



Reports of Cases

VIEW OF ADVOCATE GENERAL
KOKOTT
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Opinion procedure 2/13

initiated following a request made by the European Commission

(Conclusion of international agreements by the European Union — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) — Preservation of the specific characteristics of the European Union and EU law — Maintaining the competences of the European Union and the powers of its institutions — Participation of the European Union in the bodies established by the international agreement — Recognition of the jurisdiction of the European Court of Human Rights (ECtHR) — Effective legal protection in the common foreign and security policy)

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¹ – Original language: German.

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I – Introduction

1. The proposed accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms² (ECHR) is intended to lead to greater effectiveness and homogeneity in the observance of fundamental rights in Europe. Above all, however, as a result of this accession, the EU itself will be subject to a form of external control as regards compliance with basic standards of fundamental rights that has long been widely called for. In this way, the EU will ultimately allow the same rules to apply to itself as those which, time and again, it requires current and prospective Member States to accept.

2. It is not only the resounding political signal it sends but also its constitutional significance that makes the proposed accession to the ECHR a project of the utmost importance. Over the decades, European institutions have been occupied with this project time and again; indeed, the Court of Justice is now considering the legal aspects of the proposal for the second time.³

3. Since the entry into force of the Treaty of Lisbon, it has been clear from Article 6(2) TEU⁴ that not only does the EU have the power to accede to the ECHR, but it has been placed under an obligation by the Member States to follow that path. Ever since, the aim of acceding to the ECHR has had constitutional status within EU law.

4. The devil is, however, as so often, in the detail. Under what conditions may the EU accede to the ECHR, and how can it be guaranteed that such accession will not affect the specific features of EU law, the competences of the EU and the powers of its institutions? These are, in essence, the legal issues which, at the request of the European Commission, the Court must address in the present Opinion procedure. It will therefore be a matter of subjecting the ‘small print’ of the proposed accession to a thorough assessment as to its compatibility with the founding Treaties of the Union. This assessment will be based on the ‘Draft revised agreement on ... accession’, as submitted to the Steering Committee for Human Rights, as the competent body of the Council of Europe, by the negotiators in Strasbourg in June 2013.

II – Progress of the accession process to date

5. On 4 June 2010, upon the recommendation of the Commission of 17 March 2010, the Council of the European Union authorised the opening of negotiations for the EU’s accession to the ECHR, designated the Commission as negotiator and issued guidelines for the negotiations.

6. The accession negotiations took place within the institutional framework of the Council of Europe, specifically in two successive working groups mandated by the Committee of Ministers of the Council of Europe. In addition to the Commission, interested Member States of the Council of Europe took part in the negotiations, some of them members of the EU, others not.

7. In June 2013, the final report on the negotiations⁵ was submitted to the Council of Europe’s Steering Committee for Human Rights; in addition to the revised draft of an accession agreement,⁶ the final report also included a number of other draft legal instruments, namely a draft declaration by the EU to be made at the time of signature of the accession agreement, a draft rule to be added to the

2 — Signed in Rome on 4 November 1950.

3 — When it first dealt with this subject, the Court, it will be recalled, found on 28 March 1996 that the then European Community had no competence to accede to the ECHR (Opinion 2/94, EU:C:1996:140, paragraph 36 and operative part).

4 — This provision is modelled on Article I-9(2) of the failed Treaty establishing a Constitution for Europe (signed in Rome on 29 October 2004, OJ 2004 C 310, p. 1).

5 — Final report to the Steering Committee for Human Rights (*Rapport final au CDDH*), Document No 47 + 1(2013)008 rev2, presented in Strasbourg on 10 June 2013; ‘the final report’.

6 — Hereinafter, ‘the draft agreement’.

Rules of the Committee of Ministers, a draft model of a memorandum of understanding between the EU and State party X, and a draft explanatory report to the accession agreement.⁷ The negotiators are agreed that these documents all form a package and are equally necessary for the accession of the EU to the ECHR.⁸

III – The Commission’s request for an Opinion of the Court

8. In view of the constitutional significance of the EU’s proposed accession to the ECHR and to ensure legal certainty, the Commission, by an application dated 4 July 2013, sought the opinion of the Court of Justice pursuant to Article 218(11) TFEU on the following question:

‘Is the draft agreement providing for the accession of the European Union to the [European] Convention for the protection of Human Rights and Fundamental Freedoms compatible with the Treaties?’

9. The Commission’s request for an Opinion was accompanied by the draft agreement and all the other draft legal instruments referred to in point 7 above. Regrettably, however, these documents are available only in French and English.

10. The Commission’s request for an Opinion was the subject of written submissions to the Court of Justice and a hearing on 5 and 6 May 2014. In addition to the Commission as applicant, the Council of the European Union, the European Parliament, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Cyprus, Latvia, Lithuania, Hungary, the Netherlands, Austria, Poland, Portugal, Romania, Slovakia, Finland, Sweden and the United Kingdom of Great Britain and Northern Ireland participated in the written procedure. With the exception of Bulgaria and Poland, these participants in this Opinion procedure also made oral submissions, and Belgium and Italy were additionally represented at the hearing.

IV – Legal framework

11. The legal framework for the accession of the EU to the ECHR is derived from Article 6 TEU, Protocol No 8 to the TEU and to the TFEU (Protocol No 8),⁹ and a declaration on Article 6(2) TEU¹⁰ (Declaration No 2).

12. Article 6 TEU provides as follows:

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

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

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

7 — Hereinafter, ‘the explanatory report’.

8 — Paragraph 9 of the final report.

9 — Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

10 — Declaration No 2 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

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

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

13. Protocol No 8 is worded as follows:

Article 1

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

- (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

Article 2

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

Article 3

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

14. In Declaration No 2, the Intergovernmental Conference which adopted the Treaty of Lisbon moreover stated the following:

'The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.'

15. Reference must also be made to Article 52(3) of the Charter of Fundamental Rights:

'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

V – Admissibility of the request for an Opinion

16. A number of the participants in this procedure expressed particular doubts about the admissibility of the request for an Opinion. Their criticism relates to the Commission's remarks regarding the internal measures envisaged at EU level for the implementation of accession to the ECHR. While some participants object to the fact that the Commission is commenting on this subject at all, others take the view that the Commission's remarks do not go far enough.

17. In accordance with Article 218(11) TFEU, opinions of the Court of Justice as to whether envisaged international agreements (that is agreements or conventions under international law) are compatible with the Treaties may be obtained by the Parliament, the Council, the Commission or a Member State. The Opinion procedure has the aim of forestalling complications which would result from legal disputes that might arise subsequently concerning the compatibility with EU primary law of international agreements binding upon the EU.¹¹

18. The Opinion procedure under Article 218(11) TFEU may concern an 'agreement envisaged', provided the Court has sufficient information on the actual content of that agreement.¹²

19. In the present case, the Commission has submitted the full text of the draft agreement and its accompanying documents to the Court. Taken together, these documents show clearly and unequivocally the arrangements by which the EU's accession to the ECHR is to proceed, in particular, the arrangements by which the EU envisages submitting to the judicial control mechanisms of the ECHR.¹³ This information is sufficient for the purposes of assessing the compatibility with the Treaties of the proposed accession to the ECHR.

20. The fact that the Commission did not, in the course of this procedure, provide the Court with any draft measures for the implementation of the proposed accession agreement within the EU does not preclude the admissibility of its request for an Opinion, since the Opinion procedure is concerned only with the proposed accession agreement as such, not the internal implementing measures that may be required. Information about the internal implementing measures envisaged is not necessary for an understanding of the content and scope of the draft agreement and its accompanying documents.

21. Nor does the fact that the participants in this procedure currently disagree as to the legal form the internal implementing measures should take, and as to their content, prevent the Court from assessing the compatibility of the draft agreement with the Treaties. Given that the Court has not previously required the institutions concerned to have reached final agreement as regards the specific content of an envisaged international agreement,¹⁴ it certainly cannot make the admissibility of the request for an Opinion in this case contingent on the agreement of the institutions concerned as to the precise configuration of any internal implementing measures at EU level.

11 — Opinion 2/94 (EU:C:1996:140, paragraph 3); Opinion 1/08 (EU:C:2009:739, paragraph 107); and Opinion 1/09 (EU:C:2011:123, paragraph 47).

12 — Opinion 2/94 (EU:C:1996:140, paragraphs 20 to 22) and Opinion 1/09 (EU:C:2011:123, paragraph 49).

13 — See also Opinion 2/94 (EU:C:1996:140, paragraph 20).

14 — Opinion 1/09 (EU:C:2011:123, paragraph 55).

22. Bearing in mind the principle of institutional balance, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions¹⁵ (see also Article 13(2) TEU), it cannot, moreover, be the task of the Court in the present Opinion procedure to impose on the competent institutions, at this stage, comprehensive and detailed substantive requirements with regard to measures for the implementation of the proposed accession agreement within the EU.

23. Should it transpire, in the course of the substantive assessment of the draft agreement, that the adoption of certain internal implementing measures is absolutely essential to the entry into force of that agreement, the Court can include this in its reply to the Commission's request for an Opinion, as a condition of the compatibility with the Treaties of the proposed accession agreement.

24. All in all, however, the Commission's request for an Opinion is admissible, regardless of any disagreements between the participants in this procedure concerning the specific content of internal implementing measures which have yet to be adopted.

VI – Substantive assessment

A – Preliminary remark

25. The proposed accession of the EU to the ECHR will create a special, possibly even unique, constellation in which an international, supranational organisation — the EU — submits to the control of another international organisation — the Council of Europe — as regards compliance with basic standards of fundamental rights. As a result, in areas governed by EU law, not only national courts and tribunals and the EU Courts, but also the European Court of Human Rights (ECtHR) will be called upon to oversee the observance of fundamental rights.

26. In order to ensure that the accession of the EU to the ECHR is organised in accordance with applicable EU primary law, the delegations to the negotiations have incorporated a series of provisions in the draft agreement. Contrary to what is sometimes assumed, this will not mean that the EU receives favourable treatment, for example, vis-à-vis other contracting parties to the ECHR. The proposed provisions are intended rather to take into account the specific situation of the EU and its Member States, which is characterised inter alia by the fact that EU matters frequently involve the complex interaction of EU and Member States' acts and responsibilities; in particular, the Member States are as a general rule involved in the implementation of EU law.

27. It is clear that this special, complex situation regarding the protection of fundamental rights needs to be taken into consideration by putting in place appropriate arrangements. Particular mention must be made of three innovations provided for in the draft agreement, concerning determination of the EU's responsibility, the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice.

28. As regards, first of all, the *responsibility of the EU* for a violation of the ECHR, the first sentence of Article 1(3) of the draft agreement makes clear that accession to the ECHR is to impose on the EU obligations with regard only to acts, measures or omissions of its own institutions, bodies, offices or agencies, or of persons acting on their behalf. The second sentence of Article 1(3) of the draft agreement further provides that nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law. Lastly, it is made clear in the first sentence of Article 1(4) of the draft agreement that acts, measures or omissions of

15 — Judgments in *Parliament v Council* (C-70/88, EU:C:1990:217, paragraph 22) and *Parliament v Council* (C-133/06, EU:C:2008:257, paragraph 57); also Opinion 1/09 (EU:C:2011:123, paragraph 55).

organs of a Member State or of persons acting on its behalf are to be attributed to that State, even if such acts, measures or omissions occur in the implementation of EU law, including decisions taken under the EU Treaty and under the FEU Treaty. However, according to the second sentence of Article 1(4) of the draft agreement, in such cases the EU may be responsible for a violation of the ECHR as a co-respondent, together with the Member State(s) concerned.

29. Under the new *co-respondent mechanism* provided for in Article 3 of the draft agreement — sometimes also described as ‘additional respondent mechanism’ — it is possible, in certain cases, for both the EU and one or more of its Member States to be respondents together, and thus an equal *party* to proceedings before the ECtHR, even if the applicant’s complaint was directed only against the EU or only against one or more of its Member States. In accordance with the second sentence of Article 1(4) of the draft agreement, that applies in particular where acts, measures or omissions of the authorities of a Member State occur when EU law is implemented.

30. The *prior involvement procedure* under Article 3(6) of the draft agreement is closely linked to the co-respondent mechanism. This procedure, sometimes also described as ‘prior internal review procedure’, is to enable the Court of Justice to rule on the compatibility of EU law with the ECHR, in a case initiated before national courts or tribunals which has never been the subject of a preliminary ruling procedure pursuant to Article 267 TFEU,¹⁶ prior to the ECtHR reaching a decision in the case.

31. Whether this and other innovations provided for in the draft agreement are capable of ensuring that the EU’s accession to the ECHR is compatible with the Treaties will need to be examined in the present Opinion procedure. It is appropriate in that respect, in line with the structure adopted in the Commission’s request for an Opinion, to go, step by step, through the various legal requirements to which the accession agreement is subject under EU primary law. The provisions governing the responsibility of the EU as well as the co-respondent mechanism and prior involvement procedure will thus become relevant in the most diverse contexts. The issues to be examined below are, in particular:

- whether the competences of the EU are maintained (Part A);¹⁷
- whether the powers of the EU institutions remain unaffected (Part B);¹⁸
- whether the specific characteristics of the EU and of EU law are preserved (Part C);¹⁹
- whether the necessary arrangements have been made for the participation of the EU in the control bodies of the ECHR (Part D);²⁰ and
- whether due account has been taken of the situation of Member States in relation to the ECHR (Part E).²¹

16 — This may in some cases be attributable to an infringement of the obligation of courts of last instance to make a reference, as provided for in the third paragraph of Article 267 TFEU, but may equally be based on one of the three exceptions to the obligation to refer which this Court has recognised in its *CILFIT* case-law (see, by way of first precedent, the judgment in *Cilfit and Others*, 283/81, EU:C:1982:335).

17 — Points 33 to 104 of this View.

18 — Points 105 to 156 of this View.

19 — Points 157 to 236 of this View.

20 — Points 237 to 248 of this View.

21 — Points 249 to 279 of this View.

32. Particular attention should also be paid to the question whether recognition of the jurisdiction of the ECtHR is compatible with the autonomy of EU law,²² and whether judicial scrutiny of the activities of the EU in the context of its common foreign and security policy (CFSP) meets the requirements of effective legal protection for the purposes of Articles 6 and 13 ECHR.²³

B – *Maintaining the competences of the EU*

33. In accordance with the second sentence of Article 6(2) TEU, the accession of the EU to the ECHR is not to affect the EU's competences as defined in the Treaties.

34. A fundamental concern of the Member States is given expression in this provision and is a common thread running throughout the Treaty of Lisbon: the development of fundamental rights protection at European level — whether through the Charter of Fundamental Rights or accession to the ECHR — should not lead to any distortions in the finely calibrated system of competences on which the EU is founded and which characterises its relationship with the Member States.²⁴

35. Ultimately, the second sentence of Article 6(2) TEU is intended to ensure that the EU's accession to the ECHR does not have the effect of circumventing the procedure for amending the Treaties (Article 48 TEU), and thus of interfering with the 'constitutional charter' of the EU.²⁵

36. The need for the proposed accession agreement to be ratified by all the Member States of the EU (see the second part of the second subparagraph of Article 218(8) TFEU) does not in any way mean that its provisions could depart from EU primary law. Rather, the EU may conclude an international agreement such as the proposed accession agreement only if, and in so far as, the agreement is compatible with the Treaties. If it is not compatible, the Treaties must be expressly amended at EU level before the international agreement can be concluded.²⁶ The EU institutions are on no account permitted to engage in a tacit breach of EU primary law ('treaty override'),²⁷ even if the Member States were to offer the EU a helping hand in that respect in the context of the negotiation and ratification of the international agreement.

37. Against that background, it is necessary in this Opinion procedure to examine whether the proposed accession agreement has the effect of curtailing the EU's competences (see section 1 below) or extending the EU's competences (see section 2 below), thereby infringing the EU Treaty or the FEU Treaty. In addition, it is necessary to consider whether the obligations which the EU would assume on concluding the accession agreement might make it necessary for new competences to be conferred on it (see section 3 below).

1. No curtailment of the competences of the EU as a result of accession

38. First of all, in accordance with the second sentence of Article 6(2) TEU, it is necessary to ensure that the competences of the EU are not curtailed by its accession to the ECHR. This is emphasised also in the first sentence of Article 2 of Protocol No 8, according to which the accession agreement is to ensure that accession to the ECHR 'shall not affect' the competences of the EU.

22 — See points 162 to 196 and, specifically in relation to the CFSP, points 185 to 194 of this View.

23 — See points 82 to 103 of this View.

24 — See the second subparagraph of Article 6(1) TEU and Article 51(2) of the Charter of Fundamental Rights, which ultimately reproduce the content of the second sentence of Article I-9(2) and Article II-111(2) of the Treaty establishing a Constitution for Europe.

25 — See, to this effect, Opinion 2/94 (EU:C:1996:140, paragraph 35, last sentence).

26 — This principle is given expression, inter alia, in the second sentence of Article 218(11) TFEU.

27 — See, to this effect, also the judgment in *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285), according to which the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Treaties.

39. There is nothing in the draft agreement or in the accompanying documents laid before the Court in this Opinion procedure that might indicate a curtailment of the competences of the EU in the context of its accession to the ECHR. Nor were there any indications to that effect in the observations of the participants in this procedure.

40. There is no doubt that being bound by the ECHR under international law will impose restrictions on the EU in the *exercise* of its existing competences; as an international agreement concluded by the EU, the ECHR becomes binding on the EU institutions once accession takes place (Article 216(2) TFEU).

41. Such restrictions in the exercise of competences are, however, in the nature of any rules guaranteeing fundamental rights, for it is the intrinsic function of fundamental rights to set boundaries in respect of the actions of national and international institutions, in order to protect the individual. The mission set out in the first sentence of Article 6(2) TEU — to accede to the ECHR — would be rendered meaningless if the EU were not in a position to accept the restrictions arising from the ECHR with regard to the exercise of its competences.

42. In any case, the EU is already (that is to say, before its formal accession) applying the standards of fundamental rights protection that flow from the ECHR; therefore, viewed purely in terms of their substance, the restrictions on the exercise of the competences of the EU institutions that may in future result from being a party to the ECHR already apply (see, in particular, Article 6(3) TEU and the first sentence of Article 52(3) of the Charter of Fundamental Rights).²⁸

43. On balance, therefore, no curtailment of the competences of the EU, for the purposes of the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8, is to be feared as a result of the proposed accession of the EU to the ECHR.

2. No extension of the competences of the EU as a result of accession

44. Next, it is necessary to consider whether the proposed accession to the ECHR as such can have the effect of in any way extending the existing competences of the EU. This too would be prohibited in accordance with the second sentence of Article 6(2) TEU.

45. Ultimately, the aim of prohibiting the extension of the competences of the EU, as provided for by the second sentence of Article 6(2) TEU, is to safeguard the principle of conferral. As is well known, under this principle, the EU is to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein (first sentence of Article 5(1) and first sentence of Article 5(2) TEU), and competences not conferred upon the EU in the Treaties remain with the Member States (Article 4(1) TEU and second sentence of Article 5(2) TEU).

46. In its first Opinion on accession to the ECHR, the Court had already established that no provision of the then EC Treaty conferred on the EU institutions any general power to enact rules on human rights or to conclude international conventions in this field.²⁹ In that respect nothing has changed following the subsequent changes in EU primary law up to and including the Treaty of Lisbon. The EU still does not have a general competence in the field of fundamental and human rights. Accordingly, it may not acquire such a competence by virtue of its accession to the ECHR either.³⁰

28 — See also, to this effect, the earlier case-law of this Court, in particular, the judgments in *Hauer* (44/79, EU:C:1979:290, paragraphs 15 and 17); *Johnston* (222/84, EU:C:1986:206, paragraph 18); and *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461, paragraph 283).

29 — Opinion 2/94 (EU:C:1996:140, paragraph 27).

30 — Point 2 of the 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; Doc. P7_TA(2010)0184 (2009/2241/INI) ('the 2010 Parliament resolution').

47. Any fears that the proposed accession to the ECHR might result in such an extension of the EU's competences are unfounded, however. On the contrary, numerous statements in the draft agreement and its accompanying documents indicate that the drafters of those documents were striving to dispel outright precisely those concerns.

48. In particular, both the second sentence of Article 1(3) and Article 1(4) of the draft agreement ensure that, in the event of the EU's accession to the ECHR, the delimitation of competences and responsibilities as between the EU and its Member States is maintained as provided for in EU primary law.

49. First, the second sentence of Article 1(3) of the draft agreement makes clear that nothing in the ECHR or the protocols thereto is to require the EU to perform an act or adopt a measure for which it has no competence under EU law. This provision serves to ensure that the EU is not, by virtue of being a party to the ECHR, required to do anything which it does not have the power to do under EU law.

50. Secondly, it follows from Article 1(4) of the draft agreement that no acts, measures or omissions of the Member States of the EU are to be attributed to the EU, even when the Member States implement EU law.

51. From time to time, the question arises whether the EU's participation in the control bodies of the ECHR as provided for in the draft agreement could result in the extension of the EU's competences. That is not the case, however. The participation of the EU in the control bodies of the ECHR does not mean that the EU has in any way to act beyond the competences conferred on it in the EU Treaty and the FEU Treaty. In fact, EU primary law expressly provides for the EU's participation in the Strasbourg institutions, whether that entails participating in particular decisions of the Parliamentary Assembly and the Committee of Ministers or selecting candidates for the office of judge at the ECtHR (see Article 1(a) of Protocol No 8).

52. As regards, specifically, supervision of the execution of final judgments of the ECtHR (Article 46(2) to (5) ECHR) and of the execution of the terms of friendly settlements (Article 39(4) ECHR) by the Committee of Ministers, the participation of the EU in that body cannot be limited only to those cases which concern the EU itself or its Member States when they implement EU law. On the contrary, the very purpose of external control such as that established under the ECHR is that each contracting party to the ECHR is involved in the supervision of cases that fall within the sphere of responsibility of one or more other contracting parties. The full participation of the EU in this system of mutual supervision is in keeping with the spirit of external control that underpins the ECHR, and accordingly falls directly within the scope of the mission set out in the first sentence of Article 6(2) TEU: to accede to the ECHR.

53. Nor, it must be observed, lastly, does the proposed accession agreement prejudice the question whether, and under what circumstances, the EU has competence to accede to other international agreements for the protection of fundamental and human rights, including existing or future protocols to the ECHR. From the Council of Europe's perspective, the proposed amendment of Article 59(2) ECHR³¹ is such that the draft agreement merely gives the EU — in international law — the possibility of acceding to ECHR protocols other than the first and sixth, which it is already required to adopt. In order for accession to those other protocols to proceed however, special instruments of accession are required,³² the ratification of which within the EU is, in turn, governed by the procedure referred to in the second sentence of the second subparagraph of Article 218(8) TFEU.

31 — See the first subparagraph of Article 1(2) of the draft agreement.

32 — See also paragraph 17 of the explanatory report.

54. Admittedly, one might ask oneself whether, on the basis of what is known as the ‘ERTA doctrine’,³³ the EU will acquire exclusive competence to conclude further international agreements in the field of fundamental and human rights as soon as it accedes to the ECHR. After all, on the EU’s accession, the ECHR will become an integral part of the EU legal order.³⁴ It would thus theoretically be possible to argue that, by virtue of its accession to the ECHR, the EU is acquiring a new exclusive external competence in accordance with the last variant in Article 216(1) TFEU in conjunction with Article 3(2) TFEU, an external competence which permits the EU alone to conclude future international agreements in so far as such agreements would be likely to affect the provisions of the ECHR as part of the ‘common rules’ applying within the EU or to alter them in their scope of application. In my view, such an ‘ERTA effect’ is, however, precluded by the second sentence of Article 6(2) TEU as *lex specialis*, according to which accession to the ECHR is not to affect the EU’s competences as defined in the Treaties, that is to say, its competences *existing before* accession.

55. Against that background, all in all, there can be no question of the proposed accession to the ECHR having the effect of somehow extending the competences of the EU.

3. No need for new competences for the EU in consequence of accession

56. Lastly, it is necessary to clarify whether the accession to the ECHR requires additional competences to be transferred to the EU by its Member States.

57. As matters stand, this question certainly cannot be given a definitive and binding answer, since it is not inconceivable that a provision of the ECHR could in the future be interpreted by the ECtHR in such a way that an amendment of EU primary law would be required.

58. Admittedly such a scenario may be highly unlikely, given that the EU is already guided by the standards of fundamental rights protection that flow from the ECHR (see in particular Article 6(3) TEU and the first sentence of Article 52(3) of the Charter of Fundamental Rights), and, moreover, the second sentence of Article 1(3) of the draft agreement makes clear that the ECHR does not impose any obligations on the EU which it would lack the competence under EU law to fulfil.

59. However, it is the task of this Court in the present Opinion procedure to ensure that the EU does not, in acceding to the ECHR as proposed, knowingly assume obligations under international law which it is clearly, even now, unable to fulfil on account of its existing institutional framework.

60. In that context, there are three aspects of the EU’s proposed accession to the ECHR that merit closer analysis: first, the prior involvement procedure (see (a) below); secondly, the duty to implement judgments of the ECtHR in which a violation of the ECHR is found (see (b) below); and, thirdly, the issue of legal protection in the CFSP (see (c) below).

a) The prior involvement procedure

61. Article 3(6) of the draft agreement provides for the prior involvement procedure. According to that provision, in proceedings pending before the ECtHR, the ECtHR is, under certain conditions, to afford the Court of Justice the opportunity to make prior observations on the compatibility with the ECHR of a provision of EU law.

33 — The ERTA doctrine stems from the judgment in *Commission v Council* (22/70, EU:C:1971:32, paragraphs 15 to 19); a more recent summary can be found, for example, in Opinion 1/03 (EU:C:2006:81, paragraphs 114 to 133).

34 — Judgments in *Haegeman* (181/73, EU:C:1974:41, paragraph 5); *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraph 36); and *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 73).

62. At EU level, this means that the EU must have the necessary competences to introduce such a prior involvement procedure. The EU would be prevented from concluding the accession agreement if it were clear that, internally, the legal conditions for its establishment of a prior involvement procedure were not satisfied.

63. Individual doubts have in fact been raised in the public debate on the EU's accession to the ECHR as to whether the prior involvement procedure can be put in place without any prior amendment of the founding Treaties of the EU. In the present Opinion procedure, Poland, in particular, expressed the view that, as matters stand, the establishment of a prior involvement procedure is not compatible with the Treaties.

64. It is true that the prior involvement procedure is not among those judicial procedures expressly provided for in the EU and FEU Treaties that are within the remit of the institution that is the Court of Justice of the EU (first sentence of Article 19(1) TEU). This circumstance alone does not, however, justify the conclusion that primary law, as it currently stands, precludes the establishment of a prior involvement procedure.

65. The Court of Justice has recognised that an international agreement concluded with third countries may even confer new judicial powers on the Court, provided that in so doing it does not change the essential character of the function of the Court as conceived in the EU and FEU Treaties.³⁵

66. It is doubtful whether the prior involvement provided for in Article 3(6) of the draft agreement does in fact constitute a *new competence* of the Court of Justice at all; it is certainly arguable that the prior involvement of the Court in proceedings pending before the ECtHR merely represents a new means of exercising the existing judicial powers of the Courts of the EU in accordance with the second sentence of Article 19(1) and Article 19(3) TEU.

67. Even if it were to be assumed, however, that the prior involvement procedure represented the creation of a new competence for this Court, it would not in any event be a competence that would *change* the *essence* of the function of the Court provided for in the Treaties. On the contrary, the prior involvement procedure helps to ensure that the Court is better able to fulfil the task that has always been entrusted to it, and that, moreover, its monopoly — at least in the field of communitarised policies — of reviewing the legality of acts of the institutions, bodies, offices or agencies of the EU is preserved.³⁶

68. In essence, the Court is responsible for ensuring that in the interpretation and application of the Treaties the law is observed (second sentence of Article 19(1) TEU). To that end it is incumbent on the Court, in particular, to interpret EU law (points (a) and (b) in the first paragraph of Article 267 TFEU) and to review the acts of the institutions, bodies, offices or agencies of the EU as to their legality (first paragraph of Article 263 TFEU and point (b) in the first paragraph of Article 267 TFEU).

69. It is envisaged that the Court will, in essence, have the same function — interpreting EU law and reviewing the legality of the acts of the institutions, bodies, offices or agencies of the EU — in the prior involvement procedure provided for in Article 3(6) of the draft agreement.

70. The procedural framework within which the Court is to perform that function in the event of such prior involvement may of course differ from that of an action for annulment or the preliminary ruling procedure (Articles 263 TFEU and 267 TFEU). In particular, there may be differences in relation to entitlement to bring an action, the conduct of proceedings, any time-limits to be observed and the effects of the Court's decision.

35 — Opinion 1/92 (EU:C:1992:189, paragraph 32) and Opinion 1/09 (EU:C:2011:123, paragraph 75).

36 — See, to this effect, Opinion 1/00 (EU:C:2002:231, paragraph 24).

71. Such differences alone do not serve to change the essential character of the powers of the Court or of other EU institutions that may be involved in the prior involvement procedure; in any event, it is not affected to such an extent as would justify declaring the accession agreement incompatible with the Treaties.³⁷

72. Instead, as the Court itself has emphasised, a prior involvement procedure is one of the essential prerequisites for any accession of the EU to the ECHR.³⁸ The establishment of such a procedure serves to preserve the specific characteristics of the EU and EU law, as well as the powers of the Court of Justice (Article 1 and first sentence of Article 2 of Protocol No 8).³⁹

73. Such a procedure is thus a necessary component of the measures required in respect of this accession, measures which the EU is not only empowered but also obliged, by virtue of the first sentence of Article 6(2) TEU and Protocol No 8, to introduce. It is, moreover, expressly provided in Article 1(a) of Protocol No 8 that such 'specific arrangements for the Union's possible participation in the control bodies' of the ECHR will be established.

74. At EU level, the actual details of the prior involvement procedure will require an amendment supplementing the Statute of the Court of Justice, which will not, however, be in the nature of a 'constitutional change' and can therefore be effected through the ordinary legislative procedure (second paragraph of Article 281 TFEU), without the need for a formal Treaty revision procedure (Article 48 TEU).⁴⁰

75. It would not, however, be sufficient, in my view, merely to incorporate the relevant procedural rules in the Council's decision on the approval of the proposed accession agreement, because that would have the effect of circumventing the ordinary legislative procedure provided for in the second paragraph of Article 281 TFEU and, moreover, the procedural rules to be adopted would not have the same effect or the same ranking as the provisions of the Statute.

76. Only when the requisite provisions — particularly those relating to the entitlement to bring an action, the conduct of proceedings and the effect of the Court's decision — are incorporated in the Statute of the Court of Justice will the prior involvement procedure be fully operational and, in accordance with Article 19(3)(c) TEU, in conjunction with the first paragraph of Article 281 TFEU and Article 51 TEU, be among the 'cases provided for in the Treaties' which the Court of Justice is called upon to determine.

b) The duty to implement judgments of the ECtHR

77. The duty enshrined in Article 46(1) ECHR — to implement judgments of the ECtHR in which a violation of the ECHR by institutions, bodies, offices or agencies of the EU is found — also does not require new competences to be transferred to the EU.

37 — See, to that effect, also Opinion 1/00 (EU:C:2002:231, paragraph 14, in conjunction with paragraphs 18 and 23).

38 — Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, presented on 5 May 2010, available on the Internet site of the Court of Justice of the EU at http://curia.europa.eu/jcms/jcms/P_64268/ (viewed most recently on 12 May 2014), in particular paragraphs 9, 11 and 12; see also the joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, further to the meeting between the two courts in January 2011, published on 24 January 2011, available on the Internet site of the Court of Justice of the EU at http://curia.europa.eu/jcms/jcms/P_64268/ (viewed most recently on 12 May 2014), in particular the last paragraph of point 2.

39 — See points 121 to 135 and points 180 to 184 of this View below.

40 — The new provisions in the Statute of the Court of Justice may have to be supplemented by a number of additional detailed provisions in the Rules of Procedure of the Court of Justice.

78. Such judgments of the ECtHR are declaratory in nature, and the ECHR does not specifically stipulate how its contracting parties should implement the judgments addressed to them, but rather leaves them a certain margin of appreciation for that purpose.⁴¹

79. At EU level, it will generally be possible to put an end to a violation of the ECHR that is established by the ECtHR by repealing or amending the contested legal act of an EU institution. There is no doubt that the EU has the necessary powers for such an *actus contrarius*; the powers are the same as those on the basis of which the legal act was adopted. Furthermore the Courts of the EU have the power to annul EU measures or to declare them invalid, under the conditions provided for in the Treaties (Articles 263 TFEU and 267 TFEU).

80. It is also possible that a judgment of the ECtHR may first require an EU measure to be adopted or provide grounds for compensation to be awarded. Again, the EU institutions will have no difficulty in meeting such obligations under the powers conferred on them in the Treaties, particularly as the second sentence of Article 1(3) of the draft agreement makes clear that the ECHR does not impose any obligations on the EU that would fall outside the competences conferred on the EU by the Treaties.

81. In so far as a final decision of a Court of the EU gives rise to a finding by the ECtHR that the ECHR has been violated, it may, in certain cases, become necessary to re-open the relevant judicial proceedings. The necessary additions to Article 44 of the Statute of the Court of Justice⁴² can be introduced in accordance with the second paragraph of Article 281 TFEU without any risk of distortion of the judicial function of the Courts of the EU. To that extent, what has been stated above in relation to the prior involvement procedure applies *mutatis mutandis*.⁴³

c) Legal protection in the CFSP

82. Far more controversial than the two aspects discussed above is the question whether the present competences of the EU — to be precise, the competences of the institution that is the Court of Justice of the EU (first sentence of Article 19(1) TEU) — are sufficient to ensure a level of legal protection in the common foreign and security policy that meets the requirements of Articles 6 and 13 ECHR.⁴⁴

83. On the one hand, accession to the ECHR will undoubtedly mean that the EU must respect the fundamental rights protection that stems from the ECHR — and thus also the requirement of effective legal protection in accordance with Articles 6 and 13 ECHR — in all its spheres of activity, including the CFSP.⁴⁵ The EU would be unable to avoid these obligations even by making a

41 — See also point 11 of the Declaration of the States Parties to the ECHR on the occasion of their High Level Conference on the Future of the European Court of Human Rights ('Brighton Declaration'), adopted in Brighton in April 2012, available in French and English on the Council of Europe's Internet site at <http://hub.coe.int/de/20120419-brighton-declaration/> (viewed most recently on 14 May 2014).

42 — See, in that regard, Recommendation No. R (2000) 2 to member States on the re-examination or re-opening of certain cases at domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers of the Council of Europe on 19 January 2000. Grounds for re-opening proceedings could be modelled, for example, on those found in German law in Paragraph 580(8) of the Code of Civil Procedure (Zivilprozessordnung) and in Paragraph 359(6) of the Code of Criminal Procedure (Strafprozessordnung).

43 — See points 64 to 74 of this View.

44 — On the related issue as to whether the specific features of the CFSP preclude recognition by the EU of the jurisdiction of the ECtHR, see points 185 to 195 of this View below.

45 — In accordance with paragraph 23 of the explanatory report, responsibility is attributed to the EU regardless of the context in which the acts, measures or omissions of its institutions, bodies, offices or agencies occur, and expressly includes matters relating to the CFSP; see further Article 3(2) of the draft agreement, under which the responsibility of the EU also encompasses its decisions taken under the EU Treaty.

reservation under international law when signing the accession agreement or when depositing its instrument of ratification, since, according to the second sentence of Article 57(1) ECHR, '[r]eservations of a general character' are not permitted⁴⁶ and, moreover, Article 11 of the draft agreement does not allow any reservations to be made in respect of the accession agreement.

84. On the other hand, however, a principle applies within the EU by which the Court of Justice of the EU is not to have jurisdiction either with respect to the primary law provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions (sixth sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU). Only highly exceptionally do the Courts of the EU have jurisdiction in relation to the CFSP in accordance with the second paragraph of Article 275 TFEU, such jurisdiction encompassing, first, the monitoring of compliance with the 'non-affected' clause (Article 40 TEU) and, secondly, actions for annulment by individuals (natural or legal persons) (fourth paragraph of Article 263 TFEU) against restrictive measures adopted by the Council in the context of the CFSP.

85. Can the legal protection in the CFSP afforded by the EU legal order be regarded as effective legal protection for the purposes of Articles 6 and 13 ECHR in view of the aforementioned limitation of the judicial powers of the Courts of the EU? Or would the EU, by its accession to the ECHR as envisaged in the draft agreement, be assuming international obligations with respect to legal protection in the CFSP which its institutions — namely the Court of Justice of the EU — lack the necessary powers to fulfil? Should the Court of Justice determine the latter to be the case, not only would the EU be prevented from acceding to the ECHR but, within the EU, a lacuna would emerge in the legal protection system which would be highly problematic even now, not least in the light of the homogeneity requirement laid down in the first sentence of Article 52(3) of the Charter of Fundamental Rights.

86. The Commission⁴⁷ suggests countering any concerns regarding the effectiveness of the legal protection of individuals in the CFSP with a particularly broad interpretation of the second alternative in the second paragraph of Article 275 TFEU. It proposes that that provision be understood as meaning that the Court of Justice of the EU not only has jurisdiction over actions for annulment brought by individuals against restrictive measures, but it may in addition deal with actions for damages and reply to requests for preliminary rulings from national courts or tribunals in the sphere of the CFSP. It also advocates handling the options for the legal protection of individuals in the CFSP in such a way as to cover not only acts, within the meaning of the first paragraph of Article 263 TFEU, which produce binding legal effects, but also mere 'material acts' (*Realakte*), that is to say, acts without legal effects.

87. At the hearing the Commission added that the monitoring of compliance with Article 40 TEU provided for in the first alternative in the second paragraph of Article 275 TFEU enables the Courts of the EU to ensure appropriate legal protection in the CFSP.

88. In common with many of the participants in this procedure⁴⁸ I am highly doubtful as to whether the interpretation of the two alternatives in the second paragraph of Article 275 TFEU on which the Commission relies represents a legally sustainable means of guaranteeing effective legal protection, for the purposes of Articles 6 and 13 ECHR, for individuals in the CFSP.

46 — The Strasbourg judges examine very closely in individual cases whether a reservation made by a contracting party is permissible, and, in particular, whether it is formulated with sufficient precision; see judgment of the ECtHR, *Grande Stevens and Others v. Italy*, nos. 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, §§ 204 to 211, 4 March 2014.

47 — A minority of the Member States participating in the Opinion procedure made similar observations.

48 — Opposition to the Commission's stance was particularly pronounced in the written and oral submissions of France, the United Kingdom and the Council.

89. First, the Commission's interpretation disregards the relationship between rule and exception that underpins Article 275 TFEU; the Commission turns the principle that the Courts of the EU have no jurisdiction in relation to the CFSP, as laid down in the sixth sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, on its head. Secondly, in assuming that the Court of Justice has jurisdiction in preliminary ruling proceedings and actions for damages in the context of the CFSP, the Commission contravenes the clear wording of the second alternative in the second paragraph of Article 275 TFEU, which refers only to jurisdiction for actions for annulment brought by individuals in accordance with the fourth paragraph of Article 263 TFEU against restrictive measures, but not to any other subject-matter of an action or type of action, and certainly not to references from national courts or tribunals as provided for in Article 267 TFEU.

90. The fact that the Commission's view cannot be endorsed is confirmed if the drafting history of Article 275 TFEU is also taken into consideration.⁴⁹ That provision was originally intended to be incorporated as Article III-376 in the Treaty establishing a Constitution for Europe. The wording is essentially the product of the work of the European Convention, which in turn had found expression in Article III-282 of the Draft Treaty establishing a Constitution for Europe.⁵⁰ As the preparatory documents of the European Convention show, a broader framework for the jurisdiction of the Courts of the EU in relation to the CFSP was certainly discussed at the time, but it turned out that no consensus could be reached on proposals to that effect.⁵¹ Ultimately the Convention and — following the same approach — the two intergovernmental conferences on the Constitutional Treaty and the Treaty of Lisbon retained the model of a largely intergovernmental framework for the CFSP, in which the Courts of the EU were to be given only narrowly defined competences.

91. Furthermore, an interpretation of Article 275 TFEU such as that envisaged by the Commission would amount to an extension of the competences of the EU which is not compatible with the second subparagraph of Article 6(1) TEU and the second sentence of Article 6(2) TEU, or, more precisely, an extension of the judicial competences of the Court of Justice of the EU as an EU institution.⁵²

92. Nor is it possible to identify anything in the case-law referred to by the Commission (*Les Verts*, *Kadi*, *Gestoras Pro Amnistía* and *Segi*⁵³) that might support the view it puts forward. It is true that, in the aforementioned cases, the Court of Justice emphasised that the EU is a Community based on the rule of law — in today's terms: a Union based on the rule of law. On the basis of that fundamental statement, the Court of Justice recalled that neither the Member States nor the EU institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaties as the basic constitutional charter.⁵⁴ It did not, however, in any way conclude from that fundamental statement that, as it were, *praeter legem*, new legal remedies or types of procedure not provided for under primary law were to be recognised in the Courts of the EU.

49 — With regard generally to the possibility of giving consideration to the drafting history when interpreting provisions of the Treaties, see judgments in *Pringle* (C-370/12, EU:C:2012:756, paragraph 135); *Commission v Parliament and Council* (C-427/12, EU:C:2014:170, paragraph 36); and *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraphs 50, 59 and 70); and also my Opinion in the latter case (EU:C:2013:21, point 32).

50 — Adopted by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome on 18 July 2003.

51 — Secretariat of the European Convention, Supplementary report on the question of judicial control relating to the common foreign and security policy (Document CONV 689/1/03 of 16 April 2003, paragraphs 5 and 7(c)), and Cover Note of the Praesidium on the Articles on the Court of Justice and the High Court (Document CONV 734/03 of 2 May 2003; see, in particular, the remarks on the proposed Article 240a).

52 — See judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council* (EU:C:2013:625, paragraph 97) and my Opinion in that case (EU:C:2013:21, points 112 and 113).

53 — Judgments in *Les Verts v Parliament* (294/83, EU:C:1986:166); *Gestoras Pro Amnistía and Others v Council* (C-354/04 P, EU:C:2007:115); *Segi and Others v Council* (C-355/04 P, EU:C:2007:116); and *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461).

54 — Judgments in *Les Verts v Parliament* (EU:C:1986:166, paragraph 23); *Gestoras Pro Amnistía and Others v Council* (EU:C:2007:115, paragraph 51); and *Segi and Others v Council* (EU:C:2007:116, paragraph 51); see also judgments in *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461, paragraph 281); *E and F* (C-550/09, EU:C:2010:382, paragraph 44); *Poland v Commission* (C-336/09 P, EU:C:2012:386, paragraph 36); and *Inuit Tapiriit Kanatami and Others v Parliament and Council* (EU:C:2013:625, paragraph 91).

93. Admittedly, in the aforementioned cases, the Court of Justice advocated an interpretation of primary law that best ensured the effectiveness of the procedures expressly provided for in the Treaties. Thus, for example, in *Les Verts*, it acknowledged that actions for annulment pursuant to Article 173 of the EEC Treaty could also be brought against measures adopted by the Parliament having legal effects vis-à-vis third parties.⁵⁵ Similarly, in *Gestoras Pro Amnistía* and *Segi* it interpreted the scope of the preliminary ruling procedure under Article 35(1) EU⁵⁶ with regard to the then ‘third pillar’ as meaning that that procedure can be applied to all measures adopted by the Council and intended to produce legal effects in relation to third parties.

94. What appears to me, however, to be more illuminating as regards the issues to be discussed here is the fact that the Court of Justice expressly declined in *Gestoras Pro Amnistía* and *Segi* to recognise, within what was then the ‘third pillar’, types of actions not explicitly provided for in the EU Treaty as amended by the Treaty of Amsterdam. In particular, in that context it declared that an action for damages was not possible.⁵⁷ This can readily be applied also to the question of interest here, that of legal protection within the former ‘second pillar’, that is to say, in the CFSP, where the jurisdiction of the Courts of the EU has traditionally been even less extensive.⁵⁸

95. Against that background, the interpretation of Article 275 TFEU put forward by the Commission is not convincing. Quite apart from the fact that the Commission’s arguments are not sound, the very wide interpretation of the jurisdiction of the Courts of the EU which it proposes is just not necessary for the purpose of ensuring effective legal protection for individuals in the CFSP. This is because the — entirely accurate — assertion that neither the Member States nor the EU institutions can avoid a review of the question whether the measures adopted by them are in conformity with the Treaties as the basic constitutional charter does not necessarily always have to lead to the conclusion that the Courts of the EU have jurisdiction.

96. This is because, as Article 19(1) TEU shows, the system of legal protection established by the Treaties rests on two pillars, one of which is based on the Courts of the EU and the other on national courts and tribunals.⁵⁹ Where, therefore — as is regularly the case in the CFSP — there is no direct recourse to the Courts of the EU, national courts or tribunals have, and will retain, jurisdiction. Ultimately this follows from the principle of conferral, according to which competences not conferred upon the EU in the Treaties remain with the Member States (Article 4(1) TEU, in conjunction with the first sentence of Article 5(1) and Article 5(2) TEU).⁶⁰

97. Furthermore, the Member States are, in accordance with the second subparagraph of Article 19(1) TEU, expressly obliged to provide remedies sufficient to ensure effective legal protection in the CFSP, one of the fields covered by EU law.⁶¹

55 — Judgment in *Les Verts v Parliament* (EU:C:1986:166, paragraph 25).

56 — Treaty on European Union as amended by the Treaty of Amsterdam.

57 — Judgments in *Gestoras Pro Amnistía and Others v Council* (EU:C:2007:115, paragraphs 46 to 48) and *Segi and Others v Council* (EU:C:2007:116, paragraphs 46 to 48).

58 — See also — albeit in relation to the legal position before the entry into force of the Treaty of Lisbon — judgments in *Gestoras Pro Amnistía and Others v Council* (EU:C:2007:115, paragraph 50) and *Segi and Others v Council* (EU:C:2007:116, paragraph 50).

59 — Opinion 1/09 (EU:C:2011:123, paragraph 66) and judgment in *Inuit Tapiriit Kanatami and Others v Parliament and Council* (EU:C:2013:625, paragraph 90).

60 — See also — albeit in relation to the legal position before the entry into force of the Treaty of Lisbon — the Opinion of Advocate General Mengozzi in *Gestoras Pro Amnistía and Others v Council* (C-354/04 P and C-355/04 P, EU:C:2006:667, in particular points 99 and 104).

61 — See also judgments in *Unión de Pequeños Agricultores v Council* (C-50/00 P, EU:C:2002:462, paragraph 41); *Gestoras Pro Amnistía and Others v Council* (EU:C:2007:115, paragraph 56); *Segi and Others v Council* (EU:C:2007:116, paragraph 56); and *Inuit Tapiriit Kanatami and Others v Parliament and Council* (EU:C:2013:625, paragraphs 100 and 101).

98. Many aspects of the CFSP require implementation by Member State bodies (Articles 26(3) TEU, 42(3) TEU and 44(1) TEU). The individual's path to the national courts or tribunals is then laid down in any event, if he wishes to have acts, measures or omissions in the context of the CFSP that affect him in any way subjected to judicial scrutiny.⁶²

99. However, even where the CFSP is implemented by the EU's own institutions, bodies, offices or agencies in such a way as to be of direct and individual concern to the individual, his access to national courts and tribunals is not barred unless, exceptionally, he can find legal protection in the Courts of the EU directly, pursuant to the second alternative in the second paragraph of Article 275 TFEU. Save where jurisdiction is conferred on the Court of Justice of the EU by the Treaties, even disputes to which the EU is a party are not on that ground to be excluded from the jurisdiction of the courts or tribunals of the Member States, according to Article 274 TFEU. In view of the rule laid down in the sixth sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, that is likely generally to be the case in the context of the CFSP.

100. Where domestic courts or tribunals are seised of such disputes in the context of the CFSP, they are obliged to apply EU law. In so doing they may be required to review acts of the institutions, bodies, offices or agencies of the EU in the context of the CFSP as to their compatibility with higher-ranking EU law and — if they are found to be incompatible — to disapply them in a particular dispute.⁶³ Unlike in the field of communitarised policies, the Treaties, as already mentioned,⁶⁴ specifically do not provide for the Court of Justice to have *any* jurisdiction to give preliminary rulings in relation to the CFSP, as indicated by the sixth sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU. It follows that, in the context of the CFSP, the Court of Justice cannot claim its otherwise recognised monopoly on reviews of the legality of the activities of EU institutions, bodies, offices and agencies. The settled case-law of the Court, stemming from the judgment in *Foto-Frost*,⁶⁵ cannot, therefore, in my view, be applied to the CFSP. Unlike in supranational areas of EU law, there is no general principle in the CFSP that only the Courts of the EU may review acts of the EU institutions as to their legality.

101. There is no doubt that it is highly regrettable from the aspect of integration policy that, in matters relating to the CFSP, the Court of Justice has no jurisdiction to give preliminary rulings or a monopoly on ruling on validity as in *Foto-Frost*, because, as a result, the uniform interpretation and application of EU law in the context of the CFSP cannot be ensured. That is, however, the logical consequence of the decision by the Treaty legislature to continue to configure the CFSP essentially along intergovernmental lines, and to restrict the supranational element inherent in the jurisdiction of the Court of Justice to narrowly circumscribed exceptions which are exhaustively enumerated in the second paragraph of Article 275 TFEU.

102. Effective legal protection for individuals, as required by Articles 6 and 13 ECHR, can also be safeguarded without the Court of Justice having jurisdiction to give preliminary rulings or a monopoly on ruling on validity.

103. For all these reasons, it must be stated, with regard to the CFSP, that the proposed accession of the EU to the ECHR can be completed without the creation of new competences for the Court of Justice of the EU, since, in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (second paragraph of Article 275 TFEU) and partly by national courts and tribunals (second subparagraph of Article 19(1) TEU and Article 274 TFEU).

62 — Accordingly the first sentence of Article 1(4) of the draft agreement also provides for acts, measures and omissions of national authorities when implementing EU law to be attributed to the Member States.

63 — See also — albeit in a slightly different context — the Opinion of Advocate General Mengozzi in *Gestoras Pro Amnistia and Others v Council* (EU:C:2006:667, points 121 to 132).

64 — See points 88 to 95 of this View above.

65 — Judgment in *Foto-Frost* (314/85, EU:C:1987:452, paragraphs 15 to 20).

4. Interim conclusion

104. In the light of the above there is thus no reason to fear that the draft agreement might change the competences of the EU as laid down in the Treaties. For the purposes of implementing the proposed accession agreement within the EU there will, moreover, be no need for new powers to be conferred on the EU.

C – Maintaining the powers of the EU's institutions

105. In addition, it is apparent from the first sentence of Article 2 and from Article 3 of Protocol No 8 that accession to the ECHR must not affect the powers of the EU's institutions. This requirement must first and foremost be considered with regard to the powers of the Court of Justice of the EU (first sentence of Article 19(1) TEU) (see, in that regard, section 1 below). For the sake of completeness I shall then briefly consider the powers of the other institutions (see section 2 below), with the system under EU law governing the imposition of financial penalties in the field of competition law meriting particular attention (see section 2(b) below).

5. The powers of the Court of Justice of the EU

106. The role of the Court of Justice of the EU, which has the task of ensuring that in the interpretation and application of the Treaties the law is observed (Article 19(1) TEU), is of fundamental importance for the legal order established by the Treaties.⁶⁶ As regards the EU's proposed accession to the ECHR, two aspects in particular merit examination: on the one hand, the monopoly of the Courts of the EU on the resolution of disputes (see (a) below) and, on the other, its powers in relation to the interpretation of EU law and the review of the legality of acts of the EU (see (b) below). Protocol No 16 to the ECHR will also be considered briefly (see (c) below).

a) The monopoly of the Courts of the EU on the resolution of disputes (Article 344 TFEU)

107. In Article 344 TFEU the Member States of the EU undertook 'not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. According to settled case-law, what that provision articulates is the fact that the Court of Justice of the EU has exclusive jurisdiction to determine all disputes arising between Member States, in so far as they concern EU law⁶⁷ (see, in that regard, Article 259 TFEU). The same must apply *a fortiori* also to disputes between the EU and one or more of its Member States (see, in particular, Article 258 TFEU, second paragraph of Article 263 TFEU, first paragraph of Article 265 TFEU and Article 268 TFEU). In other words, for the purpose of settling their disputes in matters concerning EU law, the Member States have granted the Courts of the EU a monopoly on the resolution of disputes that is enshrined in primary law, in Article 344 TFEU.

108. In order to protect this fundamental function of the Courts of the EU, Article 3 of Protocol No 8 stipulates that nothing in the proposed accession agreement is to affect Article 344 TFEU.

66 — See, to that effect, Opinion 1/91 (EU:C:1991:490, paragraph 46), and judgment in *Commission v Ireland* (C-459/03, EU:C:2006:345, paragraph 169), where reference is made, in connection with the role of the Court of Justice, to the 'foundations of the Community' and to a 'fundamental feature of the Community judicial system'; similarly, judgment in *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461, paragraphs 285 and 304).

67 — Opinion 1/91 (EU:C:1991:490, paragraph 46) and judgment in *Commission v Ireland* (EU:C:2006:345, paragraphs 123 and 169).

109. Particularly worthy of consideration in this connection is the inter-State cases procedure provided for in Article 33 ECHR,⁶⁸ according to which any contracting party may refer to the ECtHR any alleged breach of the provisions of the ECHR and the protocols thereto by another contracting party.⁶⁹ The latter provision must be assessed in conjunction with Article 55 ECHR, according to which the contracting parties essentially agree not to submit disputes arising out of the interpretation and application of the ECHR to any means of settlement other than those provided for in the ECHR itself.

110. There is clearly a tension between the Member States' obligation under Article 344 TFEU to bring disputes concerning EU law only before the Court of Justice, and the obligation imposed by Article 55 ECHR to settle disputes relating to the ECHR before the ECtHR by means of the inter-State cases procedure. On the EU's accession, the ECHR will, as already mentioned, be an integral part of the legal order of the Union⁷⁰ (see also Article 216(2) TFEU). Contrary to the somewhat surprising view of the Commission, therefore, disputes between Member States of the EU or between Member States and the EU arising out of the interpretation or application of the ECHR may very well arise within the scope of EU law following such accession.

111. Should an inter-State case pursuant to Article 33 ECHR be brought before the ECtHR in order to settle such a dispute, this would constitute a failure to respect the exclusive jurisdiction of the Court of Justice, and thus an infringement of Article 344 TFEU.

112. This problem was certainly recognised during the negotiations on the proposed accession of the EU to the ECHR. In order to solve it, Article 5 was incorporated in the draft agreement and provides that proceedings before the Court of Justice of the EU are to be 'understood as [not] constituting ... means of dispute settlement within the meaning of Article 55 ECHR'. This provision of the draft agreement is amplified in the explanatory report as meaning that 'Article 55 [ECHR] does not prevent the operation of the rule set out in Article 344 TFEU'.⁷¹

113. It follows that Article 5 of the draft agreement, as interpreted in the explanatory report, resolves the possible conflict between Article 55 ECHR and Article 344 TFEU in the sense that the EU and its Member States may continue to bring before the Courts of the EU any disputes they may have arising out of the interpretation and application of the ECHR, and are not obliged to initiate the inter-State cases procedure before the ECtHR under Article 33 ECHR.

114. It must be noted, however, that there is nothing in the draft agreement or in its accompanying documents that effectively precludes Member States of the EU from none the less bringing before the ECtHR, as an inter-State case, a dispute concerning EU law arising out of the interpretation and application of the ECHR, even though, in terms of international law, they would not be obliged to do so under Article 55 ECHR in conjunction with Article 5 of the draft agreement.

115. If one wished to ensure that, in EU-law disputes concerning the ECHR, no such failure on the part of the Member States of the EU to respect the exclusive jurisdiction of the Court of Justice could arise under any circumstances, the proposed accession agreement would — perhaps along the lines of Article 282 of the United Nations Convention on the Law of the Sea⁷² — have to contain a rule going beyond Article 5 of the draft agreement, by which Article 344 TFEU would not only be unaffected but would take precedence over Article 33 ECHR. An objection of inadmissibility could then be raised before the ECtHR in respect of any inter-State case that was nevertheless initiated. In addition, prior

68 — Article 4(2) of the draft agreement provides for this procedure to be renamed 'Inter-Party cases' after the EU's accession to the ECHR. For simplicity's sake, I shall, however, continue to use the expression 'inter-State cases' below.

69 — In practice such proceedings are rare.

70 — Judgments in *Haegeman* (EU:C:1974:41, paragraph 5); *IATA and ELFAA* (EU:C:2006:10, paragraph 36); and *Air Transport Association of America and Others* (EU:C:2011:864, paragraph 73).

71 — Last sentence of paragraph 74 of the explanatory report.

72 — Signed in Montego Bay on 10 December 1982 (OJ 1998 L 179, p. 1).

to determining an inter-State case between Member States of the EU pending before it, the ECtHR would have to be obliged — at least in cases of doubt — to give the Court of Justice an opportunity, by way of the prior involvement procedure, to state its views on whether or not the subject-matter of the proceedings represented a dispute concerning EU law for the purposes of Article 344 TFEU.

116. Such a far-reaching provision, which, moreover, is not common practice in international agreements, does not, however, appear to me to be strictly necessary for the purpose of ensuring the practical effectiveness of Article 344 TFEU and thus of preserving this Court's monopoly of dispute resolution.

117. Further, if the aim in the present case is to lay down an express rule on the inadmissibility of inter-State cases before the ECtHR and on the precedence of Article 344 TFEU as a prerequisite for the compatibility of the proposed accession agreement with EU primary law, this would implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them.

118. In my view, the possibility of conducting infringement proceedings (Articles 258 TFEU to 260 TFEU)⁷³ against Member States that bring their disputes concerning EU law before international courts other than the Court of Justice of the EU, with the added possibility that interim measures may be prescribed within those proceedings if necessary (Article 279 TFEU),⁷⁴ is sufficient to safeguard the practical effectiveness of Article 344 TFEU.

119. All in all, I am of the view, therefore, that the draft agreement does not give rise to any legal concerns with regard to Article 344 TFEU, in conjunction with Article 3 of Protocol No 8.

120. Should this Court nevertheless consider the provision of stronger safeguards for the practical effectiveness of Article 344 TFEU than those currently provided for in the draft agreement to be necessary, it could make the compatibility with the Treaties of the EU's proposed accession to the ECHR subject to a declaration by the EU and its Member States at the time of the EU's accession. In that declaration, the EU and the Member States would have to declare, vis-à-vis the other contracting parties of the ECHR, in a way that is binding under international law, their intention not to initiate proceedings against each other before the ECtHR pursuant to Article 33 ECHR in respect of alleged violations of the ECHR when the subject-matter of the dispute falls within the scope of EU law.⁷⁵

b) The powers of the Courts of the EU in interpreting EU law and reviewing the legality of acts of the EU

121. In addition to their monopoly on dispute resolution under Article 344 TFEU, considered above, the Courts of the EU have the task, in the judicial system of the EU, of providing a final and binding interpretation of EU law, and a monopoly⁷⁶ on reviewing the legality of acts of the institutions, bodies, offices and agencies of the EU.⁷⁷

73 — Which is what happened in *Commission v Ireland* (EU:C:2006:345).

74 — By way of interim measure, the Court of Justice could require the Member State concerned to declare in the proceedings before the ECtHR that it does not intend to pursue the inter-State case brought before that court (Article 37(a) ECHR). Should the Court of Justice subsequently dismiss the action for failure to fulfil obligations as unfounded, it would be open to the ECtHR to decide to restore the inter-State application to its list of cases (Article 37(2) ECHR).

75 — See, to that effect, point 8 of the 2010 Parliament resolution (cited in footnote 30 above).

76 — Regarding that monopoly, see Opinion 1/00 (EU:C:2002:231, paragraph 24) and judgment in *Foto-Frost* (EU:C:1987:452, paragraphs 15 to 20).

77 — The position is different only in regard to the CFSP (see the sixth sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, as well as my remarks above in points 85 to 101 of this View).

122. In principle, the position will remain unchanged even after the EU's proposed accession to the ECHR. This is because judgments of the ECtHR in which a violation of the ECHR is found are purely declaratory in nature and leave the contracting party concerned in each case a certain margin of appreciation with regard to their implementation (Article 46(1) ECHR).⁷⁸ Furthermore the ECtHR does not make any pronouncements in its judgments regarding the binding interpretation or validity of the legislation of the contracting parties concerned.⁷⁹ Instead, it confines itself to interpreting the ECHR and establishing any violations of the fundamental rights enshrined within it.

123. However, in its judgments, the ECtHR must inevitably examine the national law of the contracting parties concerned, in so far as this is necessary in order for it to determine a complaint that fundamental rights guaranteed by the ECHR have been violated. The ECtHR necessarily bases its judgments on a certain comprehension of the content and scope of domestic legislation. That is the only way in which it can, for example, usefully examine whether the redress provided for under the internal legal order satisfies the requirements of the right to an 'effective remedy' (Article 13 ECHR), and whether any interference with certain fundamental rights under the ECHR is 'in accordance with the law' or 'prescribed by law' in the national legal order (Articles 5(1), 8(2), 9(2), 10(2) and 11(2) ECHR).⁸⁰ In the same vein, EU law, including the relevant case-law of this Court, has already been examined in past decisions of the ECtHR.⁸¹

124. It is with a view to ensuring that the powers of the Courts of the EU are maintained on such occasions and, at the same time, that the subsidiarity principle is respected within the ECHR control system, that Article 3(6) of the draft agreement establishes the prior involvement procedure. Under that procedure, in proceedings pending before the ECtHR to which the EU is a co-respondent, the Court of Justice of the EU is to be afforded sufficient time to assess the compatibility with the ECHR of a provision of EU law, in so far as it has not yet made such an assessment.

125. As the Court of Justice itself observed in its discussion paper,⁸² such a prior involvement procedure is in principle capable of preserving the jurisdiction of the Courts of the EU in the light of the EU's accession to the ECHR and is, moreover, necessary for that purpose.

126. It remains necessary, however, to examine whether the conditions for prior involvement as laid down in Article 3(6) of the draft agreement have turned out to be too restrictive and whether, as a result, there is a risk that the jurisdiction of the Courts of the EU might be affected. There are three such conditions:

- The scope of application of the prior involvement procedure is indissociably linked to the status of the co-respondent, so that the question of this Court's prior involvement necessarily arises only where the EU is a co-respondent before the ECtHR.
- Prior involvement is envisaged only where this Court has not yet made an assessment of the compatibility with the ECHR of the provision of EU law at issue.
- The subject-matter of the prior involvement is the compatibility of that EU law with fundamental rights under the ECHR the violation of which is alleged in the proceedings before the ECtHR.

78 — See point 78 of this View above.

79 — Explanatory report, paragraph 62, last sentence; see also judgment of the ECtHR in *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A, and its decision in *W. v. the Netherlands* (dec.), no. 20689/08, ECHR 2009.

80 — See, for example, judgments of the ECtHR in *Smirnov v. Russia*, no. 71362/01, § 45, 7 June 2007; *Harju v. Finland*, no. 56716/09, §§ 40 and 44, 15 February 2011; and *Heino v. Finland*, no. 56720/09, § 45, 15 February 2011.

81 — See, for example, judgments of the ECtHR in *Cantoni v. France*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V; *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI; and *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011; also its decision in *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, ECHR 2009.

82 — Cited in footnote 38 above.

127. As regards, first of all, the linking of the scope of application of the prior involvement procedure with the EU's status as co-respondent, this appears to be appropriate for the purpose of preserving the jurisdiction of the Courts of the EU. Admittedly it follows, conversely, that the prior involvement of the Court of Justice will not be possible where an application is brought before the ECtHR against the EU itself as respondent, or where the EU is not a party at all to the proceedings before the ECtHR, whether as respondent or co-respondent. In neither of the two last-mentioned cases, however, does the fact that there is no possibility of prior involvement give rise to a risk that the jurisdiction of the Courts of the EU might be affected.

128. If the EU itself is respondent, the requirement that all internal remedies must have been exhausted (Article 35(1) ECHR) alone ensures that the dispute cannot reach the ECtHR before the Courts of the EU have had an opportunity, in the exercise of their jurisdiction, to consider the interpretation and legality of the provision of EU law at issue. By contrast, if the EU is neither respondent nor co-respondent — and thus not a party to the proceedings before the ECtHR —, there is in any event no cause for concern that the jurisdiction of the Courts of the EU might be affected, because the judgment that would be delivered by the ECtHR would not be binding on the EU (see Article 46(1) ECHR), even if it contained remarks on EU law.

129. Nor, secondly, is there any threat to the jurisdiction of the Courts of the EU stemming from the fact that prior involvement is limited to those cases in which the Courts of the EU have not yet assessed the compatibility with the ECHR of the provision of EU law at issue. If the Courts of the EU have already expressed a view — in a final decision — on the specific point of law that subsequently becomes the subject of an application to the ECtHR, they will already have exercised their jurisdiction.⁸³ Where a point has been thus clarified (*acte éclairé*), not even the courts of last instance of the Member States of the EU would be expected to bring the matter before the Court of Justice. The same must apply as regards the relationship between the ECtHR and the Courts of the EU.

130. Thirdly, what is problematic, however, is the fact that the subject-matter of prior involvement is restricted — in Article 3(6) of the draft agreement — to questions of the *compatibility* (French: *compatibilité*) of EU law with fundamental rights enshrined in the ECHR the violation of which is alleged in proceedings before the ECtHR. As mentioned above,⁸⁴ the powers of the Courts of the EU are by no means limited to examination of the legality of provisions of EU law, but, crucially, extend also to their interpretation. It is precisely in connection with questions concerning fundamental rights that the jurisdiction of the Courts of the EU to interpret EU law acquires particular significance, since in most cases it will be possible to establish, just by means of interpretation, that the provision of EU law at issue does not conflict with fundamental rights.⁸⁵ This applies to provisions of EU primary law just as it does to provisions of secondary law.

131. Contrary to the view apparently taken by the Commission,⁸⁶ to limit the subject-matter of prior involvement to questions of pure legality or validity would be to blatantly disregard the powers of the Courts of the EU, as though the only choice available to this Court were between black and white.

83 — As to which court has jurisdiction to determine whether the Courts of the EU have already assessed the issue of the compatibility with the ECHR of the provision of EU law at issue, see points 180 to 184 of this View below.

84 — Point 121 of this View.

85 — See, to that effect, inter alia, judgments in *Orkem v Commission* (374/87, EU:C:1989:387, in particular paragraphs 28 and 32 to 35); *Ordre des barreaux francophones et germanophone and Others* (C-305/05, EU:C:2007:383, in particular paragraph 28); and *Promusicae* (C-275/06, EU:C:2008:54, in particular paragraph 68); see also judgment in *NS* (C-411/10 and C-493/10, EU:C:2011:865, in particular paragraphs 99, 100 and 106).

86 — At the hearing before the Court of Justice the Commission insisted that it was perfectly adequate to restrict the scope of the prior involvement procedure in respect of acts of EU secondary law to questions of validity.

132. Fortunately the reference to the assessment of compatibility in Article 3(6) of the draft agreement as such is sufficiently broad to include questions of interpretation of EU law and to enable this Court to avail itself of the prior involvement procedure in order to ensure that provisions of EU law are interpreted in conformity with the ECHR.

133. However, as is apparent from the explanatory report, the assessment of compatibility referred to in Article 3(6) of the draft agreement is, in the case of EU secondary law, to entail only a ruling by the Court of Justice on the 'validity' of legal provisions contained in acts of the EU institutions, bodies, offices or agencies.⁸⁷

134. In view of this assimilation of the question of the 'validity' of secondary law to that of 'compatibility' in the explanatory report, it must be highly doubtful whether the material scope of prior involvement, as defined in Article 3(6) of the draft agreement, is really sufficient to preserve the jurisdiction of the Courts of the EU. It is true that a number of the participants in this procedure have attempted to play down the significance of the explanatory report with regard to the interpretation of Article 3(6) of the draft agreement. That approach is not convincing, however, since the explanatory report is part of the negotiated package of instruments for the accession of the EU to the ECHR and it is the intention of those who drafted it that the report should be accorded the same importance as the accession agreement itself.⁸⁸

135. The abovementioned doubts about the scope of the prior involvement procedure can ultimately be removed only if it is clarified that the assessment of the compatibility of EU law with the ECHR, which this Court is, under Article 3(6) of the draft agreement, to be given the opportunity to undertake by means of the prior involvement procedure, covers questions of interpretation not only in respect of EU primary law but also in respect of secondary law. It seems to me that such clarification is necessary to ensure legal certainty. In my view, the draft agreement should therefore be declared compatible with the Treaties only on condition that such clarification is provided.

c) The effects of Protocol No 16 to the ECHR on the powers of the Court of Justice

136. Lastly, Protocol No 16 to the ECHR must briefly be addressed. Its possible effects on the powers of this Court were briefly discussed with the participants in this procedure at the hearing, on the basis of questions posed by the Members of the Court.

137. Protocol No 16, which, to date,⁸⁹ has been signed by only seven Member States of the EU and has not yet been ratified by any of them, provides for the introduction of a voluntary 'preliminary ruling procedure' in the ECHR system, by which certain of the highest courts and tribunals of the contracting parties to the ECHR can request the ECtHR to give an advisory opinion on the interpretation of the ECHR.

138. First, it must be noted that Protocol No 16 is not, as such, at issue in the present Opinion procedure, because it is not among the legal instruments to which the EU is to accede in accordance with the draft agreement.

139. However, it is not inconceivable that the role of this Court could indirectly be affected by Protocol No 16, even if that protocol is not ratified by the EU itself and only some of its Member States adhere to it. This is because, as already mentioned, when the EU accedes to the ECHR, the ECHR as such will be an integral part of the legal order of the EU, so that this Court will be

87 — Explanatory report, paragraph 66.

88 — Paragraph 9 of the final report.

89 — As at 6 May 2014.

responsible for its interpretation by means of preliminary rulings (Article 267 TFEU).⁹⁰ Its role in relation to the interpretation of the ECHR within the EU could, however, be jeopardised by the fact that the highest courts and tribunals of the Member States which have ratified Protocol No 16 to the ECHR might be tempted, in application of its provisions, to refer questions concerning the interpretation of the ECHR to the ECtHR rather than to the Court of Justice.

140. Ultimately, this phenomenon would not, however, be a consequence of the accession of the EU to the ECHR. Even without the proposed accession of the EU, courts and tribunals of Member States which have ratified Protocol No 16 can turn to the ECtHR with questions on fundamental rights relating to the interpretation of the ECHR, instead of referring to the Court of Justice questions that are identical in substance but relate to the interpretation of the Charter of Fundamental Rights.

141. In order to solve this problem, it is sufficient to refer to the third paragraph of Article 267 TFEU, which imposes on the Member States' courts and tribunals of last instance a duty to refer matters to the Court of Justice for a preliminary ruling. The third paragraph of Article 267 TFEU takes precedence over national law and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No 16 to the ECHR. It follows from this that the Member States' courts and tribunals of last instance are required — in so far as they are called upon to determine a dispute within the scope of EU law — to refer questions concerning fundamental rights primarily to the Court of Justice and to respect primarily the decisions of that court.

d) Interim conclusion

142. In summary, it must be stated that the draft agreement does not affect the powers of the Court of Justice of the EU in such a way as to be incompatible with the first sentence of Article 2 of Protocol No 8, provided that the scope of application of the prior involvement procedure is clarified as indicated in point 135.

6. The powers of other EU institutions

143. So far as concerns the powers of other EU institutions, in particular those of the Parliament, the European Council, the Council and the Commission, it is not clear to what extent these might be affected by the EU's accession to the ECHR. Nothing has emerged in the Opinion procedure before this Court that would suggest that these powers might be affected.

a) General

144. As a general point it should be noted that, in consequence of the accession of the EU to the ECHR, all EU institutions will be required, when exercising their respective powers, to respect the human rights and fundamental freedoms enshrined in the ECHR. This is, however, as already mentioned elsewhere,⁹¹ a necessary and intended consequence of accession to the ECHR, which must not be misunderstood as affecting their powers within the meaning of the first sentence of Article 2 of Protocol No 8.

145. In so far as the EU institutions and Member States participating in the Opinion procedure may exchange views as to who is in future to determine the EU's position in the bodies of the ECHR or of the Council of Europe, and by whom the EU will be represented there, these are problems to be solved when specific arrangements are made to implement the proposed accession agreement within the

90 — Judgments in *Haegeman* (EU:C:1974:41, paragraph 6) and *Brita* (C-386/08, EU:C:2010:91, paragraph 39).

91 — See points 40 to 42 of this View above.

EU. Any effect on the powers of one or other institution that may emerge in that context will result not from the accession agreement itself but from the implementing measures alone. Accordingly, any assessment of legal issues associated therewith must be reserved for future legal proceedings⁹² and cannot — effectively as a precautionary measure — form part of the subject-matter of the present Opinion procedure, in which those issues would be of a strictly hypothetical nature.

b) The EU's institutional system governing the imposition of penalties for infringements of competition law

146. In the hearing before the Court of Justice, there was a brief discussion with the participants in the procedure as to whether the proposed accession of the EU to the ECHR would render it necessary to alter the existing competences of the EU institutions or to make any other systemic adjustments in the field of EU competition law, more specifically in relation to the imposition of financial penalties for infringements of Articles 101 TFEU and 102 TFEU. In that context, the following were addressed: first, the institutional role of the European Commission as competition authority; secondly, the principle *ne bis in idem*; and, thirdly, the principle that proceedings must be concluded within a reasonable time.

i) The institutional role of the Commission as competition authority

147. Where Articles 101 TFEU and 102 TFEU are implemented at EU level, the Commission acts as competition authority and has the power, without prior reference to a court, to impose severe financial penalties (fines and periodic payment penalties) on undertakings and associations of undertakings (see Article 103(2)(a) TFEU, Article 105 TFEU and Articles 23 and 24 of Regulation (EC) No 1/2003⁹³). This institutional role of the Commission⁹⁴ has a particular significance in the system of the founding Treaties, which is closely linked to the fundamental task of ensuring the functioning of the European internal market.

148. Some claim that such a system, which is founded on the imposition of administrative penalties by an authority, is problematic in the light of the guarantee of a fair trial under Article 6 ECHR.

149. As the case-law of the ECtHR currently stands, such concerns are unfounded, however. As the ECtHR has made clear, while administrative penalties, including those in the field of competition law, do fall within the scope of the criminal-law procedural guarantees under Article 6 ECHR, they are not part of the 'hard core' of criminal law — and might also be described as being merely *similar to criminal law*⁹⁵ — which means that the criminal-law guarantees provided for in Article 6 ECHR need not necessarily apply with their full stringency.⁹⁶

92 — See, by way of illustration, order in *Council v Commission* (C-73/13, EU:C:2013:299) in which such legal issues arise, albeit not in the context of the ECHR.

93 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

94 — For the sake of completeness, it should be noted that the Commission does not have exclusive competence with regard to the implementation of Articles 101 TFEU and 102 TFEU. However, in so far as implementation is provided for at a national level, many Member States have also established competition authorities with tasks and powers similar to those of the Commission.

95 — See my Opinions in *ETI and Others* (C-280/06, EU:C:2007:404, point 71); *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 48); and *Schenker and Others* (C-681/11, EU:C:2013:126, point 40). In the settled case-law of the Courts of the EU, criminal-law principles are applied to European competition law (see, in relation to the presumption of innocence, the judgment in *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraphs 149 and 150, and, in relation to the principle *ne bis in idem*, the judgment in *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 94).

96 — Judgment of the ECtHR in *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-XIV; see, to the same effect, judgment of the ECtHR in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, § 62, 27 September 2011; see also judgment of the EFTA Court in *Case E-15/10 Posten Norge v ESA* [2012] *EFTA Ct. Rep.* 246, paragraphs 87 and 88, and judgment in *Schindler Holding and Others v Commission* (C-501/11 P, EU:C:2013:522, paragraphs 33 to 35).

150. The ECtHR has recently expressly acknowledged that fines for infringements of the prohibition of cartels may be imposed by an authority if the undertaking concerned is able to refer any decision imposing on it a fine in cartel proceedings to a judicial body that has full jurisdiction (French: *pleine juridiction*). This requirement is satisfied in the EU's system of legal protection, as can be inferred both from the case-law of the Court of Justice⁹⁷ and from that of the ECtHR.⁹⁸

151. Accordingly, with regard to Article 6 ECHR, the proposed accession of the EU to the ECHR does not require any institutional changes to be made in the system governing the imposition of financial penalties in the field of competition law.

ii) The principle *ne bis in idem*

152. Nor, having regard to the right not to be tried or punished twice (*ne bis in idem*), in accordance with Article 4(1) of Protocol No 7 to the ECHR, does it follow from the proposed accession of the EU to the ECHR that there is any need to alter the system under EU law governing the implementation of Articles 101 TFEU and 102 TFEU. This is because the draft agreement does not even cover Protocol No 7 to the ECHR. Thus the EU will not, by virtue of its accession to the ECHR, assume any obligations under international law as regards *ne bis in idem*. It follows that there would be no need to take action in relation to *ne bis in idem* in the light of the accession to the ECHR that is currently proposed even if — contrary to my view⁹⁹ — the assumption were made that at present the conception of this legal principle in EU competition law does not (yet) fully correspond to that applied by the ECtHR in criminal cases.

iii) The principle that proceedings must be concluded within a reasonable time

153. Lastly, the validity of the principle that proceedings must be concluded within a reasonable time, which can also be inferred from Article 6 ECHR, is generally recognised in EU law (see Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights), and the Court of Justice has already been called upon on many occasions — particularly in competition cases — to assess whether that principle has been observed.

154. The mere fact that the Courts of the EU have had to find, in a number of individual cases, that there has been a breach of that principle by the Commission as competition authority,¹⁰⁰ or by the General Court as a first-instance court of review,¹⁰¹ does not in itself lead one to conclude that institutional changes must be made within the EU in view of the proposed accession to the ECHR.

97 — Judgments in *Otis and Others* (C-199/11, EU:C:2012:684, in particular paragraph 63); *Chalkor v Commission* (C-386/10 P, EU:C:2011:815, in particular paragraph 67); and *Schindler Holding and Others v Commission* (EU:C:2013:522, in particular paragraphs 33 to 38); and, in addition, my Opinion in the latter case (EU:C:2013:248, points 27 to 30).

98 — Judgment of the ECtHR in *Menarini Diagnostics v. Italy* (cited in footnote 96 above, paragraphs 57 to 67) relating to a national system for the implementation of cartel law that strongly resembles that which exists at EU level.

99 — Opinion in *Toshiba Corporation and Others* (EU:C:2011:552, points 111 to 124).

100 — Judgments in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* (C-105/04 P, EU:C:2006:592, paragraphs 35 to 62), and *Technische Unie v Commission* (C-113/04 P, EU:C:2006:593, paragraphs 40 to 72); see also my Opinions in *Solvay v Commission* (C-109/10 P, EU:C:2011:256, points 305 to 310) and *Solvay v Commission* (C-110/10 P, EU:C:2011:257, points 146 to 151).

101 — Judgments in *Baustahlgewebe v Commission* (C-185/95 P, EU:C:1998:608, paragraphs 26 to 47); *Der Grüne Punkt — Duales System Deutschland v Commission* (C-385/07 P, EU:C:2009:456, paragraphs 183 to 188); *Gascogne Sack Deutschland v Commission* (C-40/12 P, EU:C:2013:768, paragraphs 97 to 102); and *FLSmidth v Commission* (C-238/12 P, EU:C:2014:284, paragraphs 118 to 123).

155. What appears to me to be far more critical is that the EU institutions make all necessary arrangements to prevent any breaches of the principle that proceedings must be concluded within a reasonable time and to ensure that effective penalties are imposed in the event of any such breach. There is nothing specifically to suggest that such arrangements would not be forthcoming.¹⁰²

iv) Conclusion

156. In common with the Commission and the Council I therefore conclude that the EU can accede to the ECHR as proposed without being required to alter the existing competences of the EU institutions or to make any other systemic adjustments in the field of competition law.

D – Preservation of the specific characteristics of the EU and EU law

157. Provision is, moreover, to be made in the accession agreement, in accordance with Article 1 of Protocol No 8, ‘for preserving the specific characteristics of the Union and Union law’. The fundamental desire ‘to preserve the specific features of Union law’ is, moreover, articulated in the first sentence of Declaration No 2.

158. The specific characteristics or features mentioned in Protocol No 8 and Declaration No 2 refer to two matters in particular: first, the autonomy of the EU legal order is not to be affected by the EU’s accession to the ECHR. Secondly, it is important that due account is taken, in the context of this accession, of the specific features of the EU as a multi-level system.

159. With regard to the autonomy of the EU legal order, it must be observed that the founding Treaties of the European Union created a new legal order *sui generis* — in other words: *an autonomous legal order*. The protection of that legal order has been one of the cornerstones of the case-law of the Court of Justice for more than 50 years¹⁰³ and now enjoys universal recognition. This autonomy is not only characteristic of the relationship between EU law and the laws of the Member States, but must be respected also vis-à-vis third countries and international organisations; where the EU enters into an international agreement, steps must be taken to ensure that the autonomy of the EU legal order is not affected as a result.¹⁰⁴

160. In the context relevant here, the special features of the EU as a *multi-level system* include above all the fact that, within the EU, competences and responsibilities are distributed among national and EU authorities on the basis of numerous provisions of primary and secondary law.

161. It will be necessary to consider below whether due account is taken in the draft agreement of these special features of the EU and EU law. On the basis of Article 1 of Protocol No 8, consideration will thus be given to the following three aspects in particular:

- the recognition by the EU of the jurisdiction of the ECtHR (section 1);¹⁰⁵
- the principles of direct effect and the primacy of EU law (section 2);¹⁰⁶ and

102 — See, in that regard, in particular, the recently delivered judgments in *Gascogne Sack Deutschland v Commission* (EU:C:2013:768, paragraphs 89 to 96), and *FLSmidth v Commission* (EU:C:2014:284, paragraphs 116 and 117).

103 — See, for the leading cases, the judgments in *van Gend & Loos* (26/62, EU:C:1963:1); *Costa* (6/64, EU:C:1964:66); and *Internationale Handelsgesellschaft* (11/70, EU:C:1970:114, paragraph 3); also, more recently, Opinion 1/09 (EU:C:2011:123, paragraph 65).

104 — Opinion 1/91 (EU:C:1991:490, paragraph 30); Opinion 1/92 (EU:C:1992:189, paragraph 18); Opinion 1/00 (EU:C:2002:231, paragraph 11); and Opinion 1/09 (EU:C:2011:123, paragraph 67).

105 — Points 162 to 196 of this View.

106 — Points 197 to 207 of this View.

— the mechanisms for determining the correct respondent in proceedings before the ECtHR (section 3).¹⁰⁷

7. Recognition of the jurisdiction of the ECtHR

162. First of all, it is necessary to consider whether the specific characteristics of the EU and EU law (Article 1 of Protocol No 8) may be affected by the proposed recognition on the part of the EU of the jurisdiction of the ECtHR. Surprisingly, the Commission was completely silent on this point in its request for an Opinion, yet the point is of fundamental significance for the legal assessment of the draft agreement. It was, however, the subject of extensive discussion with the participants in this procedure during the hearing before the Court.

a) General considerations

163. Nowhere in the draft agreement is it expressly provided that the EU will be subject to the jurisdiction of the ECtHR. However, the draft necessarily implies that, in acceding to the ECHR, the EU, like all other contracting parties to the ECHR, recognises the jurisdiction of the ECtHR.¹⁰⁸

164. I would add the point made by many of the participants in this procedure: that this element of external judicial control of compliance with basic standards of fundamental rights will constitute the most significant difference in comparison with the present legal position, and is generally regarded as representing the real 'added value' of the EU's proposed accession to the ECHR.¹⁰⁹ Recognition by the EU of the jurisdiction of the ECtHR should not be seen as mere submission,¹¹⁰ but as an opportunity to reinforce the ongoing dialogue between the Court of Justice and the ECtHR, as two genuinely European jurisdictions, regarding issues of fundamental rights (see, to that effect, also the second sentence of Declaration No 2). Ideally this cooperation will lead to a strengthening of fundamental rights protection in Europe and will thus also help to give effect to the fundamental values on which the EU is founded (Article 2 TEU).

165. As is clear from Article 1(a) of Protocol No 8, with its express reference to 'the specific arrangements for the Union's possible participation in the control bodies' of the ECHR, the authors of the Treaty of Lisbon also proceeded on the assumption that the EU would recognise the jurisdiction of the ECtHR, provided that arrangements were made in the accession agreement for the specific characteristics of the EU and EU law to be preserved.

166. In the same vein, this Court has already held that it is not, in principle, incompatible with EU law for the EU, in concluding an international agreement, to submit to the jurisdiction of an international court that is responsible for the interpretation and application of the provisions of that very agreement.¹¹¹

107 — Points 208 to 235 of this View.

108 — See also paragraph 26 of the explanatory report, in which it is made clear that the decisions of the ECtHR in proceedings brought by individuals and by States, to which the EU is party, will be binding on EU institutions, including the Court of Justice.

109 — See point 1 of this View above.

110 — See also the 2010 Parliament resolution (last indent of point 1 thereof), according to which neither court is superior to the other; both are specialised in different fields.

111 — Opinion 1/91 (EU:C:1991:490, paragraphs 40 and 70) and Opinion 1/09 (EU:C:2011:123, paragraph 74).

167. In view of the existing, wide-ranging convergence between the decisions of the ECtHR and those of the Courts of the EU concerning fundamental rights, the formal recognition of the jurisdiction of the ECtHR in consequence of the EU's accession to the ECHR should not lead to any practical difficulties in the vast majority of cases. It needs to be emphasised, however, that accession to the ECHR must necessarily involve a willingness on the part of the EU also to recognise decisions of the ECtHR in which it is found that EU law is incompatible with the ECHR or that the EU has violated the ECHR in a particular case.¹¹²

168. In the oral part of this Opinion procedure there was extensive discussion regarding the question whether the Court of Justice should reserve the right to decline to recognise judgments of the ECtHR where these conflict with the constitutional identity of the EU — a kind of *ordre public* in EU law — or where the Strasbourg judges have manifestly exceeded their competences and their judgments are thus delivered *ultra vires*.

169. In my view there is, as matters stand, no reason for this Court to make such a reservation on constitutional grounds.

170. Such reservations in respect of the relationship between EU law and national law are no doubt to be found in the case-law of a number of constitutional courts in the Member States of the EU.¹¹³ There would seem to me, however, to be little compelling reason to apply the same approach to the relationship between EU law and the ECHR or to relations between the Court of Justice and the ECtHR, regardless of whether or not those reservations are fundamentally regarded as legitimate. The ECHR does not create a supranational legal order comparable to EU law that would of itself take precedence and have direct effect in the internal legal orders of the contracting parties. Furthermore the contracting parties to the ECHR typically have much greater flexibility in the implementation of judgments of the ECtHR than the Member States of the EU generally have with regard to the case-law of the Courts of the EU.

171. If — unlikely as it is — a judgment of the ECtHR were to give rise to doubts as to its compatibility with fundamental principles of the EU legal order or with structural features of the institutional framework of the EU, it would be not only for the Court of Justice but also for the political institutions and the Member States of the EU to seek appropriate solutions.¹¹⁴ The range of options available would extend from the amendment of EU law — including EU primary law — right up to the EU's denunciation of the Strasbourg system (Article 58 ECHR).¹¹⁵

b) The specific arrangements for ensuring the autonomy of the EU legal order in the draft agreement

172. Specifically, in order to preserve the autonomy of the EU legal order it is necessary, according to the case-law of the Court of Justice, to provide in the international agreement for the competences of the EU and its institutions to be unaffected, and for any interpretation of EU law by the international court not to be binding on the EU and its institutions.¹¹⁶

112 — See, to that effect, also points 3 and 26 of the Brighton Declaration.

113 — Perhaps best known in that context are the reservations of the German Federal Constitutional Court regarding what may be referred to as 'ultra vires review' and 'identity review' (see judgments of the Bundesverfassungsgericht *BVerfGE* 89, 155, in relation to the Treaty of Maastricht, and *BVerfGE* 123, 267 in relation to the Treaty of Lisbon), and the theory of 'controlimiti' developed by the Italian Constitutional Court (see, in that respect, Corte costituzionale, judgment No 170 of 8 June 1984, *Granital*).

114 — As the Court of Justice stated in *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461, paragraph 285), the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Treaties.

115 — The Commission also referred to the possibility of denunciation at the hearing before the Court of Justice.

116 — Opinion 1/00 (EU:C:2002:231, paragraphs 11 to 13); see also Opinion 1/91 (EU:C:1991:490, paragraphs 41 to 46 and 61 to 65) and Opinion 1/92 (EU:C:1992:189, paragraphs 32 and 41).

173. The first of these aspects, that is the preservation of the competences of the EU and its institutions, has already been discussed above in connection with the second sentence of Article 6(2) TEU and the first sentence of Article 2 of Protocol No 8.¹¹⁷ What remains to be examined, however, with regard to the second aspect mentioned above, is whether the draft agreement ensures that the ECtHR will neither directly nor indirectly interpret EU law in such a way as to be binding on the EU and its institutions.

174. Arrangements have been made in the proposed accession agreement — in the form of the provisions on the attribution of acts, measures and omissions (first sentence of Article 1(3) and first sentence of Article 1(4) of the draft agreement), the co-respondent mechanism and the prior involvement procedure (Article 3 of the draft agreement) — which, in principle, should ensure that the ECtHR will not interpret EU law in such a way as to be binding on the institutions or on the Member States of the EU. Whether those arrangements are sufficient to guarantee the effective protection of the autonomy of EU law depends, however, on the assessment of their actual configuration. In that respect, the draft agreement appears to me to present three problems, to which I shall turn below.

i) Determination of responsibilities in the relationship between the EU and its Member States (Article 3(7) of the draft agreement)

175. The first problem arising with regard to the autonomy of EU law concerns the determination of responsibilities in the relationship between the EU and its Member States where they are joint parties to proceedings before the ECtHR as respondents or co-respondents and the ECtHR rules that there has been a violation of the ECHR.

176. The first part of Article 3(7) of the draft agreement provides that, as a rule, the respondent and co-respondent are to be jointly responsible for a violation of the ECHR established by the ECtHR. In this way, the ECtHR is relieved of the need to determine, by reference to EU law, who is to be held to account under Article 46(1) ECHR for the violation of the ECHR: the EU or its Member State(s). In the vast majority of cases this rule should mean that the ECtHR is not required to produce a binding interpretation of the competences and responsibilities of the EU and its Member States under EU law.¹¹⁸

177. However, the second part of Article 3(7) of the draft agreement also affords the ECtHR the possibility of deciding that either the respondent alone or the co-respondent alone is to be held to account for the violation of the ECHR that has been established. In order to make such a determination, the competences and responsibilities of the respondent and co-respondent would have to be precisely defined, which presupposes that the ECtHR would at least indirectly comment on provisions of EU law.

178. Admittedly the draft agreement restricts the possibility of departing from the principle of joint responsibility provided for in the second part of Article 3(7) to those cases in which the respondent and co-respondent have given appropriate reasons to the ECtHR. Although that clause is not entirely free of ambiguity,¹¹⁹ the likelihood is that the ECtHR may derogate from the principle of joint responsibility for violations of the ECHR only if such derogation is consistent with reasons in respect of which the respondent and co-respondent *concur*.

117 — See points 33 to 104 and 105 to 156 of this View above.

118 — See, to that effect, also paragraph 62 of the explanatory report.

119 — The explanatory report does not contain anything that might remove this ambiguity. In particular, paragraph 62 of the report refers only to the reasons given by the respondent and the co-respondent.

179. The reference in the second part of Article 3(7) of the draft agreement to the reasons given by the respondent and co-respondent does not, however, alter the fact that, when applying this clause in a way that is binding on the institutions and Member States of the EU, the ECtHR is stating its views on their respective competences and responsibilities as defined in EU law. That is not, however, the task of the ECtHR, even if the institutions or Member States of the EU indicate their approval by means of concurrent statements. This is because it follows from the principle of the autonomy of EU law that only the Court of Justice of the EU can have jurisdiction to give a binding interpretation of EU law. Accordingly the second part of Article 3(7) of the draft agreement conflicts with the principle of the autonomy of EU law.

ii) Assessment of the question whether the prior involvement of the Court of Justice of the EU is necessary

180. The second problem that arises with regard to the autonomy of EU law concerns the assessment of the need to initiate a procedure for the prior involvement of the Court of Justice in a particular case.

181. In accordance with Article 3(6) of the draft agreement, the Court of Justice of the EU is to be afforded sufficient time in the prior involvement procedure to assess the compatibility with the ECHR of a provision of EU law if it has not yet made such an assessment. This means that, in particular cases, the question whether the Court of Justice has already expressed a view on the compatibility with the ECHR of a provision of EU law will be of decisive importance as regards the initiation of a prior involvement procedure.

182. In many cases, the assessment of that question is unlikely to give rise to any particular difficulty, because it will not be difficult to ascertain from the case-law of this Court whether it has previously commented on the compatibility with the ECHR of a particular provision of EU law. There may very well however be borderline cases in which, notwithstanding the fact that this Court may have previously considered the provision of EU law concerned, it remains unclear whether it has already commented sufficiently on the compatibility of that provision with the fundamental right protected by the ECHR violation of which is now alleged in the proceedings before the ECtHR,¹²⁰ and whether in general terms it examined this compatibility *from the same legal aspects* as those now relevant in the proceedings before the ECtHR.¹²¹

183. It would be incompatible with the autonomy of EU law if, in such borderline cases also, the decision regarding the necessity of the prior involvement of the Court of Justice were to be left to the ECtHR alone. Ultimately the Court of Justice itself is the only reliable authority on whether it has previously dealt with the specific legal issue before the ECtHR regarding the compatibility of a particular provision of EU law with one or more fundamental rights protected by the ECHR.

184. In order to respect the principle of autonomy of the EU legal order and to preserve the jurisdiction of the Court of Justice, it is necessary therefore to ensure that, in the event of any doubt, the ECtHR will always carry out the prior involvement procedure in accordance with Article 3(6) of the draft agreement. The ECtHR may dispense with the prior involvement of the Court of Justice only

120 — It is conceivable that the Court of Justice will already have assessed an EU measure as to its compatibility with *one* fundamental right protected by the ECHR (e.g. with Article 8 ECHR), but not with regard to *another* fundamental right (e.g. Article 6(1) ECHR) the violation of which is subsequently alleged in an application to the ECtHR.

121 — By way of example, this Court has twice had occasion to consider the validity of the Data Retention Directive, from entirely different perspectives, the first time with regard to its legal basis and only the second time with regard to certain fundamental rights (see, on the one hand, the judgment in *Ireland v Parliament and Council*, C-301/06, EU:C:2009:68, and, on the other, the judgment in *Digital Rights Ireland and Seitlinger and Others*, C-293/12 and C-594/12, EU:C:2014:238).

when it is obvious that the Courts of the EU have already dealt with the specific legal issue raised by the application pending before the ECtHR.¹²² Clarification to that effect is, in my view, indispensable, and must be binding under international law, so as to ensure that the autonomy of the EU legal order is unaffected in the light of the prior involvement mechanism.

iii) The discrepancy between the scope of the powers of the ECtHR and those of the Court of Justice of the EU in the framework of the CFSP

185. The third problem that may arise with regard to the autonomy of EU law concerns the protection of fundamental rights and the review by the courts of EU measures in the framework of the CFSP.¹²³

186. Without any doubt there is, within the framework of the CFSP, a certain discrepancy between the jurisdiction of the Court of Justice of the EU (first sentence of Article 19(1) TEU) and that of the ECtHR. This was acknowledged, *inter alia*, by the Council in the oral part of this Opinion procedure.

187. Thus, following the accession of the EU to the ECHR, the ECtHR will have the task of examining applications from persons and States in all areas of EU law — including, therefore, the CFSP — and of establishing any violations of the ECHR for which the EU may be responsible as respondent in accordance with the first sentence of Article 1(3) of the draft agreement, or as co-respondent in accordance with the second sentence of Article 1(4) of the draft agreement.¹²⁴

188. By contrast, the Courts of the EU, as already mentioned, have only limited powers in relation to the CFSP (sixth sentence of the second subparagraph of Article 24(1) TEU, in conjunction with Article 275 TFEU), and it is essentially for the courts and tribunals of the Member States of the EU to ensure effective legal protection in the CFSP (second subparagraph of Article 19(1) TEU, in conjunction with Article 274 TFEU). The prior involvement procedure also (Article 3(6) of the draft agreement) can self-evidently apply only in so far as the Court of Justice of the EU has jurisdiction at all, under the founding Treaties, to interpret EU law in respect of the CFSP and to review the legality of the activities of the EU institutions; its powers would otherwise be extended in a way that is incompatible with Article 4(1) TEU, the first sentence of Article 5(1) TEU, Article 5(2) TEU and the second sentence of Article 6(2) TEU.

189. Against that background, may the EU recognise the jurisdiction of the ECtHR? Is it compatible with the autonomy of EU law that the ECtHR should be able, within the framework of the CFSP, to examine acts, measures or omissions of the EU institutions as to their compatibility with the ECHR, when — leaving aside the exceptions laid down in the second paragraph of Article 275 TFEU — the Courts of the EU lack the power to carry out such examinations themselves? Is it acceptable for the EU, in the context of the CFSP, to be held responsible under international law as respondent or co-respondent for violations of the ECHR, yet not to have its own supranational courts within the EU, with the power to penalise such violations and to help to implement the ECHR?

190. These questions are certainly novel. It would appear that the issue of the autonomy of EU law in connection with the conclusion of international agreements has, until now, only ever arisen in cases in which there was reason to fear a conflict of jurisdiction between the Courts of the EU and an international court, but not in a case in which the powers of the Courts of the EU were less extensive than those of the international court.

122 — Ultimately the problems that arise are similar to those arising in relation to the question of the exemption of national courts or tribunals of last instance from their duty to make references for preliminary rulings to the Court of Justice pursuant to the third paragraph of Article 267 TFEU (see, by way of first precedent, the judgment in *Cilfit and Others*, 283/81, EU:C:1982:335), and a similar solution would be logical.

123 — On the related issue as to whether the specific features of the CFSP are such that effective legal protection can be guaranteed in this policy area, see points 82 to 103 of this View above.

124 — See also point 83 of this View above.

191. In my view, the principle of the autonomy of EU law does not preclude the EU from recognising the jurisdiction of an international court whose jurisdiction in a particular field — in this case the field of the common foreign and security policy — extends further than that of the EU institution which is the Court of Justice of the EU.

192. Admittedly, according to settled case-law, the principle of the autonomy of EU law requires the EU to ensure, when concluding international agreements, that the competences of the EU and its institutions are not affected and that any interpretation of EU law by the international court is not binding on the EU and its institutions.¹²⁵ Ultimately, however, the purpose of doing so is simply to ensure that possible conflicts between the case-law of the Courts of the EU and the case-law of the international court are avoided, and that the unique supranational structure of the EU is preserved.¹²⁶

193. By contrast, conflicting case-law and threats to the supranational structure of the EU are precluded altogether in so far as the authors of the founding Treaties of the EU consciously refrained from setting up a supranational structure and renounced the uniform and autonomous interpretation of EU law by a judicial institution of the EU itself in a particular area — in this case, in the field of the CFSP. The absence of sufficient arrangements *within the EU*, by which the autonomy of EU law alone can be protected, can hardly be used as an argument against recognition of the jurisdiction of the judicial body of an international organisation. Furthermore, the effectiveness of legal protection for individuals is strengthened, rather than weakened, in such a situation by the recognition of an international jurisdiction.

194. This applies *a fortiori* with regard to the EU's proposed accession to the ECHR, because, by Article 6(2) TEU, the authors of the Treaty of Lisbon consciously conferred on the EU institutions the power to implement that accession, and the task of doing so, *without* first configuring the CFSP along supranational lines or, in particular, giving the Courts of the EU comprehensive jurisdiction with regard to the CFSP. It would appear, therefore, that the authors of the Treaty of Lisbon did not themselves see any contradiction between the very limited jurisdiction of the Courts of the EU in relation to the CFSP, on the one hand, and recognition of the jurisdiction of the ECtHR in consequence of the EU's accession to the ECHR, on the other.

195. As already mentioned, none of this hinders the effective application of the ECHR or the effective legal protection of individuals in the field of the CFSP. In that respect, the authors of the Treaty of Lisbon relied on national courts and tribunals as the second pillar of the EU's legal protection system. It is for those national courts and tribunals to penalise any violations of the ECHR in connection with the CFSP and to help to implement the ECHR (second subparagraph of Article 19(1) TEU, in conjunction with Article 274 TFEU), unless the Courts of the EU, exceptionally, have jurisdiction pursuant to the second paragraph of Article 275 TFEU.¹²⁷

c) Interim conclusion

196. It is not incompatible with the Treaties for the EU, by its accession to the ECHR, to recognise the jurisdiction of the ECtHR, provided that the necessary clarification is included in the draft agreement as regards assessment of the necessity of the prior involvement of the Court of Justice (Article 3(6) of the draft) and as regards determination of the responsibilities of respondent and co-respondent (Article 3(7) of the draft). The fact that, in CFSP matters, the ECtHR might be seized of matters which are not within the jurisdiction of the Courts of the EU does not affect the compatibility of the draft agreement with the Treaties.

125 — See point 172 of this View above.

126 — See, in particular, with regard to the establishment of the European Economic Area, Opinion 1/91 (EU:C:1991:490, paragraphs 34 and 35, 41 to 46 and 61 to 65) and Opinion 1/92 (EU:C:1992:189, paragraphs 32 and 41).

127 — See points 96 to 103 of this View above.

8. The principles of direct effect and the primacy of EU law

197. The essential features which characterise the EU legal order as a new, autonomous legal order also include its primacy over the laws of the Member States and the direct effect of a whole series of provisions of EU law.¹²⁸ It is necessary, secondly, therefore, to examine in the context of Article 1 of Protocol No 8 whether the proposed accession of the EU to the ECHR is likely to impair the direct effect and primacy of EU law.

198. As regards, first of all, the *direct effect of EU law*, the EU's accession to the ECHR should not pose any particular problems. When the proposed accession agreement enters into force, the ECHR will become an integral part of the legal order of the EU.¹²⁹ As such, the ECHR will, as a rule, share in the direct effect of EU law. This is because the content of the provisions of the ECHR in which classic fundamental rights are enshrined or procedural rules for individual applications to the ECtHR laid down is unconditional and sufficiently precise, so that EU citizens and, where appropriate, undertakings, can rely on them.

199. In cases governed by EU law, the *primacy of EU law* over the national laws of the Member States will, on the accession of the EU, extend also to the ECHR. This is evident from Article 216(2) TFEU, according to which all international agreements concluded by the EU are binding on the Member States.¹³⁰

200. It is somewhat more difficult, however, to determine the future ranking of the ECHR within the hierarchy of norms of the EU legal order.

201. On the one hand, as an international agreement concluded by the EU, the ECHR will rank between primary law and other secondary legislation. The ECHR will thus have precedence over other secondary legislation, because it is binding upon the institutions of the EU (Article 216(2) TFEU). At the same time, however, it will be subordinate to primary law, because the proposed accession agreement is negotiated by the Commission and approved by the Council, and is therefore subject, as an act of EU institutions, to review by the Court of Justice as to its legality (see the first paragraph of Article 263 TFEU, the first paragraph of Article 267 TFEU and, already at a preliminary stage, Article 218(11) TFEU). That cannot be altered by the fact that this accession agreement requires approval by the Member States in accordance with their constitutional requirements (last part of the second subparagraph of Article 218(8) TFEU).

202. On the other hand, to conclude from the 'intermediate ranking' of this envisaged international agreement between the primary and other secondary law of the EU that the founding Treaties could thenceforth claim unrestricted 'precedence' over the ECHR would be to fail to appreciate the special significance of the ECHR for the EU legal order.

203. It must be borne in mind that the obligation to observe the standards of fundamental rights protection that flow from the ECHR has constitutional status in the EU. This is apparent from Article 6(3) TEU, according to which fundamental rights, as guaranteed by the ECHR, are to constitute general principles of EU law. Moreover, the Charter of Fundamental Rights, which has the same value as binding primary law (second part of the first subparagraph of Article 6(1) TEU), must be interpreted and applied in line with the ECHR as the minimum standard for fundamental rights protection at EU level pursuant to the requirement of homogeneity laid down in the first sentence of Article 52(3) of the Charter.

128 — Opinion 1/91 (EU:C:1991:490, paragraph 21) and Opinion 1/09 (EU:C:2011:123, paragraph 65).

129 — Judgments in *Haegeman* (EU:C:1974:41, paragraph 5); *IATA and ELFAA* (EU:C:2006:10, paragraph 36); and *Air Transport Association of America and Others* (EU:C:2011:864, paragraph 73).

130 — As to the account that may have to be taken in this respect of the situation of Member States with regard to the ECHR, see points 249 to 277 of this View below.

204. Against that background, any possible conflict between a fundamental right protected by the ECHR and a provision of EU primary law cannot be resolved by means of a mere reference to the fact that, in formal terms, the ECHR ranks below the founding Treaties of the EU.¹³¹ Instead, it follows from Article 6(3) TEU and from the first sentence of Article 52(3) of the Charter of Fundamental Rights that the fundamental rights protected by the ECHR are to be taken into account in the interpretation and application of EU primary law, and that a careful balance must always be struck between those fundamental rights and the relevant provisions of primary law.

205. This duty to strike a careful balance, which may already be inferred from Article 6(3) TEU and the first sentence of Article 52(3) of the Charter of Fundamental Rights, will not be altered in any fundamental respect by the proposed accession of the EU to the ECHR.

206. It may be that the ECtHR will not always define the balance to be struck between the requirements of fundamental rights protection, on the one hand, and general interest considerations or economic interests, on the other, in precisely the same way as has been the case up to now in the case-law of the Court of Justice.¹³² To that extent, the fact that the EU institutions are to be bound by the case-law of the ECtHR as a result of the EU's accession to the ECHR may indeed produce a certain shift in emphasis, for example in the relationship between the fundamental rights and the fundamental freedoms of the European internal market. That potential development would, however, be an inevitable consequence of the EU's accession to the ECHR and recognition of the jurisdiction of the ECtHR, as required by the authors of the Treaty of Lisbon in the first sentence of Article 6(2) TEU and in Article 1(a) of Protocol No 8.¹³³

207. All in all therefore, neither the direct effect of EU law nor its primacy is threatened by the EU's accession to the ECHR as envisaged in the draft agreement.

9. The mechanisms for determining the correct respondent in proceedings before the ECtHR

208. Thirdly and lastly, it is necessary to consider the requirements of Article 1(b) of Protocol No 8. This provision stipulates that the specific characteristics of the EU and EU law must be preserved 'with regard to ... the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'.

209. Contrary to the inference that might be drawn on a superficial reading of the German-language version in particular of Article 1(b) of Protocol No 8, what matters in this context is not so much the *communication* ('Übermittlung') of applications as such, but rather the accurate determination of the respondent responsible. As is clear from other language versions, including the French and English versions,¹³⁴ it needs to be ensured that applications submitted to the ECtHR are, depending on the circumstances, directed appropriately against Member States and/or the EU, that is to say, in simple terms, that they *are directed against the correct respondent(s)*.

131 — See, in that regard, also the judgment in *Kadi and Al Barakaat International Foundation v Council and Commission* (EU:C:2008:461, paragraphs 285 and 304), according to which the constitutional principles of the EU include the principle that all EU acts must respect fundamental rights, and the protection of fundamental rights forms part of the foundations of the EU.

132 — Examples to illustrate these issues can be found, inter alia, in the judgments in *Schmidberger* (C-112/00, EU:C:2003:333); *Omega* (C-36/02, EU:C:2004:614); *International Transport Workers' Federation and Finnish Seamen's Union* ('Viking', C-438/05, EU:C:2007:772); *Laval un Partneri* (C-341/05, EU:C:2007:809); *Dynamic Medien* (C-244/06, EU:C:2008:85); and *Digital Rights Ireland* (EU:C:2014:238).

133 — On the recognition of the jurisdiction of the ECtHR see also above, in particular points 163 to 171 of this View.

134 — French: 'pour garantir que les recours formés par des États non membres et les recours individuels soient *dirigés correctement* contre ...'; English: 'to ensure that proceedings by non-Member States and individual applications are *correctly addressed* to ...' (my emphasis).

210. The background to this requirement in Article 1(b) of Protocol No 8 is that EU matters frequently involve the complex interaction of EU and Member States' acts and responsibilities; in particular, the Member States are, as a general rule, involved in the implementation of EU law. This creates what in terms of the ECHR system is an unusual mix, in which legislation is adopted by one or more contracting parties to the ECHR (EU primary law by the Member States of the EU, EU secondary law by the EU institutions) and is implemented by one or more of the other contracting parties to the ECHR (sometimes by the EU itself but more often by national authorities).¹³⁵ This can lead to difficulties in determining the correct respondent in proceedings before the ECtHR relating to EU law.

211. The requirement to provide for the 'mechanisms necessary' to enable the correct respondent to be selected, which, under Article 1(b) of Protocol No 8, is a condition of the EU's accession to the ECHR, must be seen against that background. Its objective is twofold: first, such arrangements ensure that the ECtHR can provide effective supervision in proceedings concerning individual applications (Article 34 ECHR), should EU law be applied to individuals in a way that is allegedly contrary to the ECHR; equally, the other contracting parties to the ECHR are able to perform their control function more effectively using the inter-State cases procedure (Article 33 ECHR).¹³⁶ Secondly, it ensures that the EU and its Member States can defend EU law effectively against any complaints that it is not in conformity with the ECHR.

212. The rules in the draft agreement on the attribution of acts, measures or omissions of the EU and its Member States (see the first sentence of Article 1(3) and the first sentence of Article 1(4) of the draft), coupled with the co-respondent mechanism (see Article 3 of the draft), serve to ensure that those two aims are realised.

a) Ensuring effective supervision in the control system of the ECHR

213. As regards the first of the two aims of Article 1(b) of Protocol No 8 — that is to say, ensuring effective supervision in the control system of the ECHR — the rules of attribution contained in the draft agreement ensure that there can be no uncertainty regarding the respondent against whom individuals or contracting parties to the ECHR should direct their applications claiming a violation of the ECHR by EU law or on account of its implementation.

214. According to those rules of attribution, the EU is responsible only for acts, measures or omissions of its own institutions, bodies, offices or agencies, or of persons acting on their behalf (first sentence of Article 1(3) of the draft agreement), whereas acts, measures or omissions of national authorities are to be attributed only to Member States, even if they occur when EU law is being implemented (first sentence of Article 1(4) of the draft agreement).

215. At the same time, the co-respondent mechanism ensures the effective execution of judgments of the ECtHR establishing a violation of the ECHR by EU law or in the implementation of EU law (Article 46(1) ECHR).

¹³⁵ — Explanatory report, paragraph 38.

¹³⁶ — See also paragraph 39 of the explanatory report, where mention is made of the avoidance of gaps in participation, accountability and enforceability of judgments in the ECHR system (French: 'éviter toute lacune dans le système de la Convention liée à la participation, à la responsabilité et à l'opposabilité').

- Under Article 3(2) of the draft agreement, it is intended that the EU assume the role of co-respondent where, by his allegation of a violation of the ECHR by national authorities, the applicant is essentially calling into question the compatibility with the ECHR of EU law,¹³⁷ notably where the alleged violation of the ECHR by national authorities could have been avoided only by disregarding an obligation under EU law.
- By contrast, Article 3(3) of the draft agreement envisages the Member States of the EU assuming the role of co-respondent where, by his allegation of a violation of the ECHR by institutions, bodies, offices or agencies of the EU, the applicant is essentially calling into question the compatibility of the EU Treaty, the FEU Treaty or other provisions of primary law,¹³⁸ notably where the alleged violation of the ECHR could have been avoided only by disregarding an obligation under EU primary law.

216. Put simply, the respondent in each case will therefore be the party to which the impugned act, measure or omission is to be attributed, whereas the role of the co-respondent falls to the party which has the power, if necessary, to bring about an amendment of the provisions of EU law relating to that act, measure or omission;¹³⁹ in the case of EU secondary law, that would be the EU itself, in the case of EU primary law, its Member States.

217. Problems may of course arise as a result of the fact that, according to the draft agreement, no contracting party to the ECHR is *obliged* to become a co-respondent in proceedings pending before the ECtHR.¹⁴⁰ Accordingly, it is theoretically conceivable that a contracting party to the ECHR — whether the EU or a Member State of the EU — might refrain from requesting to become a co-respondent in proceedings before the ECtHR or from accepting an invitation from the ECtHR to that effect, even where the conditions set out in Article 3(2) or (3) of the draft agreement are met. In such cases there is a risk that a judgment of the ECtHR establishing a violation of the ECHR attributable to EU law might not be faithfully implemented, because the entity which may be required to amend EU law will not be bound by the judgment of the ECtHR, since it will not have taken part in the proceedings as a co-respondent.

218. At first glance, it would appear that this problem would best be solved by making participation as a co-respondent in proceedings before the ECtHR mandatory both for the EU and for its Member States, wherever the substantive conditions set out in Article 3(2) or (3) of the draft agreement are met. Adding this element of automaticity to the co-respondent mechanism — with the relevant parties being joined to the proceedings by the ECtHR, for example — could, however, bring it into conflict with the autonomy of the legal order of the EU,¹⁴¹ because it would no longer be open to the authorities within the EU (whether at EU or Member State level) to assess definitively on their own responsibility whether the matter concerns EU law and whether it is necessary to defend that EU law before the ECtHR.

219. The negotiators took these conflicting interests into consideration, in that they made provision for a declaration to be made unilaterally by the EU at the time of signature of the accession agreement.¹⁴² In the proposed declaration, the EU undertakes, inter alia, to ensure that in proceedings before the ECtHR it will request to become a co-respondent in the proceedings, or accept an invitation by the ECtHR to that effect, where the conditions set out in Article 3(2) of the accession agreement are met.

137 — By way of illustration in this regard see, for example, judgment of the ECtHR in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI, and its decision in *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, ECHR 2009.

138 — This problem also has arisen in the past; see judgment of the ECtHR in *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I.

139 — See to that effect also the last sentence of paragraph 56 of the explanatory report.

140 — Explanatory report, paragraph 53.

141 — With regard to the principle of autonomy, see, generally, point 159 of this View.

142 — Appendix II to the final report.

Thus, on the one hand, the autonomy of EU law is preserved and, on the other, provision is made to ensure that the EU, as co-respondent, will be bound by any judgments of the ECtHR which, for the purposes of their implementation, will require acts of the institutions, bodies, offices or agencies of the EU.

220. It is true that there is no provision in the draft agreement or its accompanying documents for a comparable declaration of obligation to be made by the Member States of the EU, should the compatibility of EU primary law with the ECHR ever be at stake in proceedings before the ECtHR. From the perspective of EU law it is not essential, however, that the Member States enter into such an obligation, because they will already be required, by virtue of their duty of sincere cooperation under EU law (Article 4(3) TEU), to participate as co-respondents in all proceedings before the ECtHR in respect of which the conditions set out in Article 3(3) of the draft agreement are met. This applies *a fortiori* if an EU institution calls upon Member States to request to become a co-respondent in proceedings before the ECtHR.

b) Ensuring an effective defence of EU law before the ECtHR

221. In order to achieve the second of the two aims of Article 1(b) of Protocol No 8 — that is to say, ensuring an effective defence of EU law before the ECtHR — the EU and its Member States must actually be in a position to join proceedings before the ECtHR whenever they consider it necessary to do so.

i) Absence of sufficient information about proceedings pending before the ECtHR

222. An effective defence of EU law requires, first of all, that the EU is reliably informed of all proceedings against one or more of its Member States pending before the ECtHR in which there is any possibility of its participation as a co-respondent pursuant to Article 3(2) of the draft agreement. Equally, the Member States of the EU must be made aware of all proceedings against the EU pending before the ECtHR in which they could take part as co-respondents pursuant to Article 3(3) of the draft agreement.

223. According to the explanatory report on the draft agreement, the negotiators appear to have proceeded on the basis that the existing system of publication of all cases pending before the ECtHR that have been served on the relevant respondents should ensure the dissemination of the necessary information.¹⁴³

224. It must be noted in that regard that — contrary to the Commission's submission at the hearing — there is currently *no* systematic publication in the ECtHR of all pending cases, not even of those already served on the relevant respondents. In particular, unlike the Court of Justice, which uses the *Official Journal of the European Union*, the ECtHR does not have any official, regular publication in which such cases would be listed with a reference to their subject-matter. Nor, unlike on the website of the Court of Justice, is it possible to use the search engine of the ECtHR ('HUDOC'), which is freely accessible via the Internet, to find a systematic compilation of all applications which are pending and have been served. Furthermore, it would appear that there is no intention that the ECtHR should automatically communicate to the EU all applications served on one or more of the EU's Member States, just as, conversely, there is no proposal systematically to send to the Member States of the EU all applications notified to the EU.

143 — Explanatory report, last sentence of paragraph 52.

225. Under those circumstances there is at present no basis for any assumption that the system of service and publication of pending applications employed by the ECtHR is capable of ensuring that potential co-respondents are reliably informed of the existence of all proceedings in which they might have cause to submit a request to become a co-respondent in accordance with the first sentence of Article 3(5) of the draft agreement.

226. Some of the participants in this Opinion procedure are of the view that the Member States and EU institutions are required under EU law, by virtue of their duty of sincere cooperation (Article 4(3) TEU), to inform each other of all applications served on them by the ECtHR, an obligation which may yet have to be put into more concrete terms in the measures for the implementation of the accession agreement to be adopted internally at EU level.

227. I do not share this view. The possibility of asserting the procedural rights of potential co-respondents before the ECtHR must not depend on their finding out indirectly, from other parties to the proceedings, about the existence of applications that relate to EU law. In order to ensure that the possibilities for the participation of the EU or its Member States pursuant to Article 3(2), (3) and (5) of the draft agreement are fully effective in practice, and to enable them to defend EU law under the best possible conditions before the ECtHR, the ECtHR itself must be responsible for automatically informing the EU of all applications served on one or more of the Member States of the EU, just as, conversely, it must systematically inform all Member States of the EU of all applications notified to the EU. In this era of electronic communications and computerised file management, this obligation cannot be regarded as an excessive administrative burden on the ECtHR. By way of comparison: the Court of Justice itself assumes the task of practical importance of providing information to all those who may have a right to take part in the proceedings,¹⁴⁴ and certainly does not leave it to the applicant or defendant in pending proceedings to do so.

228. The lack of any systematic communication to the EU and its Member States of applications notified by the ECtHR to the main respondent in a given case is not compensated by the fact that the ECtHR may, in appropriate cases, issue an invitation to join the proceedings as a co-respondent, in accordance with the first sentence of Article 3(5) of the draft agreement. According to that provision, the ECtHR is not obliged systematically to issue such invitations, but has a discretion to select those cases in which it considers such an invitation to be necessary.

ii) The power of the ECtHR to assess plausibility in connection with requests to become a co-respondent

229. An effective defence of EU law also requires that the EU be permitted to take part in all proceedings before the ECtHR in which it considers that the compatibility of EU law with the ECHR is at issue. Equally, it must be open to the Member States of the EU to take part in all proceedings before the ECtHR in which, in their view, the compatibility of EU law with the ECHR is at stake.

230. It follows from the third sentence of Article 3(5) of the draft agreement, however, that the ECtHR is to have the power to make an assessment of plausibility in respect of the content of requests from the EU and its Member States to become co-respondents. The ECtHR will thus be given a margin of appreciation with regard to the admission of co-respondents. It is true that some of the participants in

144 — To that end, notice of every case pending before the Courts of the EU is published on the Internet site of the Court of Justice and in the *Official Journal of the European Union* at an early stage of the proceedings.

this Opinion procedure have tried to play down the significance of that margin of appreciation. Overall, however, the participants were far from unanimous as regards its intended scope.¹⁴⁵ This reveals that the possibilities for potential co-respondents' participation in proceedings are imbued with considerable uncertainty on account of the plausibility assessment provided for in the draft agreement.

231. It is my view that this plausibility assessment is likely to jeopardise the aim of ensuring an effective defence of EU law before the ECtHR that underpins Article 1(b) of Protocol No 8. Even if the ECtHR can generally be expected to approve requests for leave to become a co-respondent, it is not inconceivable that it could, in some cases, deny the plausibility of the reasons put forward in support of such a request. The EU, or its Member States, would then be precluded from participating in proceedings before the ECtHR, even though they considered it necessary to defend EU law in those proceedings.

232. Such a situation would, moreover, be incompatible with the autonomy of the EU legal order. This autonomy is predicated on the EU and its Member States being able to decide on their own responsibility, without any non-EU entity being entitled to influence that decision, whether a case concerns EU law and whether participation as a co-respondent appears, therefore, to be necessary.

233. This obvious shortcoming in the design of the co-respondent mechanism, as provided for in the draft agreement, cannot be compensated by the fact that the contracting parties to the ECHR may, under Article 36(2) ECHR, take part in proceedings before the ECtHR as 'third parties'. Such third party intervention is not automatic under that provision either, but is at the discretion of the ECtHR ('may').

234. It may be interesting in this connection to draw a comparison with the rules of procedure that apply in the Court of Justice. These confer on the EU institutions involved in the legislative process and the Member States the right to intervene in all pending actions without having to prove a legitimate interest in doing so, and without this right being limited by any form of discretion or any form of plausibility assessment by the Court.¹⁴⁶ This reflects the special responsibility of the aforementioned EU institutions and Member States for the legal order of the EU.

c) Conclusion

235. The proposed co-respondent mechanism, as provided for in Article 3 of the draft agreement, may be regarded as compatible with Article 1(b) of Protocol No 8 only if safeguards are put in place to ensure that potential co-respondents are systematically and without exception informed of the existence of all proceedings in which they might have cause to make a request to become a co-respondent pursuant to the first sentence of Article 3(5) of the draft agreement, and that any requests for leave to become a co-respondent are not subjected to a plausibility assessment by the ECtHR pursuant to the third sentence of Article 3(5) of that draft.

10. Interim conclusion

236. In summary, it should be stated that the draft agreement may be deemed to be compatible with the specific characteristics of the EU and EU law only if that draft is amended as outlined in points 179, 184 and 235 above.

145 — While some participants in this procedure took the view that, in accordance with the third sentence of Article 3(5) of the draft agreement, the ECtHR may merely satisfy itself that reasons for the request have been given at all, others expressed the view that the ECtHR can also examine the substance of the reasons put forward and whether they are *prima facie* well founded.

146 — Regarding participation in the preliminary ruling procedure, see Article 23 of the Statute of the Court of Justice of the European Union; regarding participation in direct actions and appeals, see the first paragraph of Article 40 of the Statute and Article 131(2) of the Rules of Procedure of the Court of Justice.

E – *The requisite arrangements for the EU's participation in the control bodies of the ECHR*

237. Furthermore, Article 1(a) of Protocol No 8 requires the proposed accession agreement to preserve the specific characteristics of the EU and EU law 'with regard to ... the specific arrangements for the EU's possible participation in the control bodies of the ECHR'.

238. On acceding to the ECHR as proposed, the EU will participate in both control bodies of the Convention: in the ECtHR, the judicial control body, and in the Committee of Ministers of the Council of Europe, the political control body.

11. The EU's participation in the ECtHR

239. As regards, first of all, the EU's participation in the ECtHR, there are, in the form of the proposed co-respondent mechanism and prior involvement procedure, both of which are provided for in Article 3 of the draft agreement, specific arrangements in place within the meaning of Article 1(a) of Protocol No 8. As I have already explained above, these arrangements are fundamentally capable of preserving the specific characteristics of the EU and EU law as regards accession to the ECHR. Some specific amendments, additions and clarifications regarding the operation of those mechanisms are all that is required.¹⁴⁷

240. It goes without saying that the EU will, in addition, be entitled to participate, through a delegation of the European Parliament in the Parliamentary Assembly of the Council of Europe, in the election of judges of the ECtHR (Article 6 of the draft agreement and Article 22 ECHR). The same applies to the right of the EU to nominate its own candidates for the office of judge at the ECtHR. No specific arrangements were required in this regard in order to preserve the specific characteristics of the EU and EU law. Rather, it is sufficient for the purposes of Article 1(a) of Protocol No 8 that the EU, as provided for in the draft agreement, participates in the election of judges of the ECtHR as an equal contracting party to the ECHR, and that the judge appointed upon a proposal of the EU participates as an equal member of the ECtHR in the judicial activities of that court.¹⁴⁸

12. The EU's participation in the Committee of Ministers of the Council of Europe

241. Next, so far as concerns the EU's participation in the work of the Committee of Ministers of the Council of Europe, Article 7 of the draft agreement, read in conjunction with the proposed 'Rule 18',¹⁴⁹ contains a number of special rules on the majorities required for the adoption of decisions by that committee when — in cases to which the EU is a party — it exercises its supervisory function in respect of the execution of final judgments of the ECtHR (Article 46(2) to (5) ECHR) and of the terms of friendly settlements (Article 39(4) ECHR).

242. In particular, under Rule 18(2), the votes of one fourth of the representatives entitled to sit on the Committee of Ministers are sufficient for a final decision by the Committee of Ministers to refer a matter to the ECtHR. Even such a 'hyper minority' in the Committee of Ministers can thus ensure that infringement proceedings and proceedings concerning referrals for interpretation of judgments are brought before the ECtHR.

¹⁴⁷ — See above in particular points 135, 179, 184 and 235 of this View.

¹⁴⁸ — Paragraph 77 of the explanatory report.

¹⁴⁹ — This new procedural rule, entitled 'Judgments and friendly settlements in cases to which the European Union is a party', is to be added to the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' (see Appendix III to the final report).

243. These special rules are attributable to the fact that the EU and its Member States will, on account of the obligation of sincere cooperation under EU law (Article 4(3) TEU), vote in a co-ordinated manner in the Committee of Ministers when potential violations of the ECHR that relate to EU law are at issue.¹⁵⁰ In order nevertheless to ensure that the acts, measures and omissions of the EU and its Member States can be subject to effective external control by the Committee of Ministers, the voting rules have had to be adjusted so that the EU would not be able by itself to block the adoption of a decision.¹⁵¹

244. Admittedly, the effect of these special rules is that the Member States of the Council of Europe which are not Member States of the EU have a key role in the work of the Committee of Ministers with regard to supervision of compliance with the EU's obligations under the ECHR. The special rules can lead to the EU and its Member States being 'outvoted' in relation to the supervision of judgments and friendly settlements to which the EU is a party, even though they would actually be in the majority in purely numerical terms. Nor, given that the Committee of Ministers is a political body, can it be ruled out that, in the event of a dispute, the votes of Member States of the Council of Europe which do not belong to the EU would be cast without the necessary regard being had to the specific features of the EU and of EU law.

245. It is, however, in the nature of a system of collective guarantees underpinned by effective external control¹⁵² that the Member States of the Council of Europe which do not belong to the EU can produce such decisions against the will of the EU and its Member States if they consider that the EU has failed to fulfil its obligations under a judgment of the ECtHR or a friendly settlement. Without the proposed special rules, the EU and its Member States would have a right of veto in the Committee of Ministers in matters concerning themselves, which would ultimately make a nonsense of the system of external control.

246. The risk that the specific features of the EU and EU law might be affected appears none the less to be slight, since the Committee of Ministers does not itself finally decide whether the EU has properly implemented a judgment addressed to it or a friendly settlement reached by it. Rather, any decision-making in the Committee of Ministers that may have been politically motivated would simply result in the matter being brought (again) before the ECtHR and subjected to judicial scrutiny.

247. Overall, the rules governing the work of the Committee of Ministers thus appear to be capable of preserving the specific features of the EU with regard to its participation in ECHR bodies. They do not give rise to any concerns regarding their compatibility with the Treaties.

13. Interim conclusion

248. All in all, therefore (subject to my remarks in points 135, 179, 184 and 235 above, and in point 265 below), there is nothing to indicate that the rules contained in the draft agreement concerning the EU's participation in the control bodies of the ECHR would not take due account of the specific characteristics of the EU and EU law or might otherwise be incompatible with the Treaties.

150 — Paragraph 82 of the explanatory report.

151 — Paragraphs 84 to 92 of the explanatory report.

152 — The importance of effective and fair supervision by the Committee of Ministers is also emphasised in point 27 of the Brighton Declaration.

F – *Taking into account the situation of Member States in relation to the ECHR*

249. Lastly, it is necessary to ensure, in accordance with the second sentence of Article 2 of Protocol No 8, that the proposed accession agreement does not affect ‘the situation of Member States’ of the EU in relation to the ECHR, from three aspects in particular:

- first, in relation to the protocols to the ECHR (see section 1 below);
- secondly, in relation to any emergency measures taken by Member States of the EU on the basis of Article 15 ECHR (see section 2 below); and
- thirdly, in relation to any reservations made by Member States of the EU in accordance with Article 57 ECHR (see section 3 below).

250. It will, moreover, be necessary briefly to consider one respect relating to the co-respondent mechanism in which the situation of the Member States in relation to the ECHR might be jeopardised (see section 4 below).

14. The situation of Member States in relation to the protocols to the ECHR

251. As regards, first of all, the situation of Member States of the EU in relation to the protocols to the ECHR, it should be borne in mind that not all Member States will necessarily have ratified these legal instruments.¹⁵³ Accordingly, the purpose of the second sentence of Article 2 of Protocol No 8 is to ensure that the accession of the EU to the ECHR does not indirectly lead to Member States being bound by additional protocols to the ECHR to which they themselves are not (yet) contracting parties.

252. The proposed accession agreement will in any event result in the EU’s accession only to Protocols No 1 and No 6 to the ECHR. All Member States of the EU are already parties to those two protocols. To that extent there is, therefore, no particular ‘situation of Member States’ that might be affected by the proposed accession of the EU to the ECHR.

253. The question whether a possible future accession of the EU to other protocols to the ECHR, to which perhaps not all Member States of the EU will be parties, would be compatible with the primary law provisions of the second sentence of Article 2 of Protocol No 8 does not need to be clarified in this Opinion procedure, because that is at present a purely hypothetical question which is not part of the ongoing accession process. In any event, in view of the special ratification requirement in the last part of the second subparagraph of Article 218(8) TFEU, the Member States will themselves be able to ensure, on any future accession of the EU to an additional protocol to the ECHR, that there is consistency between the EU’s prospective obligations under international law and the Members States’ own.

254. For the sake of completeness, it should be borne in mind that, *from a substantive point of view*, EU law has for some time now drawn inspiration from the additional protocols to the ECHR, notwithstanding the fact that not all Member States of the EU are parties to them. Such protocols are taken into consideration in the Charter of Fundamental Rights¹⁵⁴ and, moreover, may have a role to play in determining the substance of general legal principles of EU law¹⁵⁵ (see also Article 6(3) TEU). It is not inconceivable that such references as are made in EU law and by the Courts of the EU to the

153 — Protocols No 4, No 7, No 12 and No 13 to the ECHR have not yet been ratified by all Member States of the EU.

154 — See, in particular, the explanations relating to Articles 19, 50 and 52 of the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

155 — See, for example, — on the general legal principle *ne bis in idem* — judgments in *Limburgse Vinyl Maatschappij and Others v Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 59) and *Showa Denko v Commission* (C-289/04 P, EU:C:2006:431, paragraph 50).

substance of additional protocols to the ECHR may affect the situation of Member States — for example, their obligations in relation to the implementation of EU law, as referred to in Article 51(1) of the Charter of Fundamental Rights. That, however, is a phenomenon that already exists as EU law stands, rather than a consequence of the EU's proposed accession to the ECHR.

255. Consequently, the proposed accession of the EU to the ECHR would not entail any of the changes in the situation of Member States in relation to the protocols to the ECHR that the second sentence of Article 2 of Protocol No 8 is intended to prevent.

15. The situation of Member States in relation to Article 15 ECHR

256. The emergency clause in Article 15 ECHR permits the contracting parties to the ECHR, within certain limits, to take 'measures' derogating from the obligations under the ECHR 'in time of war or other public emergency threatening the life of the nation'.

257. This possibility of adopting emergency measures will not change in any respect as a result of the EU's accession to the ECHR. None of the provisions of the draft agreement restricts the Member States' ability to make use of Article 15 ECHR. Nor does the fact that, following the EU's accession, the ECHR will be an integral part of the legal order of the EU and, in accordance with Article 216(2) TFEU, the primacy of EU law over national laws will extend to it¹⁵⁶ affect the application of emergency measures by Member States. This is because, like the other provisions of the ECHR, Article 15 ECHR will be incorporated into EU law. Furthermore, EU law itself contains an emergency clause in the form of Article 347 TFEU, which is comparable to that of Article 15 ECHR and allows the Member States to take the same measures, in essence, as those permitted under the ECHR.

258. There is thus no reason to be concerned that the proposed accession of the EU to the ECHR might in any way affect the situation of Member States in relation to Article 15 ECHR.

16. The situation of Member States in relation to their reservations under international law in respect of the ECHR

259. What remains to be examined is whether the draft agreement can affect the situation of Member States in so far as they have made reservations under international law, in accordance with Article 57 ECHR, in respect of one or other provision of the ECHR. That issue may be discussed from two aspects: (1) in relation to the principle of joint responsibility of respondent and co-respondent, as provided for in the draft agreement (see (a) below); (2) with regard to the primacy of EU law over national law, which will extend to the ECHR on the accession of the EU (see (b) below).

a) The principle of joint responsibility of respondent and co-respondent

260. One of the aims of the rule in the second sentence of Article 2 of Protocol No 8 is to prevent a situation whereby, on account of the EU's accession to the ECHR, a Member State of the EU is held by the ECtHR to have violated a provision of the ECHR, even though the Member State itself, as a contracting party to the ECHR, had made a reservation under international law in respect of that very provision.

261. Contrary to the view the Commission appears to take, the risk of the ECtHR making such a finding is by no means averted by the rules contained in Article 1(3) and (4) of the draft agreement.

¹⁵⁶ — See point 198 of this View above.

262. Admittedly, it is made clear in Article 1(3) of the draft agreement that accession to the ECHR imposes on the EU obligations under the ECHR with regard only to acts, measures and omissions of the EU's own institutions, bodies, offices and agencies, and of persons acting on their behalf. In addition, it is evident from Article 1(4) of the draft agreement that acts, measures and omissions of national authorities are to be attributed only to Member States of the EU, even if those acts, measures and omissions occur when EU law is implemented.

263. However, the key elements of the draft agreement include the co-respondent mechanism which has already been variously mentioned above, and — following on from that — the rule on the joint responsibility of the EU and one or more Member States for possible violations of the ECHR when EU law is implemented (Article 3(7) of the draft agreement).

264. That rule may result in situations arising in which the ECtHR rules that one or more Member States as co-respondent(s) (see Article 3(3) of the draft agreement) are responsible together with the EU for the violation of a fundamental right of the ECHR, even though the Member States concerned had, in their capacity as contracting parties to the ECHR, made a reservation under international law in respect of the relevant ECHR provision. In such cases, the accession of the EU to the ECHR and the rule on joint responsibility that follows on from that could, therefore, result in an expansion of the relevant Member States' liability beyond the international obligations which they assumed as contracting parties to the ECHR.

265. Configured in this way, the draft agreement is blatantly at odds with the second sentence of Article 2 of Protocol No 8, according to which the EU's accession to the ECHR is not to affect the situation of Member States in relation to the ECHR. In those circumstances, the EU can conclude the proposed accession agreement only if it contains appropriate clarification to the effect that the principle of joint responsibility of respondent and co-respondent is not to affect any reservations made by the contracting parties within the meaning of Article 57 ECHR.

b) The ECHR as part of EU law with the same primacy over national laws

266. There is, moreover, no doubt that within the EU, as compared with the present legal position, the accession of the EU to the ECHR will also strengthen Member States' ties to the ECHR. As mentioned above, on the EU's accession, the ECHR will be an integral part of the EU legal order and, in accordance with Article 216(2) TFEU, the primacy of EU law over national laws will extend to it.¹⁵⁷

267. In most cases this should have virtually no practical effect, since, irrespective of the EU's accession to the ECHR (Article 6(2) TEU), numerous fundamental rights offering at least an equal, if not higher, level of protection than those of the ECHR are guaranteed under EU law, either in the framework of the Charter of Fundamental Rights (Article 6(1) TEU) or in the form of general legal principles (Article 6(3) TEU). All Member States are in any event bound, without restriction, to respect these fundamental rights of the EU when implementing EU law, as provided for in Article 51(1) of the Charter, regardless of whether or not they have, as contracting parties to the ECHR, made reservations under international law in respect of comparable provisions of the ECHR or the additional protocols thereto.

268. Should the unlikely situation nevertheless arise that a particular fundamental right is recognised only in the ECHR and cannot also be traced back to the Charter of Fundamental Rights or the general legal principles of EU law, Member States would be bound by that fundamental right — when implementing EU law — on account of Article 216(2) TFEU. In that situation a Member State might in future therefore find itself bound, by virtue of EU law, by a provision of the ECHR in respect of which it may well have made a reservation in its capacity as a contracting party to the ECHR.

157 — See point 198 of this View above.

269. These possible effects of Article 216(2) TFEU on the legal position of the Member States are, however, internal legal issues only, which cannot be dealt with in the proposed accession agreement but must be resolved at EU level alone, in the context of the autonomy of EU law.¹⁵⁸ For the purposes of the present Opinion procedure, suffice it to say that the second sentence of Article 2 of Protocol No 8 does not in any way require that a rule in that respect relating to the internal legal relationship between the EU and its Member States be included in the draft agreement. On the contrary, such a rule in the accession agreement would necessarily conflict with the autonomy of EU law.

17. The situation of Member States in the context of the co-respondent mechanism

270. Finally, it should be pointed out that the enumeration in the second sentence of Article 2 of Protocol No 8 of aspects under which the situation of Member States in relation to the ECHR is to be preserved is not exhaustive (see the expression ‘in particular’). There may also, therefore, be other legal issues in connection with the proposed accession of the EU to the ECHR which are not expressly mentioned but which might have an effect on the situation of Member States.

271. In that context, it is appropriate to look again, briefly, at the co-respondent mechanism provided for in Article 3 of the draft agreement.

272. As has already been mentioned, the draft agreement does not provide for the EU or its Member States automatically to participate as co-respondents in ECtHR proceedings.¹⁵⁹ In the — no doubt unlikely — event that the EU does not participate as a co-respondent in proceedings concerning an application directed against one or more of its Member States, despite the conditions under Article 3(2) of the draft agreement being met, the ECtHR could not compel the EU to take part in the proceedings. Rather, it would have to confine itself to attributing responsibility for any violation of the ECHR only to the respondent Member State(s) (Article 46(1) ECHR), even if the violation occurred when EU law was being implemented.

273. Does this residual risk that the Member States might, in some circumstances, have to answer alone for violations of the ECHR attributable to EU law mean that the situation of Member States in relation to the ECHR is affected for the purposes of the second sentence of Article 2 of Protocol No 8? In my view, it does not.

274. First, the Member States already face this risk of being held responsible, even without the EU acceding to the ECHR, for it is recognised that, even as matters stand, the Member States of the EU cannot escape their international responsibilities in the context of the ECHR by transferring sovereign rights to the EU. Thus, it is already possible for the ECtHR to be seized of applications seeking to have Member States of the EU declared responsible for alleged violations of the ECHR purportedly resulting from the transfer of sovereign rights to the EU. The ECtHR examines such complaints, even if it currently still applies limited assessment criteria, as in the *Bosphorus* case.¹⁶⁰ Even if the ECtHR were to adopt stricter assessment criteria after the EU’s accession to the ECHR than those used in the *Bosphorus* case, this would not in any way fundamentally alter the obligation to which the Member States have always been subject: to comply with the ECHR and not to evade it by transferring sovereign rights to international institutions.

158 — To comment more fully on these issues would be to exceed the bounds of the present Opinion procedure. All that can be said here is that it is possible, but by no means necessary, to take the legal principle articulated in the second sentence of Article 2 of Protocol No 8 into consideration at EU level when interpreting and applying Article 216(2) TFEU, and thus to limit, if necessary, the binding effect — on the Member States — of the ECHR, which the EU has ratified without making any reservations.

159 — See points 217 to 219 of this View above.

160 — *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.

275. Secondly, the proposed unilateral declaration to be made by the EU, the text of which is among the documents accompanying the draft agreement and thus available to the Court of Justice, provides an appropriate guarantee — taking into account also the autonomy of EU law — that, where the conditions for the EU's participation as co-respondent pursuant to Article 3(2) of the draft agreement are met, Member States will not be 'left in the lurch' by the EU before the ECtHR.

276. All in all, therefore, the fact that the EU is not automatically joined as a co-respondent to all applications concerning EU law that are directed against its Member States, but may decide independently whether to take part in proceedings before the ECtHR, does not lead to any substantive change in the situation of Member States in relation to the ECHR. There certainly cannot be any question of any *deterioration* in their situation as compared with the position before the EU's accession to the ECHR.

18. Interim conclusion

277. To summarise, there is, therefore, no reason to fear that the draft agreement might affect the situation of Member States in relation to the ECHR for the purposes of the second sentence of Article 2 of Protocol No 8, provided that the clarification mentioned in point 265 above is obtained.

G – *Concluding remark*

278. The assessment of the draft agreement on the basis of the legal criteria contained in Article 6(2) TEU and Protocol No 8 and in the light of Declaration No 2 has revealed nothing that could fundamentally call into question the compatibility of the proposed accession of the EU to the ECHR. The draft agreement merely requires some relatively minor modifications or additions, which should not be too difficult to secure.

279. Against that background, it would not appear to me to be appropriate to declare the draft agreement, in its current form, incompatible with the Treaties. Rather, the Court of Justice should, in line with its second Opinion on the European Economic Area,¹⁶¹ declare that the draft agreement is compatible with the Treaties, provided that the modifications, additions and clarifications to which I have alluded are made.

VII – **Conclusion**

280. On the basis of the above considerations, I propose that the Court should state its Opinion in the following terms:

The draft revised agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms presented in Strasbourg on 10 June 2013 is compatible with the Treaties, provided it is ensured, in such a way as to be binding under international law, that:

- having regard to the possibility that they may request to participate in proceedings as co-respondents pursuant to Article 3(5) of the draft agreement, the European Union and its Member States are systematically and without exception informed of all applications pending before the ECtHR, in so far and as soon as these have been served on the relevant respondent;

161 — Opinion 1/92 (EU:C:1992:189, point 1 of the operative part).

- requests by the European Union and its Member States pursuant to Article 3(5) of the draft agreement for leave to become co-respondents are not subjected to any form of plausibility assessment by the ECtHR;
- the prior involvement of the Court of Justice of the European Union pursuant to Article 3(6) of the draft agreement extends to all legal issues relating to the interpretation, in conformity with the ECHR, of EU primary law and EU secondary law;
- the conduct of a prior involvement procedure pursuant to Article 3(6) of the draft agreement may be dispensed with only when it is obvious that the Court of Justice of the European Union has already dealt with the specific legal issue raised by the application pending before the ECtHR;
- the principle of joint responsibility of respondent and co-respondent under Article 3(7) of the draft agreement does not affect any reservations made by contracting parties within the meaning of Article 57 ECHR; and
- the ECtHR may not otherwise, under any circumstances, derogate from the principle, as laid down in Article 3(7) of the draft agreement, of the joint responsibility of respondent and co-respondent for violations of the ECHR found by the ECtHR.