunch of the procedure for the accession as “one of the outstanding events of 2019.”<sup>15</sup> One may thus ask if maybe some more elaborate and detailed intervention on the part of the ECtHR might be beneficial in order to shape the accession process in a balanced way, so that it responds well not only to the EU law peculiarities but also to the specificity of the *Convention* system. Maybe the ECtHR might also be able to put the drafters’ attention to the goals behind the accession and to the fact that they should not be undermined by the terms of the accession. Perhaps the ECtHR might attempt at setting some boundaries for future negotiations when it comes to concessions towards EU law demanded by the CJEU. Finally, maybe the ECtHR might even try to convince the CJEU to reconsider its intransigent position. We should bear in mind that the Luxembourg court may have a chance to assess also the revised accession instruments in the future.

<sup>10</sup> "EU accession to ECHR" (last modified 1 October 2020), online: *Council of Europe* <[www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights](http://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights)>.

<sup>11</sup> Council of Europe, Ministers' Deputies, 1364th meeting, *Decision of 15 January 2020 by the Ministers' Deputies of the Council of Europe* (2020), online: *Council of Europe Portal* <[go.coe.int/uncBt](http://go.coe.int/uncBt)>.

<sup>12</sup> Council of Europe, *supra* note 10.

<sup>13</sup> CJEU, C-287/050000000000, "Joint communication from Presidents Costa and Skouris" (24 January 2011), online (pdf): *CJEU* <[www.curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh\\_cjue\\_english.pdf](http://www.curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf)>.

<sup>14</sup> ECHR & Council of Europe, *supra* note 5 at 6.

<sup>15</sup> ECHR & Council of Europe, *Annual Report 2019 of the European Court of Human Rights*, 2020 at 9, online (pdf): <[www.echr.coe.int/Documents/Annual\\_report\\_2019\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf)>.

This paper will take up a question whether there exists such a possibility. Particularly it will focus on the question whether the *Convention* system provides for an appropriate procedure. The paper will not engage into a discussion on how the contentious issues should be addressed by the ECtHR, but will focus on answering whether it at all may have a chance to address them in the current legal setting through advisory procedures with which the *ECHR* system is equipped. The text will argue that even if both the Articles 47-49 of the *Convention* advisory procedure as well as the *Protocol 16* to the *Convention* (*Protocol 16* or *Protocol*)<sup>16</sup> advisory procedure for the sake of their function and scope could not be applied to directly, holistically and systematically tackle *Opinion 2/13*, then at least the latter could provide a forum to do that, even if that forum were limited only to some of the issues covered by the CJEU's opinion and they could be addressed only in an indirect way. While the mechanism has been designed with completely different purpose, some of the features of the *Protocol 16* advisory procedure may even seem to incite such a use, especially in the context of the increasingly turbulent relations between the CJEU and the EU Member States' highest courts and tribunals in the field of fundamental rights.

## I. Can the ECtHR take a stand and tackle the *Opinion 2/13*: Advisory Opinion from the ECtHR for a change?

Even though the *Opinion 2/13* is indeed highly debatable, it is probably true that "a blanket dismissal of the Court's [CJEU] concerns would [...] be throwing out the baby with the bathwater."<sup>17</sup> Also the then President of the Parliamentary Assembly of the Council of Europe (PACE) Anne Brasseur seemed to agree when she, just after the *Opinion* had been issued, called "on the negotiators to carefully study this opinion, and immediately set to work to overcome the legal hurdles identified by the Court."<sup>18</sup> On the other hand, renegotiations leading to fully incorporating to the revised or to the brand new accession agreement all the CJEU's demands might not serve well when it comes to fulfilling the goals behind accession.<sup>19</sup> Accession in a full "compliance with the CJEU's judgment would not provide effective external control of the EU's actions",<sup>20</sup> which hence would be counterproductive. A certain balance between the

<sup>16</sup> *Protocol 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 2 October 2013, UNTS 2889 (entered into force 1 August 2018).

<sup>17</sup> Halberstam, *supra* note 9 at 107.

<sup>18</sup> President of the Council of Europe PA, "Let's overcome hurdles to ensure EU accedes to the Human Rights Convention" (18 December 2014), online: *PA of the Council of Europe* <[www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5364&lang=2&cat=15](http://www.assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5364&lang=2&cat=15)>. Compare as well Council of Europe, PA, Assembly debate (4th Sitting), *The implementation of the Memorandum of Understanding between the Council of Europe and the European Union*, Debates, Resolution 2029 (2015).

<sup>19</sup> For a summary see e.g. Zdzisław Kędzia, "Relationship Between the European Convention of Human Rights and the Charter of Fundamental Rights After the European Union's Accession to the Convention" in Jan Barcz, ed, *Fundamental Rights Protection in the European Union* (Warsaw: C.H. Beck, 2009) 224 at 247; or Johan Callewaert, *The accession of the European Union to the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 2014), ch 1 at 14-46.

<sup>20</sup> Sionaidh Douglass-Scott, "The Relationship Between the EU and the ECHR. Five Years on from the Treaty of Lisbon" in Sybe de Vries, Ulf Bernitz and Stephen Weatherill, eds, *The EU Charter of*

peculiarities of the EU legal order and the specificity of the *Convention* system is necessary. Perhaps then a voice from the ECtHR could help in achieving the necessary for meeting the CJEU's demands while remaining feasible from the Strasbourg perspective compromise.

Having a direct opportunity to tackle *Opinion 2/13* could enable the ECtHR to, *primo*, try to show which of the CJEU's concerns are, according to the ECtHR, ill-funded or addressing irrelevant or already resolved problems, either of which could be solved by the EU internally, without the necessity to renegotiate the *DAA* (like potentially the Article 53 conundrum, the mutual trust conundrum or the issue of *Protocol 16*). This could mobilize the EU to tackle those problems by itself. *Secundo*, the ECtHR could, if it found it appropriate, promote such kinds of solutions to the CJEU's concerns, which might be achievable on the grounds of the existing law and the current *DAA* through its consistent with EU law peculiarities application (like the inadmissibility of interstate disputes connected with EU law between the EU Member States in front of the ECtHR, ensuring that in the co-respondent mechanism the ECtHR assessment of admissibility would not extend to interpreting EU law or ensuring that in the prior-involvement procedure only EU institutions would be competent to rule on whether the CJEU has already dealt with a certain issue or not). Knowing that the ECtHR is willing to cooperate could help to dispel the CJEU's concerns. *Tertio*, the ECtHR could help to distill from *Opinion 2/13* those issues which may indeed demand renegotiations but at the same time it could set up boundaries aimed at not undermining the *Convention* system and the ECtHR scrutiny capacity (like when it comes to the issue of Common Foreign and Security Policy (CFSP)).<sup>21</sup>

Somehow reassuring might be the letter from former Commission President Jean-Claude Juncker and Vice-President Frans Timmermans requesting the resumption of negotiations but limiting the requested amendments to the *DAA* "only to what is strictly necessary to address the objections raised by the [CJEU]."<sup>22</sup> The current EU renegotiation agenda seems, however, quite well to reflect the CJEU's perspective.<sup>23</sup> That being the case, hearing from the ECtHR's might be particularly pertinent. *Nota bene*: possible responses to the CJEU's concerns of all the mentioned above kinds have already been to a great extent put forward in scholarly work concerning

---

*Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart, 2015) 21 at 29.

<sup>21</sup> When it comes to the CFSP, even the European Parliament admitted that lack of competence by the CJEU in some areas might be compensated by the external scrutiny by the ECtHR. See European Union, *European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241 (INI))*, No P7 TA(2010)0184 (19 May 2010) at para K(1).

<sup>22</sup> Directorate of Legal Advice and Public International Law, "EU accession to the ECHR: How to square the circle" (9 March 2020), online: *Council of Europe* <[www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle-?](http://www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle-?)>.

<sup>23</sup> Council of the European Union, General Secretariat, *Note from the Presidency to the Permanent Representatives, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (CEHR)*, 12349/19, 20 September 2019.

the *Opinion*.<sup>24</sup> It is not the aim of this paper to revisit or even sum up this discussion.<sup>25</sup> A clear statement on those issues from Strasbourg could, however, play an important role in reaffirming that such solutions exist and that they are achievable as well as that the ECtHR might be willing to cooperate in order to achieve them. When it especially comes to the group of problems, which could be solved by consistent with EU law application of the *Convention* after accession, a reassurance about the ECtHR's willingness to cooperate could make a difference. The question, however, arises whether there exists a procedure in which the ECtHR could do that.

The idea to request an advisory opinion (AO) from the ECtHR for the first time has been put forward by Steve Peers already just after *Opinion 2/13* had been adopted. As he argued, in the light of very far-reaching demands by the CJEU,

if those amendments were indeed [...] incompatible with the *ECHR*, there would be no point wasting further time and effort on negotiating them. So it would be best for the Committee of Ministers to invoke Article 47 *ECHR*, which allows it to ask the ECtHR to give an advisory opinion on the interpretation of the *Convention* or its protocols.<sup>26</sup>

As he, however, himself admitted the AO procedure as known to the *ECHR* system (Articles 47-49 *ECHR*) did not seem to extend to the draft accession agreement.<sup>27</sup> At the moment the Articles 47-49 *ECHR* advisory procedure is not the only one available in the Strasbourg system. Since a few years, the system is also equipped with advisory procedure set up by *Protocol 16* to the *Convention*.

### A. ECtHR Advisory Opinion under Articles 47-49 *ECHR*

Before going into legal details, one should notice that on a political level it would seem to be very difficult to find a sufficient incentive to launch Article 47 AO procedure. That is the case, even despite the fact that the majority necessary for launching the procedure in the Committee of Ministers of the Council of Europe (CoM) after *Protocol 11*<sup>28</sup> incorporated the procedure into the *Convention* is not any longer 2/3 but ordinary. It is important to note that the political initiative for a request for AO does

---

<sup>24</sup> See especially Gragl, *supra* note 6; Halberstam, *supra* note 9; Jörg Polakiewicz, "Accession to the European Convention on Human Rights (Convention) – An Insider's View Addressing One By One the ECJ's Objections in Opinion 2/13" (2016) 36 HRLJ 10. When it comes to the issue of *Protocol 16* see as well Thomas Volland & Britta Schiebel, "Advisory Opinions of the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?" (2017) 17:1 HRL Rev, 73 at 92-94.

<sup>25</sup> See e.g. Christoph Krenn, "Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13" (2015) 16:1 German LJ 147; Stian Øby Johansen, "The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences" (2015) 16:1 German LJ 169; Adam Łazowski & Ramses A. Wessel, "When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR" (2015) 16 German LJ 179; Peers, *supra* note 6.

<sup>26</sup> Peers, *supra* note 8.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, 11 May 1994, 2061 UNTS 7 (entered into force 1 November 1998).



not have to come from within the CoM itself. The initiative to lodge the first ever request came from PACE. In 2001 PACE adopted a Recommendation for the CoM to request the Court to give an opinion concerning coexistence of the *Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (CIS Convention)* and the *ECHR*.<sup>29</sup> Nevertheless, there seems to be no political will in the CoE for such a move and that is the only competent body to actually launch the procedure. As Andrew Drzemczewski noted in 2015: “Most informed commentators have argued that [...] the Council of Europe and its member states have – at present – no reason to take part in discussion on this [accession] matter.”<sup>30</sup> The situation has not since significantly changed. All in all, it is the EU that is obliged by its own law to join the *Convention* and it is the EU institution—the CJEU—that singlehandedly aborted the process. As Jörg Polakiewicz sums up, “[it] is certainly not for the Council of Europe to tell the EU how it should settle its internal problems.”<sup>31</sup> The negotiations, if we bear in mind the difficulties encountered in the process of reaching the *DAA* and sometimes the at best obstructionist attitude of some states<sup>32</sup> do not promise an easy success. Some parties to the *Convention*, especially those which are not members to the EU, might for various reasons not be willing to facilitate this process in any way.

From the legal point of view, the situation is even more straightforward. The scope of Opinions under Articles 47-49 of the *Convention* is very limited. It has been noticed already during the *travaux préparatoires* on *Protocol 2* to the *Convention*,<sup>33</sup> which introduced the procedure in 1963, that it should serve to clarify on the grounds of the *Convention* mostly procedural issues, falling outside the scope of adversarial proceedings (interstates disputes and individual applications) in front of the Court. Examples of issues falling under the scope of AOs to be given at that time covered controversies regarding the election of judges or the duties of the Secretary General of the Council of Europe under the *Convention* and the procedure of the CoM in exercising its role in the execution of judgments.<sup>34</sup> The mentioned above question concerning coexistence of the *CIS Convention* and the *ECHR*, in which the ECtHR did not find itself competent to give the advisory opinion, gave the Court an opportunity to issue

---

<sup>29</sup> Council of Europe, PA, *Co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights*, PACE Recommendation 1519 (2001).

<sup>30</sup> Andrew Drzemczewski, “Background note: the relationship between the EU and the Council of Europe” in *International Workshop: EU cooperation with the UN & regional organisations in the field of human rights*, Frame Work Package 5 (Poznań, Poland, 2015) at 4.

<sup>31</sup> Jörg Polakiewicz, *Accession to the European Convention on Human Rights (ECHR): stocktaking after the CJEU’s opinion and way forward*, European Parliament – Committee on Constitutional Affairs Public Hearing (20 April 2016) at 2.

<sup>32</sup> For more see e.g. Chané et al, *supra* note 1 at 61-62, 71-72; cf Martin Kuijer, “The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed Accession” (2018) 24:7 Intl JHR 1 at 4.

<sup>33</sup> *Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions*, 6 May 1963, 1496 UNTS 245 (entered into force 21 September 1970).

<sup>34</sup> *Decision on the Competence of the Court to Give an Advisory Opinion* [GC], No A47-2004-001 [2004] at para 28.

quite an elaborate decision on its competence to give AOs under Articles 47-49. The ECtHR confirmed the very limited scope of the procedure. Accordingly, the procedure has been applied so far only twice in the context of questions relating to the election of judges.<sup>35</sup>

As under Articles 47-49 of the *Convention* can be issued only on legal questions concerning the interpretation of the *Convention and the Protocols thereto* (Article 47(1) of the *Convention*) and opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the *Convention and the Protocols thereto*, or with any other question which the Court or the CoM might have to consider in consequence of any such proceedings as could be instituted in accordance with the *Convention* (Article 47(2) of the *Convention*). Meanwhile, many of the CJEU concerns relate either to the accession instruments or EU law, which remain outside of the scope of Article 47(1). When they relate to the *Convention* and the way it could be applied after accession or the way it would be modified by the *DAA*, they all fall outside of the Article 47(2) scope, as they all could be considered in proceedings under Articles 33 and 34 of the *Convention*. The ECtHR has been very strict when it comes to Article 47(2) criterion in the past.<sup>36</sup> Nothing seems to indicate that change from this approach could be possible or desirable.<sup>37</sup> Therefore, even if there was a political will in the CoM to issue a request for an AO under Article 47 of the *Convention* in which the ECtHR were to address *Opinion 2/13*, such a request would have to be struck down by the Court as inadmissible.

## B. ECtHR Advisory Opinion under *Protocol 16*

The CJEU does not only try to protect its position in relation to the ECtHR. It also tends to expand its influence, especially in the field of human rights, in relation to the EU Member States' constitutional and other apex courts and tribunals. It does so by promoting the wide scope of application<sup>38</sup> of the EU fundamental rights under the *EU Charter of Fundamental Rights (Charter)*<sup>39</sup> as well as through the character of the EU standard of protection within this scope, which it promotes in combination with principles of primacy, unity and effectiveness of EU law.<sup>40</sup> That tendency does not remain unquestioned nor unopposed by the highest courts and tribunals of the EU

---

<sup>35</sup> See i.e. *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights* [GC], No A-47-2008-001 [2008]; *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)* [GC], No A-47-2010-001 [2010].

<sup>36</sup> *Supra* note 34 especially at para 33.

<sup>37</sup> Leszek Garlicki "Art. 49. Uzasadnienie opinii doradczych" in Leszek Garlicki, ed, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom II. Komentarz do artykułów 19–59* (Warsaw: C.H.Beck, 2011) 414 at nb 3.

<sup>38</sup> *Åklagaren v Hans Åkerberg Fransson*, No C-617/10, [2013] ECLI: ECLI:EU:C:2013:105; cf *Cruciano Siragusa v Regione Sicilia*, No C-206/13, ECLI:EU:C:2014:126.

<sup>39</sup> *Charter of Fundamental Rights of the European Union*, 12 December 2007, Official Journal of the EU C303/01 (entered into force 1 December 2009).

<sup>40</sup> *Stefano Melloni v Ministerio Fiscal*, No C-399/11, ECLI: ECLI:EU:C:2013:107.

Member States.<sup>41</sup> Perhaps then, it is the EU Member States' highest courts and tribunals, who might be particularly inclined to challenge the CJEU's position also by giving the ECtHR an opportunity to respond to *Opinion 2/13* in which the CJEU openly confirmed its position on the matters that are controversial also in relations between the Member States' courts and the CJEU.<sup>42</sup> The recent reform of the *Convention* system led to entry into force (on 1 August 2018) of *Protocol 16*, which enables the apex courts and tribunals of the parties to the *Convention* and to the *Protocol* to request advisory opinions from the ECtHR. Admittedly, due to the way in which the mechanism is designed, this procedure seems not to make the possibility of the ECtHR to issue its opinion directly on *Opinion 2/13* much more plausible than it is under Article 47 of the *Convention*.

The *Protocol* has been introduced in the process of a reform of the Strasbourg human rights protection mechanism<sup>43</sup> suffering from case overload.<sup>44</sup> *Protocol 16* was considered as another step in the process of the reform of the *Convention* system. The goal behind the *Protocol* was clearly not the one to provide a platform for the ECtHR to tackle problems of such a kind as expressed in *Opinion 2/13*, but to tackle the case-flow hurdle by enhancing domestic implementation of the *Convention*.<sup>45</sup> As it was possible to expect,<sup>46</sup> so far the procedure has not become very popular. Until now, the ECtHR has delivered two opinions under *Protocol 16*.<sup>47</sup> Only one of the two requests came from the EU Member State and none of the cases concerned the EU or its law.

---

<sup>41</sup> For a summary see e.g. Stefanie Schmahl, "The National Identity Criterion in the Crossfire Between European Integration and the Preservation of National Sovereignty" in Marten Breuer, ed, *Principled Resistance to ECtHR Judgments - A New Paradigm?* (Berlin Heidelberg: Springer 2019) 299.

<sup>42</sup> *Opinion 2/13*, *supra* note 3 at paras 171, 185-95.

<sup>43</sup> For a summary see e.g. Władysław Józwicki, "Protocol 16 to the ECHR. A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?" in Elżbieta Kuźelewska et al, eds, *European Judicial Systems as a Challenge for Democracy* (Mortsel: Intersentia, 2015) 183 at 184-87 or Voland & Schiebel, *supra* note 24 at 75-79.

<sup>44</sup> For more see e.g. Council of Europe & Directorate General Human Rights and Rule of Law, *Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and Beyond* (2014), 16714GBR, online (pdf): [Conseil de l'Europe <edoc.coe.int/fr/conferences-sur-l-avenir-de-la-cour-europeenne-des-droits-de-l-homme/7308-reforming-the-european-convention-on-human-rights-interlaken-izmir-brighton-and-beyond-a-compilation-of-instruments-and-texts-relating-to-the-ongoing-reform-of-the-echr.html#>](https://www.coe.int/fr/conferences-sur-l-avenir-de-la-cour-europeenne-des-droits-de-l-homme/7308-reforming-the-european-convention-on-human-rights-interlaken-izmir-brighton-and-beyond-a-compilation-of-instruments-and-texts-relating-to-the-ongoing-reform-of-the-echr.html#>); Jon Petter Rui, "The Interlaken, Izmir and Brighton declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights" (2013) 31 *Nordic J of Human Rights* 28.

<sup>45</sup> It is explicitly declared in the Preamble to the *Protocol 16*: "Considering that the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity"; for more on *Protocol 16*, its background, the purpose behind it, the mechanism it introduces and its preliminary assessment see e.g. Józwicki, *supra* note 43 at 183 and following.

<sup>46</sup> *Ibid* at 205-206.

<sup>47</sup> *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], No P16-2018-001, [2019] ECHR [Recognition in domestic law]; *Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, No P16-2019-001, [2020] ECHR.

The aim behind introduction of the AO procedure under *Protocol 16* is well expressed in the scope of the AOs, which the highest courts and tribunals of parties to the *Convention* can request from the ECtHR. First of all, the AOs under the *Protocol* are limited only to questions of principle relating to the interpretation or application of rights and freedoms defined in the *Convention or the protocols thereto* (Article 1(1) of the *Protocol*). At first glance, it may seem that the *Protocol 16* AOs cover what has been left outside the scope of Articles 47-49 of the *Convention* AOs. That is, however, not the case. The scope of the AOs under *Protocol 16* covers only questions of principle and not all questions relating to interpretation or application of the *Convention* rights and freedoms. Second of all, it concerns only rights and freedoms defined in Section I of the *Convention and Protocols thereto* and not any other kind of regulations in any other kind of document, including the *DAA* or, all the more, EU law. That leaves the *DAA* and concerning it issues—addressed in *Opinion 2/13*—outside the scope of the procedure.

Even if the *DAA* and accession instruments were to be considered as at least partially modifying the *Convention* and *Protocols* in a way that could affect questions of principle relating to interpretation of the *Convention* rights and freedoms, the AOs under the *Protocol* are not aimed to deal with contrived or hypothetical problems.<sup>48</sup> The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it (Article 1(2) of the *Protocol*). The Court has already used a chance to confirm that it “infers from Article 1 §§ 1 and 2 of *Protocol 16* that the opinions it delivers under this Protocol must be confined to points that are directly connected to the proceedings pending at domestic level.”<sup>49</sup> Since the *DAA* is not in force and the Union did not join the *Convention*, all the problems relating to the accession instruments would have a hypothetical character, hence would be outside the scope of *Protocol 16* procedure. That also excludes the *Protocol 16* advisory procedure as a method to directly, openly and systematically tackle *Opinion 2/13*.

Having said that, it seems that the procedure still could be used to tackle at least some of the issues risen by the CJEU in *Opinion 2/13* but only in an indirect way. Already before the *Opinion* and before the *DAA*, the ECtHR has been addressing issues concerning the EU in cases against the EU Member States, when they were acting under EU law. The ECtHR developed in its jurisprudence a rather deferential approach to the EU and its law, which was oriented around the so-called Bosphorus<sup>50</sup> doctrine and presumption of equivalent protection.<sup>51</sup> After the *Opinion* the situation did not change; on the contrary, the ECtHR and the CJEU quite naturally continued to shape their relationship as they did before - mostly through case law.<sup>52</sup> Already after the *Opinion*,

---

<sup>48</sup> Józwicki, *supra* note 43 at 189-190.

<sup>49</sup> *Recognition in domestic law*, *supra* note 47 at para 26.

<sup>50</sup> *Bosphorus v Ireland* [GC], No 45036/98 [2005], VI ECHR 107.

<sup>51</sup> For a brief summary see e.g. Lize R Glas and Jasper Krommendijk, "From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court" (2017) 17 HRL Rev 567 at 570-571.

<sup>52</sup> *Ibid* at 568.

in the *Avotiņš* case,<sup>53</sup> the ECtHR upheld the Bosphorus presumption of equivalent protection. It, however, made it clear that the presumption should not be taken for granted, but is rebuttable.<sup>54</sup> The ECtHR has also continued to hold EU Member States responsible for the way in which they apply EU law when they are left with some discretion in doing it<sup>55</sup> (which already before the *Opinion* provided some difficulties for the CJEU to square with EU law)<sup>56</sup> as well as for the way in which they deploy the EU fundamental rights scrutiny mechanisms, especially when it comes to referring for preliminary judgment to the CJEU.<sup>57</sup> *Nota bene*: regarding the latter, the ECtHR's demands under Article 6 of the *Convention* outgrow what the Member States are bound to do by EU law when it comes to dealing with the parties to the case requests for referrals.<sup>58</sup> When it comes to the mutual trust issue, the recent years have brought a significant shift in the CJEU approach and led to a revolution, labelled by some as "horizontal Solange."<sup>59</sup> In a nutshell, the CJEU allowed Member States to rely on some exceptions from the mutual trust aimed at fundamental rights protection.<sup>60</sup> The revolution has been brought by a strong pressure from the EU Member States and their constitutional courts but also by the aforementioned Strasbourg jurisprudence.<sup>61</sup>

The ECtHR has also already used an opportunity to address the *Opinion* in its case law. For example, the landmark *Avotiņš* judgment was not only a confirmation of the Bosphorus doctrine, but also a long-awaited reaction to *Opinion 2/13*. The *Opinion* was explicitly addressed in the judgment. It was invoked in the section on "Relevant European Union and international law materials"<sup>62</sup> as well as referred to in several other

<sup>53</sup> *Avotiņš v Latvia* [GC], No 17502/07, [2016] ECHR at para 3, see joint dissenting opinion of Judges Ziemele, Bianku and De Gaetano.

<sup>54</sup> See e.g. Glas and Krommendijk, *supra* note 51 at 567.

<sup>55</sup> *M.S.S. v Belgium and Greece* [GC], No 30696/09, [2011] I ECHR 121; *Tarakhel v Switzerland* [GC], No 29217/12, [2014] VI ECHR 159; *M.T. v the Netherlands*, No 46595/19 (11 October 2019).

<sup>56</sup> *Joined cases of N.S. v United Kingdom & M.E. v Ireland* [GC], No C-411-10, [2011] CJEU 865; Glas & Krommendijk, *supra* note 51 at 572-573.

<sup>57</sup> *Michaud v France*, No 12323/11, [2012] VI ECHR 39; *Povse v Austria* (dec), No 3890/11 (18 June 2013); *Dhahbi v Italy*, No 17120/09 (8 April 2014); *Schipani and Others v Italy*, No 38369/09 (21 July 2015); see as well *Ullens de Schooten and Rezabek v Belgium*, No 3989/07 (20 September 2011); *Vergauwen and Others v Belgium*, No 4832/04 (10 April 2012); *Ramaer and van Willigen v the Netherlands*, No 34880/12 (23 October 2012); *Baydar v the Netherlands*, No 55385/14 (24 April 2018); *Somorjai v Hungary*, No 60934/13 (28 August 2018); *Harisch v Germany*, No 50053/16 (11 April 2019); *Repecevirág Szövetkezet v Hungary*, No 70750/14 (30 April 2019); *Sanofi Pasteur v France*, No 25137/16 (13 February 2020).

<sup>58</sup> Glas and Krommendijk, *supra* note 51 at 582-83.

<sup>59</sup> Iris Canor, "My brother's keeper? Horizontal solange: 'An ever-closer distrust among the peoples of Europe'" (2013) 50 *Common Market L Rev* 383.

<sup>60</sup> *Joined cases of N.S. v United Kingdom and M.E. v Ireland*, *supra* note 56; *Criminal proceedings against Piotr Kossowski*, No C-486/14, [2016] CJEU 483; *C. K. and Others v Republika Slovenija*, No C-578/16PPU, [2017] CJEU 127; *Request for a preliminary ruling from High Court (Ireland)*, No C-216/18 PPU, [2018] CJEU 856; *Request for a preliminary ruling from the Hanseatisches Oberlandesgericht in Bremen*, No C-220/18 PPU, [2018] 589; *Dorobantu*, No C-128/18, [2019] CJEU 857.

<sup>61</sup> Davide Paris, "Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review" (2017) 24 *Maastricht J of European and Comparative L* 793 at 818; Johan Callewaert, "Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences" (2018) 55 *Common Market L Rev* 1685 at 1702-04.

<sup>62</sup> *Avotiņš v Latvia*, *supra* note 53 at para 49.

places<sup>63</sup> in a rather polemic way.<sup>64</sup> The Court did not, however, approach it systematically and holistically. It focused on issues of general significance, which the *Opinion* touched upon, but which are indeed significant for fundamental rights protection in Europe regardless of accession, also in the context of relations between the EU and its Member States but especially in the light of the obligations of the latter with which they are bound as parties to the *ECHR*. I mean here especially the issue of mutual trust and, less explicitly, the problem of Article 53 of the *Charter*.<sup>65</sup> These are probably the two most controversial issues in relations between the CJEU and the Member States' courts.

If touching upon those issues was possible for the ECtHR through case law, it could also be possible through advisory opinions under *Protocol 16*. It is rather unquestioned that both the issues may raise questions of principle relating to interpretation of the Convention rights and freedoms. The Member States' courts might seek preemptive clarification of their duties under the *Convention* while they are applying EU law, not to be later challenged in the individual complaint procedure.<sup>66</sup> They might also be tempted to find a way to use *Protocol 16* as a way to release the tension that is building up while the EU accession to the *Convention* is not taking place: "why should domestic supreme courts have to accept indefinitely to be subject of external scrutiny [by the ECtHR], including when they apply EU law, if the [CJEU] should indefinitely be allowed to avoid it?"<sup>67</sup> The requesting courts would have to remember though that they could not simply seek confirmation of what the ECtHR has already cleared out. The already resolved issues seem to fall outside the scope of the advisory procedure.<sup>68</sup> It is, however, possible to try to further develop the ECtHR's doctrine and apply what it had previously ascertained to new challenges, which may emerge in the future in relation to the mutual trust principle or perhaps also to the issue of Article 53 in the context of the *Convention* rights protection. Some characteristics of the *Protocol 16* advisory procedure may even be considered as encouraging to use it to that end.

First of all, the advisory opinions under *Protocol 16* are not obligatory (Article 1(1) of the *Protocol*), so the highest courts and tribunals may request for them, when they find it appropriate, but they are not obliged to do so. More than that, the opinions are not binding (Article 5 of the *Protocol*), so it is up to the requesting court whether to implement the opinion or not as well as how to implement them in a particular case. That may lead to what can be called the "ownership" effect on the side of domestic courts and tribunals. One aspect of the effect might be an increased willingness of the courts to request for and follow the opinions.<sup>69</sup> The effect may, however, have yet another

---

<sup>63</sup> *Ibid* at para 95, 114.

<sup>64</sup> Glas & Krommendijk, *supra* note 51 at 584.

<sup>65</sup> Both of these also in the context of shortcomings from the ECHR perspective of Article 52(3) of the *Charter* application (for more see Callewaert, *supra* note 61 at 1692-1710).

<sup>66</sup> Some sensitive areas show that it is not a purely hypothetical possibility (see Callewaert, *supra* note 61 at 1712).

<sup>67</sup> *Ibid* at 1716.

<sup>68</sup> Ada Paprocka & Michał Ziółkowski, "Advisory opinions under Protocol No. 16 to the European Convention on Human Rights" (2015) 11:2 European Constitutional L Rev 274 at 289.

<sup>69</sup> Józwicki, *supra* note 43 at 192, 196-197; see also Björg Thorarensen, "The Advisory Jurisdiction of the ECtHR under Protocol No.16: Enhancing Domestic Implementation of Human Rights or a Symbolic Step?" in Oddný Mjöll Arnardóttir, Antoine Buyse, eds, *Shifting Centres of Gravity in Human Rights*

dimension. It might encourage the domestic courts to raise problematic questions concerning also their relations with the CJEU in the field of fundamental rights in which they could seek support—even if only indirect—from the ECtHR. The voluntary and nonbinding character of the opinions would give the domestic courts and tribunals much more field for manoeuvre as to how use the ECtHR's opinion and to what extent apply it in a certain case or not. Even if their motives behind seeking for an advisory opinion from the ECtHR would be pragmatic in that sense, still, it could give a chance to the ECtHR to take a stand on some of the contentious issues.

The nonbinding character of the *Protocol 16* opinions might as well have an effect on the ECtHR's activity within the frames of the procedure. The ECtHR, knowing that the opinions will not be binding, might be more inclined to come to perhaps a bit more far-reaching or controversial conclusions than it would in ordinary proceedings.<sup>70</sup> At the end of the day, it will be the responsibility of the requesting court to implement the opinion in particular case or not or to apply it only to certain extent, so it will be its responsibility to for example enter into a conflict with the CJEU on the controversial issues and to support itself with the ECtHR's opinion, or to find a way to apply the ECtHR's opinion in a nonconflictual way or not to apply it at all. The opinions could thus be a sort of a training ground for the ECtHR to test new concepts and approaches as well as their reception.

We also have to remember that, even if not binding, the opinions by the ECtHR under *Protocol 16* constitute a part of the ECtHR's case law of the highest possible status—questions of principle settled by the highest authority of the Court, which is the Grand Chamber. That significantly increases the “orientation” or the quasi-precedential effect of the ECtHR's opinions.<sup>71</sup> The opinions, even if not applied in a given case by the requesting courts, or applied only partially, would still build up the Court's jurisprudence and would be followed by the ECtHR in cases to come also in the adversarial proceedings in front of the Court. Even if the ECtHR's opinion would not be immediately followed in the proceedings in the context of which it was issued, there would also still exist a possibility for it to be followed by another domestic court in a similar case without requesting for a new opinion.

The *Protocol 16* procedure might serve the ECtHR as well to address some of the issues contained in the *Opinion* in a deferential towards the EU way, while still clarifying some of the aspects of the relations between EU law and the *Convention*, also by rejecting the request for an opinion under *Protocol 16*. The dialogical character of the procedure is reflected in the obligation to give reasons at every stage of the procedure, including when the ECtHR refuses to issue an opinion.<sup>72</sup> That also gives the ECtHR a chance to clarify what falls outside of the competence of the Strasbourg Court and in what kind of issues the ECtHR does not have an ambition to interfere with EU law. Of course, the scope of the ECtHR's competences would change with the accession. Still, even if

---

*Protection Rethinking Relations between the ECHR, EU, and National Legal Orders* (New York: Routledge, 2016) 79.

<sup>70</sup> Józwicki, *supra* note 43 at 195-96.

<sup>71</sup> *Ibid* at 191, 194-95; similarly see Volland & Schiebel, *supra* note 24 at 79-80.

<sup>72</sup> Józwicki, *supra* note 43 at 196.

only *obiter dictum*, some general principles of the ECtHR's deference applicable also for the future could be expressed in decisions over rejecting the requests for an AO under *Protocol 16*.

It needs to be clear that the *Protocol 16* advisory procedure, if at all, can be only of a very limited utility to the goal of tackling *Opinion 2/13* and the CJEU's concerns. It could serve to that end only indirectly and only regarding issues of general importance related to *Convention* rights protection which may resurface in the current legal setting and which have not yet been settled by the ECtHR in its case law. More than that, there are also other practical circumstances which even further limit the potential use of the *Protocol 16* advisory procedure. It would probably last a while before a new problem that would give a chance to address issues contained in *Opinion 2/13* emerges in domestic proceedings (also due to the CJEU jurisprudence nuancing its approach to some of the EU law principles - especially mutual trust - in its recent case law<sup>73</sup>). Even if such case would arise, it would not be obvious that a court or tribunal would lodge a request for AO to the ECtHR due to some characteristics of the procedure, which from one perspective might be considered as its strength, but from another perspective show its potential weakness. I mean here again the not obligatory and nonbinding character of the *Protocol 16* AOs in the light of a possible length of the proceedings, which in order to reach the highest courts and tribunals of the states already have to be rather lengthy, what might discourage the court or tribunal from even further prolonging the proceedings by seeking an opinion for which it is not obliged and with which it will not be bound instead of dealing with the case by itself.<sup>74</sup>

It should not remain unnoticed that an attempt at tackling *Opinion 2/13* through *Protocol 16* advisory procedure could be tricky from a more political than legal perspective. It could strengthen the "disloyalty" effect stemming not any more solely from the fact that *Protocol 16* has been introduced with "the active role of some EU Member States in introducing nation-state-serving amendments to the ECHR"<sup>75</sup> just after the *DAA* negotiations have been closed, but also from the fact that *Protocol 16* AO procedure would be actually used, or it would be perceived that it was used, "against" the CJEU after it had clearly expressed its critical assessment of its compatibility with EU law. Nevertheless, the aforementioned opportunities, which the procedure opens for the domestic courts and tribunals in cooperation with the ECtHR might prevail and convince them to try to give the ECtHR a chance to take a stand and the ECtHR might be tempted to use it.

\* \* \*

---

<sup>73</sup> *N.S. v Secretary of State and M.E., A.S.M., M.T., K.P., E.H. (C) v Refugee Applications Commissioner*, No C-411/10, [2011] CJEU 865; *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, No C-404/15, [2016] CJEU 198; *C. K. and Others v Republika Slovenija*, *supra* note 60.

<sup>74</sup> For more on why these characteristics of the *Protocol 16* AO procedure can be considered its weaknesses see e.g. Jóźwicki, *supra* note 43 at 199-201.

<sup>75</sup> Scheinin, *supra* note 9.



*Opinion 2/13* is the stumbling block in the process of EU accession to the ECtHR. It halts the process until the accession agreement is changed to become compatible with EU law or until EU law is changed so that the agreement is not contrary to it. “To say that either of these options is difficult is probably an understatement.”<sup>76</sup> The process could be facilitated and the scope of necessary changes could be limited by realizing that some of the CJEU’s demands are indeed ill founded, achievable through consistent with EU law application of the current agreement or are possible to be solved by the EU itself (together with its Member States). Setting some limits to the possible changes is also necessary so that the accession reflects characteristics of the Strasbourg system and does not undermine the goals behind the accession. This has been already analyzed elaborately in scholarly work. Perhaps a statement from the ECtHR itself might provide a new incentive for such a way of thinking. It seems, however, that the Strasbourg court is not equipped with procedural possibilities to do that in a systemic and direct way. Neither the Articles 47-49 of the *Convention* nor the *Protocol 16* advisory procedures provide such a possibility.

The way to shape the future relation between the Strasbourg and Luxembourg courts is by the case law. This has already allowed the ECtHR to express its opinion on some of the issues raised by the CJEU in *Opinion 2/13*. That concerns only issues of general importance for fundamental rights protection in Europe regardless of accession, which have been issues both before and after *Opinion 2/13*, as well as which will probably be relevant also after the accession. As such, they may resurface as well in the *Protocol 16* advisory procedure. Some of the features of the procedure, like its nonbinding and notobligatory character as well as the kind of institutions competent to request the opinions might be considered as encouraging to apply this procedure to that end. The requesting courts would be the hosts of the procedure and decide on the application of its results, and they could use these results to shape their relations not only with the ECtHR but also with the CJEU. Also, the nonbinding character of the *Protocol 16* AOs might encourage the ECtHR to express more far-reaching or controversial conclusions than in the ordinary proceedings. On the other hand, the not obligatory and nonbinding character of the procedure might discourage the domestic courts from unnecessarily prolonging the proceedings with a request, especially if it would likely be outside of the scope of the *Protocol 16* advisory procedure or would concern an issue already resolved in the ECtHR’s case law, which would result in the request being struck down. That might lead to the possibility for the ECtHR to address in the advisory procedure, even if only indirectly and even if only some of the issues which are covered by *Opinion 2/13*, never to occur.

---

<sup>76</sup> Ágoston Mohay, “Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note” (2015) *Pécs J of Intl and European L* 28 at 34.