EU Accession to the ECHR: At the End of the Long and Winding Road?

*Ágoston Mohay**

https://doi.org/10.15170/PJIEL.2024.2.4

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Abstract

Accession to the European Convention on Human Rights has been on the European Union's agenda for decades. The Lisbon Treaty has removed the initial legal barriers, but actual accession has not been achieved to date: the reconciliation of the special characteristics of EU law with the Convention has proved to be a rather complex issue, illustrated well by Opinion 2/13 of the Court of Justice of the European Union (CJEU). The new draft accession agreement, which was drawn up during the relaunched negotiations, sought to address the issues raised by the Opinion 2/13, but questions remain, in particular regarding legal remedies in the Common Foreign and Security Policy (CFSP) as well as the EU law principle of mutual trust. Following an overview of the accession process so far, the paper concentrates on the analysis of these two selected issues, assessing the solutions included in (or indeed missing from) the 2023 draft.

* Associate professor, University of Pécs, Faculty of Law, Department of International and European Law. ORCID ID: https://orcid.org/0000-0002-1166-2400

Keywords: EU accession, ECHR, European Court of Justice, European Court of Human Rights, fundamental rights, judicial interpretation, CFSP, mutual trust

I. Preliminary remarks

The European Convention on Human Rights (ECHR), as a fundamental human rights standard, has served as a point of reference for European integration for decades, despite the fact that the European Union is not currently a party to this international agreement. First, the ECHR has influenced EU law through the case-law of the Court of Justice of the European Union as a source of inspiration[1] for fundamental rights which form part of Community law in the unwritten form of general principles.[2] In addition to the protection of fundamental rights via case-law starting in the 1970s, the Union (or its predecessors) has had two alternatives to the development of an EU system for the protection of fundamental rights in writing: developing its own fundamental rights catalogue or joining an external (international law based) human rights system – in the latter case, it was clear that the reasonable choice would the ECHR, to which all EU Member States are parties.[3] In the end, the Union did not opt for one alternative, but a choice of both paths combined, although the achievement of either objective was not an easy task.

This paper does not concern the case law of the CJEU in relation to the ECHR or a detailed analysis of the current role of the ECHR in EU law; nor does it examine the underlying political processes relating to the development of fundamental rights protection, but, more narrowly, confines itself to examining the accession process. In this context, it should be noted that membership of an external system of human rights protection is necessary for the Union, regardless of the fact that own system of protection of fundamental rights has been established and is fully functional (in particular after the entry into force of the Treaty of Lisbon). Indeed, if it accedes to the ECHR, the EU will be obliged to comply with an external human rights standard and monitoring system, where compliance with obligations is monitored by a judicial body and where individuals can assert their human rights against the EU in court. The principles of unwritten primary law and the Charter of Fundamental Rights are, by definition, *internal* standards of fundamental rights review for the Union. Currently no international human rights monitoring mechanism with jurisdiction over EU law

[1] Case 29/69 *Stauder v Ulm* [1969] ECLI:EU:C:1969:57.

[2] Case 4/73 *Nold v Commission* [1974] ECLI:EU:C:1974:51.

[3] The importance of the ECHR was highlighted in a joint statement (legally non-binding) by the Parliament, the Council and the Commission, in which the institutions stood up for the importance respect for fundamental rights. Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms [1977] OJ C103/1.

exits that is independent of the Union.[4]

II. From Opinion 2/94 to the Lisbon Treaty

The EU's first accession attempt took place in the 1990s, which failed for reasons of competence: the European Court of Justice stated in its Opinion 2/94 that the European Community has no competence to accede to the ECHR.[5] The Court found that the Treaties did not confer on the Community any power to legislate on general human rights issues, nor could it conclude an international agreement in this area; this would have required an amendment of the Treaties.[6] That situation was initially the subject of an attempt by the Member States to change that situation by[7]providing for the accession of the European Union to the ECHR by means of the Constitutional Treaty, but as is known that that treaty did not enter into force.

However, the Treaty of Lisbon incorporates the relevant provision of the Constitutional Treaty in substance, with the result that, in the primary EU law in force, Article 6(2) TEU imposes a legal obligation on the EU to accede to the ECHR.[8]

With regard to accession, primary EU law imposes the following conditions in Article 6(2) TEU and in the relevant Protocol[9]:

- accession shall not affect the competences of the Union and its institutions as defined by the Treaties;
- the accession agreement should provide for the preservation of the specific characteristics of EU law;
- it shall ensure that accession does not affect Member States' relations with the ECHR;
- the provisions of the Agreement shall be without prejudice to Article 344

[4] Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union (TEU). A Commentary* (Springer 2013) 310.

[5] The opinion was requested from the Court of Justice pursuant to art. 218(6) EC [now art. 218(11) TFEU, with the same substantive content].

[6] In the opinion procedure, the Commission, the Council and some Member States argued that art. 235 TEC (which today is art. 352 TFEU) could serve as a legal basis for accession to the ECHR, but the Court did not agree (as many Member States didn't either). See Anthony Arnull, *The European Union and its Court of Justice* (2nd edn, OUP 2006) 370-371.

[7] Treaty establishing a Constitution for Europe [2004] OJ C310/1.

[8] The wording "shall accede" used in the English version also clearly refers to the binding character.

[9] Protocol (No. 8) relating to art. 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

TFEU.[10]

Although not legally binding, mention should also be made of Declaration No 2 on Article 6(2) TEU, according to which the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that the accession of the Union to the ECHR should take place while preserving the specificities of EU law, in order to ensure the regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights, which 'can be strengthened upon accession'.[11] As far as the ECHR is concerned, since only States have so far been contracting parties, an amendment was also necessary; thanks to Protocol No 14, Article 59(2) of the ECHR now provides that the European Union may accede to the ECHR.[12]

In view of the obligation to accede, as a follow-up to the negotiations between the Council of Europe and the Union, a draft Accession Agreement was drawn up in 2013 to address the institutional and legal aspects of accession.[13] Here the paper refrains from dealing with the process of negotiation of the original draft international agreement on accession (hereinafter: original DAA), the positions taken by the parties involved, or the overall analysis of the DAA, only the most relevant substantive aspects.[14]

Of particular importance in the original DAA is the question of co-respondents in the relation between the Member States and the EU (which allows the EU and the Member States to become co-respondents in the event of one of them being sued; thus, there is no need for the ECtHR to decide whether the EU and/or one or more Member States are the appropriate respondent, or how the division of responsibility between them should occur)[15]and the procedure for the prior involvement of the European Court of Justice to ensure that the European

[10] According to that provision, Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

[11] Declaration on art. 6(2) of the Treaty on European Union.

[12] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention. The Protocol entered into force on 1 June 2010.

[13] Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[14] For other issues in this context, see in particular: Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 361; Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 Fordham International Law Journal 1114; Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon' in Sybe De Vriesm, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument. Five Years Old and Growing* (Hart 2015).

15 See art. 3 (1)-(5) of the DAA.

Court of Justice is able to review the fundamental rights compatibility of an EU act before the ECtHR decides on the compatibility of EU law with the ECHR.[16]

The European requested an opinion from the European Court of Justice pursuant to Article 218(11) TFEU, which thus gave the ECJ the opportunity to examine whether the DAA was in conformity with primary law. The Commission explained in its submission that for its part, it considered the Agreement to be compatible with the Treaties.[17]

III. Opinion 2/13

Unsurprisingly, the Court's Opinion No 2/13 was anxiously expected. The negative opinion issued in December 2014 found the DAA to be incompatible with primary EU law on a number of points including Article 53 of the EU Charter (the level of protection of fundamental); the EU law principle of mutual trust; the preliminary ruling procedure and the advisory opinion procedure provided for in Protocol No 16 to the ECHR; the obligation enshrined in Article 344 of the TFEU; the co-respondent mechanism as well as the prior involvement of the Court of Justice in proceedings before the ECtHR; and, last but certainly not least, the issue of jurisdiction over CFSP acts. For the purposes of this paper, only three that are particularly relevant will be highlighted.

With regard to *mutual trust*, the Court stressed its particular importance between Member States: this principle enables the Union to establish an area of freedom, security and justice without internal frontiers. It requires Member States to consider all other Member States as complying with the standards of EU law and, in particular, with the fundamental rights recognized by EU law, unless there are exceptional circumstances.[18] The Member States of the Union may therefore, when implementing EU law and on the basis of its provisions, be obliged to 'to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the funda-

[16] See art. 3(6) of the DAA.

[17] Case Opinion 2/13 *Opinion pursuant to Article 218(11)* [2014] ECLI:EU:C:2014:2454, para. 73. The European Parliament (EP), the Council and twenty-four Member States submitted comments in the procedure, and although there are differences in reasoning, the EP, the Council and the Belgian, Bulgarian, Czech, Danish, German, Estonian, Ireland, Greek, Spanish, French, Italian, Cypriot, Latvian, Lithuanian, Hungarian, Austrian, Polish, Portuguese, Romanian, Slovak, Finnish, Swedish and the UK Governments all concluded that the DAA was in fact compatible with the Treaties (see: Opinion 2/13, paras. 108-109).

[18] Opinion 2/13, para. 191.

mental rights guaranteed by the EU.'[19] As the European Convention on Human Rights (ECHR) would (also) require EU Member States to examine the respect of fundamental rights by another EU Member State on the basis of the ECHR, while EU law requires mutual trust between the Member States, accession could undermine the 'balance on which the European Union is founded' and undermine the autonomy of EU law, and the DAA does not provide a solution for the avoidance of that situation.[20]

With regard to *Article 344* of the TFEU, the Court recalled that, according to its settled case law, international agreements concluded by the EU must not undermine the system of competences established by the Treaties and the autonomy of the EU legal order. [21] This principle is, inter alia, expressed in Article 344, according to which Member States undertake to settle disputes concerning the interpretation or application of the Treaties solely by means of the procedures provided for in the Treaties. According to the Court, the fact that Article 5 of the DAA states the proceedings before the Court of Justice are not a means of resolving disputes which the contracting parties have waived[22] under Article 55 of the ECHR and are not sufficient to preserve the exclusive jurisdiction of the Court of Justice. That provision merely limits the scope of the obligation under Article 55 of the ECHR, with the result that it remains possible for the European Union or the Member States to bring an action before the ECtHR on the[23] basis of Article 33 of the ECHR because of an alleged infringement of the ECHR bya Member State or by the European Union in relation to EU law, since that possibility infringes the Article 344 TFEU.[24] Article 344 and the autonomy and constitutional principles of EU law cannot be prejudiced by such an agreement.

As regards the *CFSP jurisdiction issue*, the starting point of Court of Justice was

[19] Opinion 2/13, para. 192.

[20] Opinion 2/13, paras. 194-195.

[21] Opinion 2/13, para. 201.

[22] Art. 55 of the ECHR concerns the exclusion of the settlement of disputes by other means: 'The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.'

[23] Art. 33 – Inter-State matters: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.'

[24] Opinion 2/13, paras. 207-208. According to the Court, the appropriate solution would be to expressly exclude, in the draft agreement, the jurisdiction of the ECtHR arising from Article 33 of the ECHR in disputes between EU Member States and between EU Member States and the EU concerning the application of the ECHR falling within the material scope of EU law (ibid, para. 213).

that it has only very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU and review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU. This means that certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice. The DAA, however, would have empowered the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, whereas the Court lacks such jurisdiction, entrusting judicial review to a non-EU institution. Yet according to the Court of Justice's case law, jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.[25]

It was with regard to all of the above that the CJEU concluded that the DAA was not compatible with Article 6 (2) TEU and Protocol No. 8.

IV. The renegotiated draft agreement

Since Opinion 2/13 was delivered on the basis of Article 218(11) TFEU, two options were possible which could allow for the continuation of accession: amending the EU Treaties themselves or preparing a new accession agreement – and as the first option was not on the agenda at all in this context, the EU chose the second option: following Opinion 2/13, the Member States meeting in the Council agreed on the need for a reflection period, while reaffirming their commitment to accession.[26] The Commission was tasked with analysing the obstacles set out in Opinion 2/13; the analyses were discussed in the Council Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) and invited the Commission to prepare proposals for the revision of the new Accession Agreement.[27] Both the Commission and the Council of Europe had confirmed that the intention to facilitate the EU's accession to the ECHR remains unchanged, yet no formal progress has been made for years.
Following an informal meeting in June 2020[28], accession negotiations were of-

[25] Opinion 2/13, paras. 250-258.

[26] Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17), 3.

[27] See: Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play, 3 and General Secretariat of the Council: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), 14639/18, 10 December 2018, 1.

[28] Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+ 1") on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020.

ficially resumed in September 2020.[29] The issues raised in Opinion 2/13 were grouped into "negotiation baskets" that required a solution.[30]

At its 18th meeting in March 2023, the Negotiating Group reached a provisional unanimous agreement to resolve the issues raised in Opinion 2/13, with the exception of the CFSP.[31] According to the Negotiating Group, the solutions proposed for baskets 1, 2 and 3 were in line with the general principles agreed by the Group, i.e. preserving equal rights of individuals and applicants, maintaining equality between all contracting parties (be they States or the EU) and preserving, as far as possible, the control mechanism of the ECHR, and ensuring that it applies to the EU in the same way as to all other parties.[32] At the same meeting, the EU informed the Negotiating Group that it intended to solve the CFSP issue 'internally', so that the Negotiating Group 'does not need to address this issue as part of its own work.' The Negotiating Group rightly noted that it would nevertheless be necessary for all participants in the accession negotiations to be properly informed of the way in which the EU intends to solve the problem of basket 4, which is a prerequisite for the conclusion by all parties of a final agreement on the accession of the EU; the EU has committed to inform the CDDH accordingly.[33]

The full analysis of the renegotiated draft agreement would go beyond the scope of this study, so, as above, we will confine ourselves to examining two selected issues: the CFSP jurisdiction problem and the CJEU's concerns with mutual trust.

4.1. The CFSP jurisdiction problem

With regard to the CFSP issue, in its initial position presented at the beginning of the negotiations, the Union stressed the need to find a solution reflecting the 'reflecting the EU internal distribution of competences for remedial action in

[29] The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission. Réf. DC 123(2020)

[30] Basket 1: the EU-specific mechanisms of the procedure before the European Court of Human Rights; Basket 2: the operation of inter-party applications (Art. 33 of the Convention) and of references for an advisory opinion (Protocol No. 16 to the Convention) in relation to EU Member States; Basket 3: the principle of mutual trust between the EU Member States; and Basket 4: EU acts in the area of the Common Foreign and Security Policy (CFSP) that are excluded from the jurisdiction of the CJEU. See Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms, 47+1(2020)01, 5 March 2020.

[31] 46+ 1(2023)35FINAL, 30 March 2023.

[32] ibid.

[33] ibid.

the allocation of responsibility for the EU acts at issue for the purpose of the ECHR system."[34] In a subsequent non-paper, the EU drew attention to the fact that in the meantime the CJEU has had the opportunity to reflect on the limitation of its competence in the CFSP and concluded that the limitation should be interpreted narrowly.[35] The EU pointed to the judgments in *Rosneft,*[36] *Bank Refah Kargaran*[37] and *Elitaliana Spa*[38] and *H*[39], which reflect the CJEU's position[40] that the general rule in the CFSP is not in fact the limited nature of the Court's jurisdiction: on the contrary, the Court assumes that, under Article 19 TEU, it has general jurisdiction to carry out judicial review, from which the limited powers provided for in the CFSP are exceptions – that logic is totally at odds with what a grammatical interpretation would suggest.[41]

During the relaunched negotiations, the EU proposed a solution that, at least in its own view, avoids the conflict of jurisdiction perceived by the CJEU (or, in other words, the challenge to the autonomy of the EU legal order) and at the same time avoids a gap in jurisdiction within the CFSP. Such a solution would be tantamount to introducing a "reattribution" rule applicable to CFSP acts. According to the solution proposed in March 2021, the EU should be able to allocate responsibility for an act adopted under the CFSP to one or more Member States where the act does not fall within the jurisdiction of the CJEU.[42] In

[34] European Union Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms. 47+ 1(2020)01, 5 March 2020, 5.

[35] Non-paper for the 7th meeting of the CDDH Ad Hoc Negotiation Group („47+1") on the Accession of the European Union to the European Convention on Human Rights <https://rm.coe.int/non-paper-basket-4-003-/1680a170ab>.

[36] Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236.

[37] Case C-134/19 P *Bank Refah Kargaran v Council* [2020] ECLI:EU:C:2020:793.

[38] Case C-439/13 P *Elitaliana Spa v Eulex Kosovo* [2015] ECLI:EU:C:2015:753.

[39] Case C-455/14 P *H v Council and Commission* [2016] ECLI:EU:C:2016:569.

[40] In the meantime, the CJEU has clarified that it interprets its jurisdiction in relation to the CFSP as covering not only annulment proceedings but also preliminary rulings on the validity of legal acts (*Rosneft*) and actions for damages (*Bank Refah Kargaran*) and introduced a 'centre of gravity' test for measures that could potentially be considered to fall within or outside the scope of the CFSP *(H.)*. Interestingly, in her View in Opinion 2/13, Advocate General Kokott argued that actions for damages do not fall within the limited CFSP jurisdiction of the Court of Justice and argued against a very broad interpretation of the relevant provisions of primary law [Case Opinion 2/13 *Opinion pursuant to Article 218(11)* [2014] EU:C:2014:2475, View of the Advocate General, paras. 89-95].

[41] Ramses A. Wessel, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' (2019) Presented at the workshop Contemporary Challenges to EU Legality, European University Institute, Florence, 6-7. <https://ris.utwente.nl/ws/portalfiles/portal/113162240/wesselconf19.pdf>

[42] 9th meeting of the CDDH ad hoc negotiation group ("47+ 1") on EU accession to the

practice, this would mean that acts for which the EU could not be held accountable by either the CJEU or the ECtHR would be 'reattributed' to one or more EU Member States by the Union. In essence, the concept would therefore not follow a classic approach of attribution of liability (adhesive to the conduct), but would shift the responsibility to an actor that is otherwise *not* responsible, in order to fill the accountability gap.

It should be noted that, following the agreement in the Ad Hoc Negotiating Group, the CJEU ruled on two further cases where it further refined and expanded its (increasingly less exceptional) jurisdiction in the CFSP. In Neves77, it ruled on the permissibility of preliminary rulings on interpretation in the CFSP.[43] In the joined cases KS and KD[44] it also took a permissive position on actions for damages vis-à-vis CFSP acts which are not individual sanctions, albeit limiting its statement by introducing a kind of 'EU poltical question doctrine', ruling out the CJEU's review of 'strategic or political decisions' in the context of the CFSP.[45] Of course, in the process of renegotiation so far, these two judgments could not yet have been relevant due to the time factor but will certainly be an additional point of reference for the EU in terms of the CJEU's ability to adequately guarantee the right to an effective remedy also in the CFSP.

With a reattributrion solution, the EU would deviate from the overall logic of attribution under international law[46]; however, the EU has not further clarified how or on what basis it would "redistribute" responsibility to some Member States in the situation outlined. Making the attribution of responsibility an internal issue could, in principle, make the situation of potential applicants easier (because they have an entity they can sue), yet the dogmatic background of such a concept is unclear, at least in the absence of official documents on the details.[47]

European Convention on Human Rights. Meeting Report 25 March 2021, p. 3.

[43] Case C-351/22 *Neves 77 Solutions SRL v Agenția Națională De Administrare Fiscală* [2024] ECLI:EU:C:2024:723.

[44] Joined Cases C-29/22 P and C-44/22 KS and KD v Council and Others [2024] ECLI:EU:C:2024:725.

[45] Ibid, para. 117. Cf. for the comparison with the political question doctrine: Thomas Verellen, 'A Political Question Doctrine for the CFSP: The CJEU's Jurisdiction in the KS and KD Case' (*Verfassungsblog,* 24 September 2024) <https://verfassungsblog.de/political-question-doctrine/> accessed 29 January 2025.

[46] The cornerstones of liability and attribution in international law are (primarily) the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) (GA Res. 56/83, 28 January 2002) and (albeit with a much more debated character) the Articles on the Responsibility of International Organizations (ARIO) (GA Res. 66/100 9 December 2011). Of course, international liability in itself raises numerous questions of interpretation and application.

[47] The representatives of the EU have themselves pointed out the difficulty of the issue or indeed finding an alternative solution. See: 13th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human

The sensitivity of the CFSP problem is illustrated by the fact that, among the numerous working documents submitted to the Ad Hoc Negotiation Group on accession, the document entitled 'Proposals by the European Union on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union' was one of the very few documents not publicly available.[48] Also, even in light of (especially) the KS and KD judgement, gaps in judicial review in the CFSP remain: apart from the aforementioned strategic or political decisions, the concept of factual *conduct* as a source of fundamental rights infringements seem to be absent from the CJEU's line of though as it focuses strongly on 'decisions'.[49]

4.2. The question of mutual trust

As we have seen, the fundamental problem for the CJEU regarding the principle of mutual trust was that the ECHR would require EU Member States (just like other ECHR states parties) to examine the respect of fundamental rights by other EU Member States under the Convention; if necessary, even by bringing state-vs.-state proceedings before the Strasbourg court. Rather interestingly, in *Aranyosi and Căldăraru*, the Court specifically emphasised, in the context of the EAW, that the authority of a Member State must concretely and precisely examine whether there are serious and substantiated grounds for believing that there is a breach of the Charter of Fundamental Rights in another Member State to which the person to be surrendered would actually be exposed – and, if the answer to that question is in the affirmative, postpone the decision on surrender and decide whether it is at all enforceable; the Court referred here specifically to the ECHR and the relevant case-law of the ECtHR.[50] However, regardless of the principle of mutual trust, it is clear that breaches of EU law or of EU fundamental rights by EU Member States are not at all exceptional cases, as – to name just one factor – the ECtHR often finds violations of human rights enshrined in the ECHR by EU Member States as well.[51]

During the renegotiation of the accession agreement, a number of possible approaches have been identified from a methodological point of view, i.e. that

Rights, CDDH46+1(2022)R13. pp. 7-8.

[48] See e.g. Report on the 13rd meeting of the CDDH CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, 46+1(2022)R13.

[49] Stian Øby Johansen, 'The (Im)possibility of a CFSP "Internal Solution"' (2024) 9 European Papers, 797.

[50] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, para. 92.

[51] Nuala Mole, 'Can Bosphorus be maintained?' (2015) ERA Forum 467, 479

(1) there should be a provision referring to the issue of mutual trust in the draft agreement, (2) there should be no explicit provision, (3) an attached declaration should address the issue, or (4) the issue should only be addressed in the explanatory report annexed to the draft; in the end, a substantive provision was inserted into Article 6 of the new draft, its Preamble and the Explanatory Report also mention the issue.[52]

The wording of the substantive provision has changed significantly as compared to the originally proposed one. Initially, the CDDH Secretariat tabled the following text for adoption: "Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust in the context of mutual-recognition mechanisms within the European Union provided that such application is not automatic and mechanical to the detriment of human rights in an individual case. [53] That version was designed to take into account the relevant case-law of the ECtHR[54] and, in addition to the declared general rule, provided for the possibility of a derogation, which was in essence no different from what the CJEU postulated in *Aranyosi and Caldararu*. Yet the provision was significantly diluted in the new draft[55], mainly due to the insistence of the EU representatives: according to the new version: 'Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.'[56] The reference to the automaticity of mutual recognition resulting from mutual trust as a potential risk to fundamental rights was omitted and replaced by a general reference to the ECHR. The specific reference to its case-law has been relocated to the explanatory report[57], which may be relevant to the interpretation but has no legal binding effect. It is not difficult to see in this solution a fear that the CJEU would once again give a negative

[52] Eleonora Di Franco and Mateus Correia de Carvalho, 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?' (2023) 8 European Papers 1221, 1223.

[53] 10th Meeting of the CDDH Ad Hoc Negotiation Group ("47+ 1") on the Accession of the European Union to the European Convention on Human Rights 47+1(2021)8, 8 June 2021. <https://rm.coe.int/cddh-47-1-2021-8eng/1680a2da31> accessed 29 January 2025.

[54] *Avotiņš v. Latvia* App no. 17502/07 (ECtHR, 23 May 2016); *Bivolaru and Moldovan v. France* App nos. 40324/16 and 12623/17 (ECtHR, 25 March 2021).

[55] EU negotiators referred, *inter alia*, to the fact that the original proposal would unnecessarily limit the further development of rights by the CJEU in the area of mutual trust. See Di Franco and de Carvalho (n 49) 1224.

[56] 18th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights, 46+ 1(2023)36, 17 March 2023. <https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd> accessed 29 January 2025.

[57] Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, para. 88.

opinion regarding an accession instrument that takes a 'harder' stance.[58]

V. Concluding remarks

The broadly interpreted 'procedure of accession' has been a legal and political process spanning decades taking a number of less expected turns. With the provisional text of the renegotiated draft agreement adopted in 2023, the EU and the Council of Europe are both trying to close these much-discussed issues. However, as demonstrated by the analysis of just two selected issues, a successful closure is not absolutely guaranteed.

As regards the CFSP issue, if the redistribution described above will be governed solely by the internal rules of the Union, the EU will not be in the same position as the other Contracting Parties[59] and would in part weaken the external judicial review carried out by the ECtHR (one could also say partly: it would eliminate it in part), as the ECtHR ultimately would not have jurisdiction to decide to whom responsibility should be attributed.[60]

Moreover, the internalisation of the question of the CFSP issue could have negative consequences for applicants, as it may complicate and/or draw out access to justice, adversely affecting the right to an effective remedy (as enshrined in the Charter of Fundamental Rights).[61] Furthermore, it is far from certain whether the internal reattribution of responsibility (or whatever it will finally be called) within the EU, to the exclusion of the ECtHR, will be acceptable as a prospective solution for non-EU states parties to the ECHR (or even for some

[58] Di Franco and de Carvalho, (n 49) 1232-1233.

[59] Yet this was one of the stated principles for the drafting of the original draft accession agreement (see: Steering Committee for Human Rights: Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights. CDDH(2011)009, p. 16. This principle is also the strongest argument against maintaining the Bosphorus presumption following the eventual accession. See: Leonard F.M. Besselink, 'Should the European Union ratify the ECHR?' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), Co*nstituting Europe. The European Court of Human Rights in a National, European and Global Context* (CUP 2013), 310-312. Even without the presumption, many believe that the EU would have been in a privileged position under the original draft accession agreement [see e.g. Korenica Fisnik, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015), 99-100] – the same is true regarding the revised agreement.

[60] Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and Hard Place?' in Christine Kaddous, Yuliya Kaspiarovich, Nicolas Levrat and Rasmes Wessel (eds), *The EU and its Member States' Joint Participation in International Agreements* (Hart 2022) 248.

[61] ibid 247.

EU Member States).[62] The most recent CJEU judgments in the field of CFSP (Neves77 and KS and KD) throw some new light on the issue of judicial review, but one cannot but wonder whether an almost purely case-law based solution is the most ideal one, bearing in mind the principle of legal certainty and foreseeability among other things.[63] That being said, a modification of the EU Treaties in this context does not seem to be on the agenda.

The provision in the new draft agreement aimed at resolving the issue of mutual trust could be seen as potentially only sweeping the problem under the carpet rather than actually solving it.[64] Of course, as regards certain rights (see e.g. Article 3 of the ECHR and Article 4 of the Charter), there is a clear convergence of interpretation and practice in the jurisprudence of the two European courts, but this conclusion cannot be stated with certainty in general for all fundamental rights potentially affected – therefore, the mutual trust provision in the new draft does not adequately serve or guarantee the convergence of fundamental rights between the courts of Luxembourg and Strasbourg.[65]

Of course, it is unsure at the moment how and when the accession process will formally proceed at all: indeed, no formal progress has been made since spring 2023, which is understandable to the extent that the new set of rules would only be complete with the EU's internal regulatory solution on the CFSP issue, but the latter remains unavailable.[66]

[62] As regards the overall perspective of non-EU states, see Alain Chablais, 'EU Accession to the ECHR: The non-EU Member State Perspective' (2024) 9 European Papers 715.

[63] The CJEU regards the principle of legal certainty as a general principle of EU law. See e.g. Jérémie Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 European Law Review 275.

[64] Di Franco and de Carvalho, (n 49) 1232.

[65] ibid 1233.

[66] Thomas Giegerich, 'The Rule of Law, Fundamental Rights, the EU's Common Foreign and Security Policy and the ECHR: Quartet of Constant Dissonance?' (2024) 27 Zeitschrift für Europarechtliche Studien 590, 627. According to Giegerich, the Union should 'take the risk' and ask the CJEU for an opinion on the new draft agreement in its current form.