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The devil is in the details: does the end of Protocol n° 16 to the ECHR lie in the wrinkles of the EU accession to the ECHR process?

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SUMMARY: Introduction. – 1. The criticism of the lack of coordination between the advisory mechanism under Protocol n°16 and the EU preliminary ruling in ECJ Opinion 2/13. – 2. Resuming the negotiation process for the accession of the EU to the ECHR: new talks about the coordination between Protocol n°16 and the preliminary ruling ex art. 267 TFEU. – 3. The EU position and the Chair's paper. – 4. Protocol n°16 issue in the first meetings debate: the solution envisaged.- 5. A critical and unsatisfying solution.

Introduction

In its Opinion 2/13 on the compatibility of the Draft revised agreement on the accession of the European Union to the Convention for the protection of Human Rights and Fundamental Freedoms ("Draft Agreement")[3] with the EU Treaties, when Protocol n°16 to the ECHR

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Albeit the unitary conception of the manuscript, Prof. Nascimbene drafted the Introduction and paragraph n°1 and dr. Ilaria Anrò drafted paragraph n°2, 3, 4, 5. The espression "the devil is in the detail" in an echo of Advocate General Kokott in her view concerning Opinion 2/13, par. 4.
[3] The Draft agreement on the accession of the European Union to the Convention for the protection of Human Rights and Fundamental Freedoms was approved by the negotiation group on 5 April 2013 and then revised on 10th June 2013, 47+1(2013)008rev2, available at the following link: https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf . For an analysis of the negotiation process see I. ANRÒ, *L'adesione dell'Unione europea alla CEDU, L'evoluzione dei sistemi di tutela dei diritti fondamentali in Europa*, Milano, 2015. For the analysis of the issues involved see also F. KORENICA, *The EU accession to the ECHR, Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*, London 2015; V. KOSTA, N. SKOUTARIS and V. P. TZEVELEKO (eds.), *The EU accession to the ECHR*, Oxford, 2014; P. GRAGL, T*he accession of the European Convention to the European Convention on Human Rights*, Oxford, 2013. M. PARODI, *L'adesione dell'Unione europea alla CEDU: dinamiche sostanziali e prospettive formali, Firenze, 2020.*

("Protocol n°16")[4] was not even in force, the European Court of Justice ("ECJ") expressed its concern that the mechanism enhanced by this instrument may lead to a circumvention of the preliminary ruling ex art. 267 TFUE, a *"keystone of the judicial system established by the Treaties"*.[5] Even if the procedure and scope of the Protocol n°16 mechanism and the EU preliminary ruling are substantially different,[6] it is true that fundamental rights, as guaranteed by European Convention on Human Rights ("ECHR"), constitute general principles of the Union's law (art. 6 TEU) and the Charter of Fundamental Rights of the EU[7] provides at art. 52, par.3, that "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" and it contains twelve articles where both the meaning and the scope are the same as the corresponding articles of the ECHR[8] and seven articles where the meaning is the same as the corresponding articles of the ECHR, but the scope is wider.[9] In addition to that, once the EU accession is

[4] Protocol n° 16 to the ECHR, 2 October 2013, entered into force on 1°August 2018, after ten ratifications by the High Contracting Parties. For the text and the status of ratifications see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214 . For an analysis of the mechanism *ex multis*: C. MASCIOTTA, *Il Protocollo n. 16 alla CEDU alla prova dell'applicazione concreta e le possibili ripercussioni sull'ordinamento italiano*, in *DPCE* 1/2020, 183 ss.; for interactions with B. NASCIMBENE, *Le Protocole n°16 en tant qu'instrument de collaboration entre juges nationaux et européens*, in L. SICILIANOS, I. MOTOC, R. SPANO E R. CHENAL (eds.), *Regards croisés sur la protection nationale et internationale des droits de l'homme, Liber Amicorum Guido Raimondi*, Tilburg, 2019, p. 657 ss.; I. ANRÒ, *Il Protocollo n. 16 alla CEDU in vigore dal 1° agosto 2018: un nuovo strumento per il dialogo tra Corti?*, in *Riv. trim. dir. proc. civ*., 2019, 189 ss.; E. LAMARQUE (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali, Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo*, Torino, 2015.

[5] ECJ (full Court), Opinion 2/13, 18 December 2014, ECLI:EU:C:2014:2454, par. 176.

[6] For an analysis of the comparison of the two instruments, see B. NASCIMBENE, *La mancata ratifica del Protocollo n. 16. Rinvio consultivo e rinvio pregiudiziale a confronto*, in *Giustizia insieme*, 29 January 2021.

[7] Solemnly proclaimed on 7 December 2000 by the Council, Commission and European Parliament at the end of the Nice European Council, the Charter was first published in OJ, C 364 of 18 December 2000, p. 1 ss. On 12 December 2007 the Charter was again proclaimed by the Presidents of the Commission, Parliament and Council in Strasbourg in anticipation of the signing of the Lisbon Treaty and the text, modified and updated to make it consistent with the Lisbon Treaty, was published in OJ, C 303 of 14 December 2007, p. 1 ss. Lastly, the Charter was published in OJ, C 202 of 7 June 2016, p. 391.

[8] According to the *Explanations relating to the Charter of Fundamental Rights* (in OJ, C 303, 14.12.2007, p. 17), spec. art. 52, par. 6, the articles of the Charter where both the meaning and the scope are the same as the corresponding articles of the ECHR are: Article 2 (that corresponds to Article 2 of the ECHR), Article 4 (that corresponds to Article 3 of the ECHR), Article 5(1) and (2)(that corresponds to Article 4 of the ECHR), Article 6 (that corresponds to Article 5 of the ECHR), Article 7 (that corresponds to Article 8 of the ECHR), Article 10(1) (that corresponds to Article 9 of the ECHR), Article 11 (that corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States' right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR), Article 17 (that corresponds to Article 1 of the Protocol to the ECHR), Article 19(1) (that corresponds to Article 4 of Protocol No 4), Article 19(2) (that corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights), Article 48 (that corresponds to Article 6(2) and(3) of the ECHR, and Article 49(1) (with the exception of the last sentence) and (2) (that correspond to Article 7 of the ECHR).

[9] According to the *Explanations relating to the Charter of Fundamental Rights*, cit., the articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider are: Article 9, that covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation, Article 12(1) that corresponds to Article 11 of the ECHR, but its scope is extended to European Union level, Article 14(1) that corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training, Article 14(3) that corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents, Article 47(2) and (3) that corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does

completed, the ECHR will be integrated in the sources of EU Law according to article 216, par. 2, TFEU.[10] This would inevitably result in a possible overlapping of the jurisdiction of the court of Strasbourg and the one of Luxembourg.

After Opinion 2/13, Protocol n°16 entered into force and gave rise to two opinions[11] that could add some clarity to the understanding of the relevant mechanism. In the meantime, the negotiations on the accession of the EU to the ECHR have been resumed and one of the issues under discussion is how to coordinate the advisory mechanism under Protocol n° 16 with the preliminary ruling ex art. 267 TFEU in order to overcome the ECJ criticism and therefore to preserve the EU (and ECJ) autonomy as well as the effective operation of the new advisory mechanism.

In the context of the recent negotiation meetings on the EU accession to the ECHR, the introduction of a new procedure was proposed, allowing the EU to request suspension of the advisory proceeding pending before the ECtHR, in cases where the EU Law may be at issue, to verify firstly if a request for an advisory opinion by the court or tribunal of an EU Member State under Protocol n° 16 would amount to a violation of EU law.

The present article is aimed to give an overview on the issues concerning the coordination of Protocol n°16 mechanism and the preliminary ruling in the context of the negotiation process for the EU accession to the ECHR. The attention will then be focused on the solution envisaged during the first negotiation meetings to coordinate the advisory mechanism ex Protocol n° 16 and the preliminary ruling according to article 267 TFEU, i.e. the possible suspension of the advisory procedure before the ECtHR, arguing if this may be a satisfactory solution to overcome ECJ criticisms to the Draft Agreement expressed in Opinion 2/13.

1. The criticism of the lack of coordination between the advisory mechanism under Protocol n°16 and the EU preliminary ruling in ECJ Opinion 2/13

As it has been clearly pointed out by scholars[12], the rationale behind ECJ criticism to the Draft Agreement lied mainly in the defense of the autonomy of the EU legal order. As a matter of fact, the accession, according to the terms of the Draft, would have affected the autonomy of EU legal order in different ways. This is the reason why the ECJ was first concerned with verifying compliance with the principle of primacy and the autonomy of the EU law as described in the Opinion[13] in the post-accession scenario created by the Draft Agreement, with

not apply as regards Union law and its implementation, Article 50 that corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States.

[10] See View of Advocate General Kokott, Opinion 2/13, 13 June 2014, ECLI:EU:C:2014:2475, par. 257.

[11] ECtHR (Grand Chamber), *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother,* requested by the French Court of Cassation, 10 April 2019; *Advisory Opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law* requested by the Armenian Constitutional Court, 29 May 2019. Recently, other two requests have been submitted to the ECtHR: one from the Supreme Court of Slovakia (see the press release of 6 December 2020) and one from the Supreme Administrative Court of Lithuania (see the press release of 11 December 2020).

[12] See D. HALBERSTAM, *"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way forward,* in *Public Law and Legal Theory Research Papers*, February 2015; K. Lenaerts, *The Autonomy of European Union Law*, *I Post di Aisdue,* 2019; P. IANNUCCELLI, *La Corte di giustizia e l'autonomia del Sistema giurisdizionale dell'Unione europea: quousque tandem?,* in *DUE* 2018, p. 281 -308.

[13] ECJ, Opinion 2/3, 18 December 2014, ECLI:EU:C:2014:2454, parr. 155 -176.

particular reference to the submission to judicial review by the ECtHR and the protection of primacy of EU law.

Initial criticisms expressed in Opinion 2/13 with reference to the specific characteristics and autonomy of EU legal order regarded the concern about the possibility that the application of Protocol n°16 would create a sort of "forum shopping" between this procedure and the preliminary ruling, with the risk of circumvention of the latter, a "keystone" of the judicial and institutional system of the Union. In fact, when the ECHR, as a result of accession, becomes an integral part of EU law pursuant to art. 216, par. 2, TFEU, a question to the European Court of Human Rights ("ECtHR") with reference to the interpretation of the rights and freedoms guaranteed by the ECHR, could, in principle, replace the preliminary reference on EU law pursuant to art. 267 TFEU.[14]

It is interesting to compare the ECJ analysis with that of the Advocate General Kokott's.[15]

The Advocate General first notes that Protocol n° 16, as such, is not the subject of the opinion procedure before the ECJ, as it is not among the texts to which the Union must adhere pursuant to the Draft Agreement. Subsequently, however, she stresses that it cannot be excluded that this Protocol may affect the competences of the ECJ, as its role in the interpretation of the ECHR could be jeopardized by the fact that the judges of the highest jurisdictions of the States refer to the Court of Strasbourg, rather than Luxembourg. According to the Advocate General, however, this circumstance would not be a consequence of accession, as where Protocol n° 16 enters into force, the risk highlighted could nonetheless arise.[16] Furthermore, the Advocate General believes that a solution of this problem could be referring to art. 267, third paragraph, TFEU which imposes on the courts of last resort the obligation to refer for a preliminary ruling, prevailing over national law and, therefore, also over any international obligations assumed by member states through the ratification of Protocol n° 16.[17]

By contrast, the ECJ expressed a great concern about the lack of coordination between the Protocol n°16 mechanism and the preliminary ruling. After having recalled "that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013", the Court pointed out that "nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU".[18] In this regard, it should be noted that, if the concern of the ECJ does not appear entirely groundless, it is also true that these instruments have different scope and operating mechanisms.[19] First of all, the opinion pursuant to Protocol n° 16 can only be requested by the "highest courts and

[14] ECJ, Opinion 2/3, 18 December 2014, ECLI:EU:C:2014:2454, parr. 196-197.
[15] View of Advocate General Kokott, Opinion 2/13, 13 June 2014, ECLI:EU:C:2014:2475.
[16] Notwithstanding the entry into force in 2018, at the moment there are no issues of this kind, even if it is very likely that they may happen if future, even without the EU accession to the ECHR.
[17] See General Advocate's view, parr. 136-141.
[18] ECJ, Opinion 2/3, 18 December 2014, ECLI:EU:C:2014:2454, par. 198.
[19] On this point see again B. NASCIMBENE, *La mancata ratifica del Protocollo n. 16. Rinvio consultivo e rinvio pregiudiziale a confronto,* cit.

tribunals",[20] while the reference for a preliminary ruling is accessible to all national courts. Furthermore, the "referral" to the ECtHR concerns the interpretation of the ECHR with a general purpose (even if in the context of a specific trial), while the preliminary reference is aimed at the solution of a concrete case. Lastly, it should be noted that preventing the highest national courts from using the procedure set out in Protocol n° 16 to ensure the intangibility of the reference for a preliminary ruling, would mean emptying this instrument of any meaning.

In addition to that, the Court considered that: "it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties".[21] This is a very difficult to read and understand statement by the ECJ. The first obscure element is the reference to the triggering of the "prior involvement procedure":[22] this kind of procedure is described at art. 3, par. 6, of the Draft Agreement, which provides that: "in proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union Law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court […]". As is clearly stated at the beginning of the reported paragraph of art. 3, the procedure of the ECJ prior involvement here described is designed to be started only when the EU is a co-respondent, that is uniquely possible – according to the previous art. 3, par. 2 of the Draft Agreement – when an application has been directed against one or more Member States of the EU and the EU has become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question compatibility with the rights at issues defined in the ECHR of a provision of EU Law.[23] Therefore, the EU may be a co-respondent only before the ECtHR after an application and only there the prior involvement of the ECJ may be triggered to let it rule on the interpretation of the EU primary

[20] See Protocol n° 16, art. 1.

[21] Opinion 2/13, par. 198.

[22] For a full analysis of the prior involvement procedure see R. BARATTA, *Accession of the EU to the ECHR: The Rationale for the ECJ'S prior involvement mechanism*, in *CMLR*, 2015, p. 1305 ss.

[23] Cfr. Draft Agreement, art. 3, par. 2: *"Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably* where that violation could have been avoided only by disregarding an obligation under the European Union law".

law[24] or on the validity of EU secondary law, before the Strasbourg Court[25]. As a consequence, it is impossible that a request for an advisory opinion according to Protocol n°16 may trigger the prior involvement mechanism.

Even after six years, the ECJ' statement in par. 198 of Opinion 2/13 remains obscure.[26] In any case, the ECJ concern appears to be inconsistent, as a hypothetical triggering of the prior involvement would in any case result in the possibility of the assessment of a question of validity concerning EU secondary legislation in the same way as in the preliminary ruling (as far as the jurisdiction of the court is concerned).

After the above reported arguments, the conclusion of the ECJ was that: *"*by failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure".[27] Even if the ECJ concern is to be shared, it is very difficult to envisage a norm, in such a peculiar agreement as is accession, to coordinate the Protocol n°16 mechanism and the preliminary ruling. Following the rationale of the prior involvement, a norm for the coordination of the two mechanisms would imply the priority for the preliminary ruling not only every time the addressed ECHR article relates to a fundamental rights enshrined EU Charter of fundamental rights as well or every time a question of interpretation or validity of EU Law is at stake by the application of ECHR, but for every question concerning the interpretation of the ECHR, as "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 responsible for its interpretation by means of preliminary rulings".[28] It is clear that such a norm would eventually prevent Member States judges from referring to the ECtHR and this would frustrate the very purpose of Protocol n°16, creating insurmountable hindrances to the path of the dialogue between national judges and Strasbourg.

In addition, the EU did not intend to adhere to Protocol n° 16, as the only protocols mentioned in the Draft agreement were Protocol N°1 and n° 6 and even the Member States that

[24] The Draft Explanatory Report to the Draft Agreement, at paragraph 66, inexplicably explains that the words '[a]ssessing the compatibility of the provision' in the context of the prior involvement procedure means to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law. As pointed out by ECJ in Opinion 2/13 (point 243), "*It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure"*. The option to include also questions of interpretation of secondary law in the prior involvement mechanism is currently under discussions in the resumed negotiation process for the EU accession to the ECHR (see par. 3).

[25] Another point under discussion in the current negotiations is the option to extend the prior involvement mechanism to the case of interpretation of EU secondary law, inexplicably excluded by the Explanatory Report.

[26] S. ØBI JOHANSEN in the post *The negotiations on the EU's accession to the ECHR have resumed*, https://obykanalen.wordpress.com/2020/11/18/the-negotiations-on-the-eus-accession-to-the-echr-have-resumed/, has a different interpretation of this point 198 of Opinion 2/13: ha says that *"what the CJEU seems to fear here is not that it wouldn't be involved before the ECtHR gives an advisory opinion, but rather that a request for an advisory opinion would trigger the 2013 DAA prior involvement procedure. This means that the case is brought, by a domestic court, before the CJEU, using a different procedure than TFEU article 267"* .

[27] Opinion 2/13, par. 199.

[28] See General Advocate's view, parr. 139.

have already ratified Protocol n°16 are a minority (for the time being); therefore, such a coordination norm is even less justifiable.[29]

The Advocate General's opinion appears to be more persuasive, since it states that Protocol n° 16 cannot in any way undermine the constraint to make the preliminary reference for the judges of last resort pursuant to art. 267 TFEU: if the Commission considers that this provision has been violated as a result of Protocol n°16, it could still trigger an infringement procedure according to art. 258 TFEU.

Another criticism to the Draft Agreement under the scrutiny of the compatibility of the agreement envisaged with EU primary law relates to possible overlapping of inter-states applications according to article 33 CEDH and article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.[30] This criticism has to be remembered briefly because during the recently resumed negotiations on EU accession to the ECHR, it has been proposed to overcome it in the same way as to the one relating to Protocol n° 16 (as better explained in the following par. 3).

According to the ECJ, the Draft Agreement must also be censored because of the contrast with art. 344 TFEU. The inter-states applications according to art. 33 ECHR would, in fact, be capable of being applied to any Contracting Party, and therefore also to disputes between Member States or them and the Union, when EU law is at issue. Therefore, in this way, disputes that are instead obligatorily and exclusively attributed to it pursuant to art. 344 TFEU would be deferred to the ECtHR. In the view of the ECJ "only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope ratione materiae of EU law would be compatible with Article 344 TFEU".[31] According to the Advocate General, instead, "[s]uch 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".[32] In the opinion of Advocate General Kokott "the possibility of conducting infringement proceedings (Articles 258 TFEU to 260 TFEU) 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)"[33] would be enough to secure the effectiveness of article 344 TFEU.

As better explained as follows, the issues concerning the ECJ criticisms about the possible circumvention (and violation) of art. 267 TFEU and art. 344 TFUE are currently analyzed

[29] Today only twelve on the fifteen ratifications have been made by Member States of the EU. See the full list of ratification https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=WXfnBoD7.

[30] See Opinion 2/3, cit., points 201 -214.

[31] *Ibidem*, point 213.

[32] View of Advocate General delivered on 13 June 2014, point 116.

[33] *Ibidem*, point 118. In the meantime, the first inter-state application between EU Member States was lodged on 15 September 2016 and decided by the ECtHR Grand Chamber on 16 December 2020. The same States have been opposed (for a different issue) according to article 259 TFEU before the ECJ in case C-457/18, judgement delivered on 31 January 2020, ECLI:EU:C:2020:65.

jointly in the context of the restarted negotiation process for the accession of the EU to the ECHR, envisaging the adoption of the same solution for both cases.

2. Resuming the negotiation process for the accession of the EU to the ECHR: new talks about the coordination between Protocol n°16 and the preliminary ruling *ex* art. 267 TFEU

As is well known, Opinion 2/13 caused a critical break in the process of EU accession to the ECHR. Notwithstanding, the works did not completely stop. In 2016, a hearing was held at the Constitutional Affairs Commission of the European Parliament, during which some of the leading experts in the accession project were called on to express an opinion on the tools to be put in place to overcome the rejection of the Court[34]. Then, the former president of the EU Commission, Jean-Claude Juncker, during a visit to the Parliamentary Assembly of the Council of Europe in Strasbourg, reiterated the importance of the partnership between the two supranational legal realities, qualifying the accession of the EU to the ECHR as *"a political priority for the Commission"*.[35]

During the Justice and Home Affairs Council of 7-8 October 2019, in the same session in which the 10th anniversary of the EU Charter of fundamental rights was commemorated, the ministers of the Member States reaffirmed the commitment of the Union to adhere to the ECHR. In that meeting, Ministers agreed on additional negotiating directives to allow the Commission to resume negotiations with the Council of Europe in the near future.[36]

As reported in the dedicated section of the Council of Europe's website,[37] by a letter dated 31 October 2019, the European Commission informed the Council of Europe of the will to restart the negotiations[38]. In November 2019, at its 92nd meeting, the Steering Committee for Human Rights (CDDH) instructed the work of the ad hoc negotiation group, the so called "47+1", composed by representatives of the 47 Member States of the Council of Europe and a

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[34] Constitutional Affairs Commission of the European Parliament (*Public Hearing*), *Accession to the European Convention on Human Rights (ECHR): Stocktaking after the ECJ's Opinion and Way Forward*, 20 April 2016: see the speeches of J. P. JACQUÉ, *L'adhésion à la Convention européenne des droits de l'homme après l'avis 2/13 de la Cour de justice de l'Union européenne*; J. KOKOTT, *The relevance of the case-law of the Human Rights Court in Strasbourg for the jurisprudence of the Court of Justice after the Opinion on accession of the EU to the Human Rights Convention*, S. MORANO-FOADI, S. ANDREADAKIS, *The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward***;** J. POLAKIEWICZ, *Accession to the European Convention on Human Rights (ECHR): stocktaking after the ECJ's opinion and way forward*, on the EU Parliament website *www.europarl.europa.eu*.

[35] See the President Jean-Claude Juncker speech to the Council of Europe Assembly on 16 April 2016, *www.coe.int*.

[36] See Justice and Home Affairs Council of 7-8 October 2019, https://www.consilium.europa.eu/it/meetings/jha/2019/10/07-08/.

[37] Notwithstanding the fact that only few documents were made open access to the public, the progress in the negotiation process are reported in a dedicated section of the CoE website: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights .

[38] As far as it is possible to understand by the documents available from the negotiation process, the mandate issued by the Council to the Commission in 2010 is still the basis for the new negotiation process. See *Council Decision authorising the negotiation of the Accession Agreement of the European Union to the ECHR*, 8 June 2010. See also the overview of M. PARODI, *L'adesione dell'Unione europea alla CEDU: un "nuovo" inizio?,* in *Osservatorio sulle fonti*, 3/2020.

representative of the European Union[39]. The Chair was conferred to the Norwegian Tonje Meinich, that had already held the presidency in the previous rounds, between 2010-2011 and 2012-2013, showing consistency with the previous works. On 15 January 2020, the Ministers' Deputies approved the continuation of the *ad hoc* terms of reference of the Steering Committee for Human Rights (CDDH) as proposed, in order to finalize the instruments for EU accession.[40]

In March 2020, the European Union drafted a position paper on the issues at stake, in light of the first meeting scheduled for the same month, then postponed due to the pandemic.[41]

An informal meeting of the 47+1 group was held on 22 June 2020.

In August 2020, the Chair drafted a paper in order to structure the negotiation process around the most crucial issues.[42] The first point was to recall the principles for negotiation, already reported in the Draft Agreement Explanatory Report, including the EU accession on an equal footing with the other Contracting Parties, the respect of the distribution of competences between the EU and its member States and between the EU institutions, and the preservation of the ECHR system.[43] As clearly stated in the opening of the paper, it deals exclusively with problems that arise from Opinion 2/13 grouping the issues in four "baskets": 1) EU-specific mechanisms of the procedure before the ECtHR; 2) Operation of inter-party applications (Article 33 of the Convention) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states; 3) The principle of mutual trust between the EU member states; 4) EU acts in the area of the Common Foreign and Security Policy.

From 29 September to 1° October 2020, the negotiation process officially restarted with the first official meeting of the 47+1 group (indicated in the report as the sixth negotiating meeting, continuing the numbering from the previous ones stopped in April 2013), followed by the second one (or the seventh) on 24 – 26 November 2020.

Protocol n°16 and its implications have already been the object of discussion as better described in the following section, even if it is to be argued if the topic has been addressed in the correct way.

[39] This kind of composition of the negotiation group is the same of the one that started the second round of negotiation on 13th June 2012 that lead to the Draft agreement of 2013 (see Cfr. CM/Del/Dec(2012)1145/4.5, 13 June 2012) .

[40] See the dedicated page on the Council of Europe website: https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.

[41] See *Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms*, 5 March 2020, 1680a06264 (coe.int) .

[42] See *Paper by the Chair to structure the discussion at the sixth meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights*, 31 August 2020, 47+1(2020)2. For a first analysis see S. ØBY JOHANSEN, *The negotiations on the EU's Accession to the ECHR have resumed*, 18 November 2020, https://obykanalen.wordpress.com/2020/11/18/the-negotiations-on-the-eus-accession-to-the-echr-have-resumed/ (reposted in European Law Blog, on 31 January 2021, with the title *Negotiations for EU accession to the ECHR relaunched – overview and analysis*).

[43] *Ibidem*, par. 13.

3. The EU position and the Chair's paper

As far as it is possible to understand from the restricted documents available online, after Opinion 2/13, the European Commission drafted several working documents analyzing the issues raised by ECJ criticism (but unfortunately they are not accessible to public).[44]

On the basis of such documents and of the works of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons ("FREMP"), on 20 September 2019, the Presidency of the Council of the European Union submitted to the Permanent Representative Committee a note with an overview of the required amendments to the negotiated instruments, recommending the Committee to invite the Council to adopt supplementary negotiating directives to include that amendments.[45] This note, only available in a restricted way, should be the basis of the supplementary negotiating directives approved by the Council in the meeting on 7-8 March 2019, whose text is not accessible to public.[46]

The note to the Permanent Representatives Committee, among the required amendments to the negotiated instruments, states that the ECtHR should have to inform the EU of any application under article 33 ECHR as well as of any reference made by a Member State's highest court under Protocol n° 16. Then, whereas an infringement is detected in that case, the ECtHR would have to *"automatically suspend the procedure"*. If the ECJ finds out that by initiating the procedure under Article 33 ECHR or Protocol n° 16 the Member State concerned, has failed to fulfil its obligations under the EU Treaties, the ECtHR should have to strike out the case from the register, otherwise the procedure before the ECtHR continues[47]. Finally, the note states that it should be clarified that the prior involvement of the ECJ does not apply in respect of a procedure before the ECtHR that has been initiated by a request for an advisory opinion made pursuant to Protocol n° 16.

This is a very extreme position for the negotiation. In the EU's view, at first the ECtHR should have a systematic obligation to inform the EU of inter-states applications and advisory opinion request that is without precedent: in the ECtHR database (HUDOC) is today quite difficult even to detect the pending proceedings: this obligation would result in an additional burden to the system. Then, the EU should have the time to decide whether the application or request at stake imply an infringement. Afterwards, the solution for a possible circumvention of article 267 TFEU by a request for advisory opinion would be an automatic suspension of the procedure before the ECtHR. This suspension – according to this document – should last until the final decision of the ECJ on the infringement procedure. In addition to that, the ECtHR – according to the EU position expressed in this document – should have to automatically accept the ECJ decision and eventually strike out the case from the register. Even if the EU position is clearly understandable in the light of a mandate for the negotiation and with the difficult task

[44] WK 249/2016 on the co-respondent mechanism, WK 764/2016 on mutual trust, WK 12044/2018 on the scrutiny on CFSP and WK 6866/2019.

[45] See the note of the Presidency to the Permanent Representatives Committee, 20 September 2019, n° 12349/19 (only a restricted version) available on line https://www.statewatch.org/media/documents/news/2019/sep/eu-council-acession-coe-12349-19.pdf. S. ØBY JOHANSEN, in *The negotiations on the EU's Accession to the ECHR have resumed*, 18 November 2020, cit., address this document as the Commission's mandate.

[46] See the Outline of the Council meeting: st12837-en19_both-days_edited.pdf (europa.eu) . In the register of the Council the text of the supplementary negotiating directives is listed under n° ST 12585 2019 INIT but is not available.

[47] See the note of the Presidency to the Permanent Representatives Committee, 20 September 2019, n° 12349/19, cit. Annex I, letter g, h, i, k.

to overcome ECJ criticism, this construction appears to be a "circumvention" of the ECtHR jurisdiction in favor of the ECJ, instead of a solution for a coordination of the advisory opinion mechanism and the preliminary ruling.

In the public EU position paper of March 2020, the issue is treated in a more neutral way. After having said that inter-state applications and Protocol n°16 had to be considered both problematic for the possibility to affect the ECJ exclusive jurisdiction, the EU then highlighted the need to find out a solution while preserving "to the largest possible extent the existing features of those procedures before the ECtHR"[48] but nothing more.

The Chair's paper inserted the issues about the coordination of art. 267 TFEU and Protocol n°16 in Basket n° 2 "Operation of inter-party applications (Article 33 of the Convention) and of references for an advisory opinion (Protocol No. 16) in relation to EU Member States". Concerning the possible action of the negotiation group, the paper stated that: "The «47+1 Group» may consider in what manner the draft accession instruments or other means should address the issue of a possible circumvention of EU law, under certain factual circumstances, by a request made by a designated court of tribunal of an EU member state for an advisory opinion of the ECtHR. In this connection, it may be important to bear in mind that it can be assumed that the drafters of Protocol No. 16 (including representatives from all EU member states) did not have in mind the creation of a possibility for EU member states to use that Protocol to circumvent an EU internal, mandatory procedure".[49] Therefore, the focus of the group should be on how to avoid breach of EU law, that is art. 267 TFUE, when the highest courts designated by Member States decide to request an advisory opinion according to Protocol n° 16. This is the first point, even if the criticism of the ECJ in Opinion 2/13 is linked not only to the circumvention of the preliminary ruling procedure, but also to the possibility that the interpretation of EU Law, comprising the ECHR after the accession, as an agreement ex art. 216, par. 2, TFEU, may be conferred to the ECtHR, with the ECJ prevented by the possibility to give its word on the point: that would explain the obscure mention of the prior involvement procedure at point 198 of Opinion 2/13. As a possible solution to the case, in parallel with the solution proposed for the overlapping of inter-state applications according to art. 33 ECHR and art. 344 TFEU,[50] the paper states that "a possible way forward could be to consider the feasibility of an arrangement to provide the EU with the possibility to finalise an internal procedure with a view to determining whether the filing of a request for an advisory opinion by the court or tribunal of an EU member state under Protocol No. 16 would amount to a violation of EU law (i.e. Article 267 TFEU)".[51] This is an initial tentative proposal that allows different elements to be deducted. The first one is that the solution for the coordination of the advisory mechanism according to Protocol n° 16 and the preliminary ruling, may not be confined in the accession agreement: it is a very complex issue which may require the insertion of another procedure, with annexes or protocols and with the possible need to modify the ECJ procedure. The paper itself says that:"[t]he Draft Accession Agreement as an international treaty for all High Contracting Parties may not necessarily be the sole place in which this issue could be

[48] See *Position paper for the negotiations on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms*, cit., par. 3.
[49] Cfr. *Chair's paper*, cit., par. 78.
[50] *Ibidem*, parr. 62 -72.
[51] *Ibidem*, par. 79.

solved. Therefore, delegates may also wish to discuss in which way complementary measures could assist in resolving the issue and engage in a dialogue with possible stakeholders with the competence to take those measures".[52] Secondly, in the view of the Chair's proposal, the respect of the autonomy of EU legal order implies the necessity that the EU can establish firstly if the request for an advisory opinion entail the infringement of art. 267 TFEU. This is not very clear: would this mean that the Commission makes an assessment? That it is necessary to wait for the ECJ judgement according to art. 258 TFEU?

It is easy to say that a procedure of this kind would inevitably prevent the highest court to request advisory opinions according to Protocol n° 16: the possibility to be under the scrutiny of the European Commission or/and the ECJ for an infringement procedure will be a significant deterrent that will plunge the possible Opinion's benefit into darkness.

In the end, the Chair's paper, at par. 82, addressing the ECJ's "confusion" in mentioning the prior involvement procedure according to art. 3, par. 7 of the Draft in the context of an advisory opinion request[53], suggests to "include an amendment of paragraph 65 of the draft explanatory report to clarify that the prior involvement-procedure to be established for the co-respondent mechanism (Article 3, paragraph 6 of the draft Accession Agreement) applies only to adversarial proceedings and not to requests for advisory opinions under Protocol No. 16". The paper admits that this modification is not really really necessary because "the current wording of that paragraph ("Cases in which the EU may be a co-respondent arise from individual applications…") already excludes the possibility to apply the procedure for any matters which are not related to an individual application under Article 34 of the Convention for which the co-respondent mechanism applies" but, considering the ECJ oversight "this could be further refined in order to eliminate any possible misunderstandings".

4. Protocol n°16 issue in the first meetings debate: the solution envisaged

In September 2020, at the sixth meeting of the 47+1 Group (the first negotiation meeting, after 2013), Basket 2 issues, i.e. inter-state applications ex art. 33 ECHR/art. 344 TFEU and Protocol n°16/art. 267 TFEU were both discussed, drawing parallelism in the possible solutions to be envisaged.

Concerning the second issue, the representative of the Registry of the ECtHR "underlined that the competences of the ECtHR under Protocol No. 16 (expressing itself on the minimum level of protection by the ECHR) and the CJEU under Article 267 TFEU (expressing itself on a uniform and harmonized protection under the EU Fundamental Rights Charter) are different in nature, which would not make it decisive which of the two European courts would be called upon first".[54] He then recalled that the ECtHR has discretionary power to accept the requests under Protocol n° 16 and that it is in the interest of the Court to have sufficient evidence of the involvement of EU law in the case at issue. On its side, the EU delegation stated that the solution

[52] *Ibidem*, par. 81.
[53] See point 198 of Opinion 2/13 again.
[54] See *Meeting report of the 6th Meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights* 29 September – 1° October 2020, 47+1(2020)R6, 22 October 2020, par. 29. The reports of the past meetings and the agenda of the scheduled meetings are available on https://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessionEU&c= .

to be addressed may be the same as the one already discussed about the inter-state applications issues. Both issues have been considered as implying "mixed applications" i.e. "containing some but not exclusively EU-related elements in the applications". The solution proposed was to elaborate a sort of "suspension" of the inter-state applications pending before the ECtHR, to give the EU the possibility to determine whether a violation of Article 344 TFEU had occurred in bringing the application in the first place. In the view of the Group, this would be fairly acceptable considering the long period necessary for inter states applications to be solved. This solution would imply "the idea of an internal EU-procedure prior to instituting an inter-party application was suggested, requiring the respective EU member state to "seek clearance" from the competent EU institutions for such application".[55] As underlined by the Group, this may also imply the need to provide for specific rules concerning the six months term. In addition to that, "it was also suggested whether this could possibly be included as an inadmissibility-criterion in the accession instruments".[56]

Therefore, looking for the same solution under discussion for inter-states applications should mean to imagine a way to suspend an advisory opinion proceeding under Protocol n° 16, pending before the ECtHR, to give the competent EU institution the chance to judge on the issue before the ECtHR. In our opinion, this solution implies many difficulties in its application and raises some criticism, as it will be argued in the following paragraph. Anyway, in the course of the sixth negotiation meeting, the issue remained open and the discussion was postponed to the following meeting.

Lastly, in the course of the sixth meeting the Group discussed the famous point 198 of Opinion 2/13 agreeing that "that the current wording would state that the application of the prior involvement-procedure would presuppose an application for which the co-respondent mechanism applies" and therefore implying that the ECJ concern was not really grounded. Nonetheless, the Group evaluated a possible modification to the explanatory report, to clarify beyond any doubts, postponing the issues to the following meeting[57].

In the seventh meeting, held between 24 and 26 November 2020, discussions on the EU proposal to suspend inter-parties applications *ex* art. 33 ECHR as well as Protocol n°16 advisory procedure continued (as on the other issues of the other Baskets that are not the object of this contribution).[58] It emerged more clearly that the EU proposal "concerned the introduction of an additional provision in the draft Accession Agreement which would provide for a procedure in which the EU could ask the ECtHR to suspend inter-party applications between EU member states under Article 33 ECHR or a request for an advisory opinion by a court of an EU member state under Protocol No. 16, pending internal EU proceedings on the question whether the institution of such application/request was in violation of EU law, and eventually discontinue the proceedings before the ECtHR if that was the case".[59]

In this second meeting report, it appears that the suspension of an inter-state application or an advisory opinion proceeding should not be automatic, but upon request of the EU. At the

[55] *Ibidem*, par. 26.
[56] *Ibidem*.
[57] *Ibidem*, par. 31.
[58] But that are anyway worthy of a deep analysis: see *7th Meeting of the CDDH ad hoc negotiation group ("47+1") on the accession of the European Union to the European Convention on Human Rights*, 47+1(2020)R7, 26 November 2020.
[59] *Ibidem*, par. 14.

moment, details are obviously missing about the procedure in the EU and before the ECtHR, but it appears that the EU should be informed of every request of advisory opinion coming from Member States and it should have the time to assess the option to start an infringement procedure (as expressed in the Note for the Permanent Representatives Committee reported in par. 3). Therefore, the EU should ask the ECtHR to suspend the advisory proceeding and then the latter would have to decide on this request. The ECtHR in principle may have the possibility to say no to the EU requests. But if the Strasbourg's court accepts the request, the advisory opinion procedure will remain suspended while the EU infringement procedure is carried out by the European Commission and eventually decided by the ECJ. According to this proposal (as formulated in the meeting's report), the ECtHR would have to accept the ECJ decision and eventually strike out the case.

The meeting report states that some delegations "expressed concern about this proposal in terms of it being in line with the general principles of the negotiation process, as well as whether the proposed provision should relate to both Article 33 ECHR and Protocol No. 16 simultaneously".[60] The Group also discussed the relationship between the Draft Agreement and Protocol n°16, acknowledging once again that the EU is not going to accede to this for the time being. The meeting report also states that "some suggestions were made whether a solution could be found by having regard to all tools at the disposal of the Group to amend the draft accession instruments, and to the fact that the ECtHR – unlike in the case of inter-party applications – has a discretion under Protocol No. 16 on whether or not to entertain a request for an advisory opinion". [61] This is an interesting point of discussion: as ascertained in the previous meeting, in this case the ECJ' "demands for revising the accession instruments with regard to Protocol No. 16 were less strongly formulated by Opinion 2/13 than with regard to Article 33 ECHR".[62] Therefore, the solution would not necessarily imply the modification of the draft accession agreement, but it should also look to the ancillary instruments, eventually inserting new ones.[63] The discussion remained open for the following meetings.

5. A critical and unsatisfying solution

The EU proposal to suspend the advisory opinion proceeding in case of requests made by the highest court EU Member State implying the application of EU Law to let the EU verify if that application has been made in violation of art. 267 TFEU, is definitely an unsatisfying solution for several reasons.

First of all, timing. The request for an advisory opinion is allowed only for the highest national courts and tribunals, where a case may arrive after the exhaustion of previous judicial degree or preliminary examination, sometimes after years from its very first introduction. In

[60] *Ibidem*.
[61] *Ibidem*.
[62] *6th Meeting report*, cit. par. 30.
[63] In addition to the Draft Agreement on the Accession of the European Union to the Convention for the Protection of fundamental rights and Fundamental Freedoms approved on 5th April 2013 and revised on 10th June 2013, 47+1(2013)008rev2, the accession package also comprised: (i) Draft Declaration by the EU); ii) Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of settlements in cases to which the EU is a party; iii) Draft model of Memorandum of Understanding; iv) Draft explanatory report to the Accession Agreement.

addition to that, the Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol n° 16 to the Convention provide that "A request for an advisory opinion will be dealt with as a matter of priority in accordance with Rule 41 of the Rules of Court",[64] which means that, in principle, the request should be treated in a fast way, as it implies the suspension of the national trial. The national court may also ask for an urgent procedure "giving reasons, whether there are any special circumstances which would require an urgent examination of the request and a speedy ruling by the Court". It is self-evident that an additional suspension would imply a further pause in the trial that could jeopardize the protection of the fundamental rights involved.

Secondly, this solution would definitely clash with the principle of the EU accession on an equal footing with the other Contracting parties. The need to preserve the EU autonomy would result in a suspension of the proceedings pending before the ECtHR, while this has never been envisaged for other contracting parties, giving the EU as indisputable privilege, far beyond the equivalence presumption.[65] At the present stage of negotiations, it is not even clear how the internal procedure may be structured: if there will be just an assessment of the European Commission or - more likely, reading the Note to the Permanent Representatives Committee - if the ECJ judgement will be required according to art. 258 TFEU. This would result in an additional ECJ "prior involvement" (provided at art. 3, par. 6 of the Draft Agreement) with all the relevant disadvantages in terms of timing and procedural complexity. In addition to that, the critical point is that here the suspension of the advisory procedure would be added to the one of the national trial.

Lastly – but of greater importance, in our opinion – the introduction of a sort of suspension of the advisory mechanism when a request is made by one of the Member States highest courts in a case implying EU law, with the systematic scrutiny of the EU Commission and the risk of triggering an infringement procedure (that may lead to a judgement and even to a penalty)[66] would be the end of Protocol n° 16 in EU Member States. It is obvious that national judges, confronted with such perspectives, evaluating risks and benefits, will be prevented from presenting a request for an opinion to the ECtHR that may imply an infringement procedure for their State. It must also be remembered that, once the EU accession is completed, the ECHR will be integrated in the sources of EU Law, and thus potentially all cases concerning the ECHR will imply the application of EU Law.

In addition to that, the ECtHR scrutiny on the EU request to suspend the advisory opinion may also affect EU autonomy, implying an assessment by the Court of Strasbourg of the possibility of an EU Law infringement.

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[64] Cfr. *Guidelines on the implementation of the advisory opinion procedure introduced by Protocol n° 16 to the Convention* (as approved by the Plenary Court on 18 September 2017), par. 29.

[65] As stated by the ECtHR in the famous case *Bosphhorus*, State action taken in compliance with legal obligations imposed by an in international organization is justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (ECtHR, *Bosphorus Hava Yollari v. Ireland*, 30 June 2005, par. 155-156). According to the ECtHR case law, the EU fundamental rights protection has always been considered equivalent to the ECHR one (see also ECtHR, *Avotins v. Latvia*, 23 May 2016).

[66] For a recent and comprehensive study on the infringement procedure see C. AMALFITANO, M. CONDINANZI, *La procedura di infrazione dieci anni dopo Lisbona*,in Federalismi.it, 17 June 2020.

It is true that the coordination between Protocol n°16 and the preliminary ruling *ex* art. 267 TFEU may be a real dilemma[67] but it is to bear in mind that among the principles governing EU accession, there is the one stating that the current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary.[68] Conceiving such a suspension of the advisory mechanism would affect the operation of Protocol n° 16 in an irreparable way. This solution appears to be – from a ECHR side – inacceptable.

In our opinion, national judges should be responsible for the solution. First of all, it is to be reminded that only "the highest courts and tribunals" are allowed to submit requests to the ECHR ex Protocol n°16: therefore, we are talking about the supreme and constitutional national courts, with the highest degree of reliability. In the European integrated system, national judges should be conferred the task to distinguish if an opinion by the ECtHR is needed or it is prevalent the "Eu law" side of the case should be conferred to national judges, in a mutual trust spirit. In case of breach of the duty to comply with art. 267 TFEU in submitting a request to the ECtHR, an infringement procedure would, in any case, always be possible. It is worth noting that the triggering of the infringement procedure itself by the EU institutions would be in the end under the scrutiny of the ECtHR, the only jurisdiction which will have the final word on fundamental rights protection after the completion of the EU accession process: the ECtHR could in the end find out that, preventing a national judge from the request of an advisory opinion through an infringement procedure constitute a violation of the ECHR fundamental rights (possibly, art. 6 ECHR).

As a second option, it would be more desirable that the question of the "protection" of article 267 and 344 TFEU (and therefore, of the ECJ jurisdiction) would be treated as an internal issue of the European Union. A procedure should be imagined that would enable the national judge of the Member State at issue to directly ask to the European Commission or the ECJ about the possible infringement procedure before submitting the request or application to the ECtHR. This would avoid difficult suspension of the proceeding before the ECtHR as well as hard decisions for the latter. It could be a problem in terms of timing as well, but the problem would in any way be completely resolved internally for the EU, fostering dialogue instead of conflicts between the EU institutions and the national authorities.

The next negotiation meeting will be held on 2-4 February 2021 and discussions on the issue – that is stil open - is on the agenda.

[67] As already stated by S. ØBI JOHANSEN in the post *The negotiations on the EU's accession to the ECHR have resumed*, https://obykanalen.wordpress.com/2020/11/18/the-negotiations-on-the-eus-accession-to-the-echr-have-resumed/, cit. He suggested as possible solution that EU and Member States would agree not to ratify Protocol n°16 (or to withdraw from it, for those who have already ratified it). As an alternative, he reminds the option not to change the Draft Agreement, banking on the possibility that the ECJ has changed its mind. Both solutions, even if very interesting, appear quite severe.

[68] See again *Chair's paper*, par. 13.