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Accession of the European Union to the European Convention on Human Rights from the perspective of the Common Foreign and Security Policy**

ABSTRACT: According to Article 6 of the Treaty on the Functioning of the European Union, the European Union (EU) is obliged to access the European Convention on Human Rights (ECHR). Accession to the ECHR is particularly important in the context of Common Foreign and Security Policy (CFSP). The work carried out on the basis of which the EU will accede to the ECHR should aim to shape the future accession agreement so that it not only resolves the problem of judicial control over the CFSP and the compatibility of the law created with the standards developed by the European Court of Human Rights (ECtHR) but also, above all, addresses the relationship between the CJEU and the ECtHR in the context of the deficit of judicial control of the Court of Justice of the European Union (CJEU) over the law created under the CFSP and the practice of the functioning of this policy. This article thus focuses on previous works concerning EU accession to the ECHR, possible solutions to problematic questions, and the importance of the ECHR to the CFSP. The process of accession to the ECHR has shown that the introduction of an explicit legal basis in the treaties authorising the EU to do so has proven insufficient and created new problems which have in turn proved difficult to solve in practice.

Keywords: accession, Common Foreign and Security Policy (CFSP), Court of Justice of EU, European Convention on Human Rights (ECHR), Opinion 2/13, Protocol no. 8.

1. Introduction

The European Union (EU) is a community of states with respect for and observance of human rights. Among the many mechanisms for realising this

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value, the Treaties mention accession to the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR). EU's accession to the ECHR will entail a fundamental change in EU's legal order, as the Union will become part of a distinct international institutional system and its legal order will be integrated not only with the provisions of the ECHR but also with the entire body of the case law of the European Court of Human Rights (ECtHR). Accession to the ECHR will thus have constitutional significance for the legal order created by the EU.

Accession to the ECHR is of particular importance in the context of the Common Foreign and Security Policy (CFSP), which, despite the Lisbon reform and its integration as one of the EU's policies and activities, is still intergovernmental rather than supranational in nature. Legislative acts adopted under the CFSP are drafted by bypassing the supranational bodies of the EU and, in addition, much of this legislation has been excluded from the jurisdiction of the Court of Justice of the European Union (CJEU). Therefore, the question arises as to how to ensure that the law created under the CFSP and the actions of the Member States and the EU in military and civilian missions are compatible with the fundamental rights and rich jurisprudence of the ECtHR. The work on the basis of which the EU will accede to the ECHR should aim to shape the future accession agreement so that it not only resolves the problem of judicial control over the CFSP and the compatibility of the created law with the standards developed by the ECtHR but also, above all, addresses the problem of the relationship between the CJEU and the ECtHR given the deficit of judicial control of the CJEU over the law created under the CFSP and the practice of the functioning of this policy.

This article does not address all aspects that the EU accession to the ECHR will bring about for the CFSP, as its primary purpose is to present a possible solution to the problem of the judicial control deficit of the CJEU over the CFSP. Until this problem is resolved, EU's accession to the ECHR is impossible. However, the solutions must comply with EU law, which has placed several conditions for accession to the ECHR. These considerations are preceded by a brief historical outline and characterisation of the current legal basis for accession. Opinion 2/13 requires a separate discussion in the context of the conditions under which the CJEU placed the accession agreement in the context of the CFSP.

2. Historical background to the process of EU accession to the ECHR with particular reference to the CFSP

The idea for the EU accession to the ECHR emerged in the 1970s. In 1979, the Commission presented a 'Memorandum on the Accession of the European Communities to the ECHR', with considerations for and against accession.[1] The Commission stressed that the formal accession of the Community to the ECHR was the best way to strengthen the protection of fundamental rights at the Community level and proposed to the Council to start the accession procedure. However, this document was not followed by any actual action to bind the three Communities to the ECHR.

The proposal to accede to the ECHR was reiterated in the Communication of the European Commission (EC) concerning the accession of the Community to the ECHR on 19 November 1990.[2] Then, the question of accession to the ECHR was not revisited until the 1990s, when the creation of the EU provided the impetus. On 26 October 1993, the EC published a working document titled 'The Accession of the Community to the European Convention on Human Rights and the Community Legal Order', in which it examined, *inter alia*, the question of the legal basis for accession and the exclusive jurisdiction of the Court of Justice (CJ) for judicial review.[3] In 1993 as well, on the initiative of the Belgian Presidency, an *ad hoc* group was created within the Committee of Permanent Representatives (COREPER) to analyse the initiative for EU accession to the ECHR. As the working group did not reach a consensus on the existence of the European Community's competence to accede to the ECHR and the compatibility of the accession with the EC legal autonomy and the exclusive jurisdiction of the CJ over Community law, the Council requested the CJ to deliver an opinion based on Article 228(6) TEC (now Article 218(11) Treaty on the Functioning of the European Union [TFEU]). Opinion 2/94 was issued on 28 March 1996.[4] The CJ first emphasised that nothing in the Treaty conferred general power (express or implied) to the EC to issue human rights standards or conclude international agreements in this field.[5]

[1] Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM/1979/0210 final.
[2] Communication of 19.11.1990, SEC (90), I 087 final.
[3] Krzysztofik, 2022, p. 126.
[4] Opinion of the Court, 2/94, Admissibility of the request for an Opinion, ECLI:EU:C:1996:140.
[5] Point 27.

The legal basis for accession to the ECHR is Article 235 of the EC Treaty (now Article 352 TFEU), which allows the EC to legislate under its so-called complementary competence. According to the CJ, the modification of the rules for the protection of human rights in the Community resulting from accession to the ECHR would have a systemic character for the Community and for the Member States and, by its nature, would go beyond the scope of Article 235.[6] In the legal state of affairs at the time, the CJ found no legal basis for EC's accession to the ECHR. It is worth noting that the Treaties of Amsterdam and Nice, drafted shortly after this opinion, did not change the competence of the EU or EC to accede to the ECHR.

EU's accession to the ECHR was discussed by the European Convention working on the draft Treaty establishing a Constitution for Europe.[7] Within the framework of the Convention, the Working Party on Fundamental Rights worked on the issue of the EU accession to the ECHR, recommending accession but drawing attention to several related problems .[8] One was the issue of individuals' access to the CJ in the context of ensuring effective legal aid. Ultimately, the issue of EU's accession to the ECHR was dealt with in Article I-9(2) of the Constitutional Treaty (Treaty establishing a Constitution for Europe), which stated that the Union should accede to the convention.[9] In doing so, it was emphasised that 'accession to the Convention shall not affect the Union's competences as defined in the Constitution'. The European Convention further elaborated Protocol No. 32 under the conditions of accession and Declaration No. 2, incorporated into the Final Act. However, the failure of the Constitutional Treaty did not lead to the demise of the idea of introducing into Union law a treaty basis enabling EU's accession to the ECHR. The obligation indicated in Article I-9(2) of the Treaty establishing a Constitution for Europe was fully incorporated into the Lisbon Treaty and, as Article 6(2) TEU, came into effect on 1 December 2009.[10]

[6] Paragraph 35.
[7] Treaty establishing a Constitution for Europe, OJ of the European Union, C 310, 16 December 2004.
[8] Wyrozumska, 2007, pp. 51–52.
[9] Treaty establishing a Constitution for Europe, OJ EU C 310, 16.12.2004.
[10] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13.12.2007 (OJ C 306, 17.12.2007, pp. 1–271).

Shortly after the entry into force of the Lisbon Treaty on 11 December 2009, the European Council adopted the Stockholm Programme, envisaging early accession to the ECHR as essential for the EU.[11]

It is worth noting that the Council of Europe also recognised the need for legal changes to enable the EU to accede to the ECHR since 2002. The Steering Committee on Human Rights (CDDH) submitted a check to the Committee of Ministers of the Council of Europe with suggestions for modifications to the ECHR, thus enabling EU accession. The CDDH believed that these modifications could be made either through a protocol amending the ECHR or through an accession treaty to be concluded between the Union on the one hand and State Parties to the ECHR on the other.[12] However, the CDDH favoured the second option in 2002. The EU still did not have a legal basis for accession to the ECHR; hence, the Council of Europe decided to amend only Article 59(2) and create a formal legal basis for the EU to be bound by it. This amendment was carried out under Protocol No. 14 of the ECHR.[13] Therefore, from the perspective of the Council of Europe, the formal legal prerequisite for EU accession to the ECHR was guaranteed.

The entry into force of Protocol 14 to the ECHR coincided with the entry into force of the Lisbon Treaty and, in July 2010, the CDDH *Ad Hoc* Negotiating Group on EU accession to the ECHR began negotiating a draft agreement. In 2013, the CDDH has reached a preliminary agreement with the draft accession agreement.[14] However, negotiations on agreements with the EU were prolonged. In December 2014, at the request of the EC, the CJEU issued Opinion 2/13 on the compatibility of the draft accession agreement with the treaties,[15] and concluded that the draft was not compatible with EU law. Given the wording of Article 218(11) TFEU, according to which 'In the event of a negative opinion of the Court, the

[11] European Council Conclusions, 10–11 December 2009.
[12] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13.5.2004.
[13] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No. 194), Strasbourg, 13.05.2004; Protocol entered into force in 1.06.2010.
[14] Fifth Negotiation Meeting Between the CDDH *Ad Hoc* Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final report to the CDDH, 10.06.2013, 47+1(2013)008rev2.
[15] Opinion 2/13 CJEU (full), 18.12.2014, ECLI:EU:C:2014:2454.

agreement envisaged may not enter into force unless it is amended or the Treaties are revised', Opinion 2/13 blocked the accession process for several years. Only in October 2019. The Council expressed its commitment to the early resumption of negotiations and adopted additional negotiating directives to address the concerns expressed by the CJEU in Opinion 2/13. Since then, negotiations have focused mainly on aligning the 2013 draft accession agreement with the requirements indicated by the CJEU in Opinion 2/13.

During the intra-EU discussion on Opinion 2/13, the problems listed by the CJEU were divided into four baskets. Basket 1 comprises an EU-specific mechanism for proceedings before the ECtHR. Basket 2 covers interstate complaints and requests for advisory opinions against EU Member States. Basket 3 deals with the principle of mutual trust between EU Member States and the guarantee that EU accession to the Convention will not be affected. Basket 4 covers EU actions in the CFSP areas that are excluded from CJEU jurisdiction.

In practice, the issues in the CFSP sphere have triggered the most heated discussions within the EU. By 2022, EU Member States reached a provisional agreement on all issues raised by the CJEU in Opinion 2/13, with the exception of those concerning Basket 4 and ensuring the judicial review of EU acts in the CFSP. Meanwhile, the accession to the ECHR has also taken a political dimension. At the 4th Council of Europe Summit of Heads of State and Government in Reykjavik on 16–17 May 2023. The Council of Europe welcomed the unanimous provisional agreement on revised draft accession instruments as an important achievement in EU accession to the ECHR. The Council of Europe Heads of State and Government also stressed that accession would enhance the coherence of human rights protection in Europe and encourage the timely adoption of the agreement.

3. Treaty legal bases for EU accession to the ECHR

The legal basis for EUs accession to the ECHR should be sought in both the ECHR itself and EU law.

The ECHR is an international agreement addressed primarily to states, so accession to it by the EU, which is an international organisation, requires a separate legal basis. Within the framework of the Council of Europe, the legal basis was provided by Protocol No. 14 to the ECHR, which amended

the ECHR provisions by defining entities entitled to be bound by the Convention. According to the new wording of Article 59(2), the European Union may accede to this Convention. This provision establishes only a formal legal basis for the EU to bind itself to the ECHR but does not specify either the conditions for accession or the required institutional and procedural changes in the functioning of the human rights protection mechanisms established by the Convention. Therefore, the ECHR leaves it to the Council of Europe and EU member states to determine all conditions for accession and future EU membership in the Convention.[16]

From the EU side, the legal basis for accession to the ECHR is Article 6(2) TEU, according to which 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. This provision also notes that 'Accession to the Convention shall not affect the Union's competences as defined in the Treaties'. Article 6(2) TEU is supplemented by Protocol No. 8 of the Treaties and Declaration No. 2 relating to Article 6(2) TEU, which formulates certain conditions upon which the EU will accede to the ECHR. While Protocol No. 8 is an integral part of the Treaties (Article 51, TEU) and has the rank of primary law, Declaration No. 2 does not enjoy this status.[17] It is evident from the content of this declaration that it was agreed upon by the Intergovernmental Conference and, thus, by all the signatory states of the Lisbon Treaty. It has no binding force, although it may have international legal significance in the interpretation of Article 6(2) TEU and Protocol No. 8. The Declaration may be regarded as an agreement concerning the treaty reached between all parties in connection with the conclusion of the treaty, which provides the context. Considering Article 31(2)(a) of the Vienna Convention of 23.05.1959 on the Law of Treaties, context is of vital importance for the interpretation of any treaty.

According to Article 1 of the Protocol, the accession agreement must reflect the need to preserve the specific features of the Union and Union law, particularly regarding:

a) specific conditions for EU participation in ECHR monitoring bodies;

[16] Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13.5.2004.

[17] Kornobis-Romanowska, 2023.

b) the mechanisms necessary to ensure that complaints by non-member states and individual complaints are correctly addressed against the EU or its member states, as the case may be.

Protocol No. 8 emphasises that accession would not affect the competences of the EU or the powers of its institutions. The accession agreement should also contain guarantees that nothing in it will affect the particular situation of Member States in relation to the ECHR, in particular the protocols to that Convention, measures taken by Member States by way of derogation from the ECHR in accordance with Article 15 and reservations to the ECHR made by the Member States in accordance with Article 57.

Furthermore, Protocol No. 8 expressly emphasised that the accession agreement would not affect the obligation not to submit disputes arising from the interpretation and application of EU law to procedures other than those regulated by the Treaties.

Declaration No. 2 emphasises that EU's accession to the ECHR should take place in such a way that the specific nature of the Union's legal order can be preserved. The Intergovernmental Conference stressed the existence of a regular dialogue between the CJEU and the ECtHR and indicated that this dialogue could be strengthened upon EU's accession to the convention.

When analysing the legal basis for EU's accession to the ECHR contained in EU law, the accession framework needs to be shaped in such a way that it does not lead to changes in the EU's competences or affect the powers of its institutions.[18] This is required to comply with the principle of conferral, which is a fundamental structural principle of the EU. On the one hand, EU accession must not lead to a diminution in the competencies of the union. On the other hand, this should not be extended, particularly to human rights. Indeed, the Union still lacks general competence in the field of fundamental rights and cannot acquire such competence through accession to the ECHR.

EU's accession to the ECHR will be implemented through an international agreement concluded between the EU and the Council of Europe[19]. According to Article 218(8) TFEU, the decision on the conclusion of the agreement on the EU's accession to the ECHR will be taken by the Council, acting unanimously. The Council's decision in this regard will enter into force only after it has been approved by all Member States in

[18] Bear, 2015, p. 10.
[19] Grądzka, 2022, p. 184.

accordance with their respective constitutional requirements. The procedure for EU's accession to the ECHR involves the European Parliament, which provides consent for the agreement.

The parties to the future accession agreement will not be EU Member States, although the Treaty provisions validate the Council's decision to conclude the accession agreement, subject to its approval by all Member States in accordance with their respective constitutional requirements. Nevertheless, in accordance with Article 216(2), the accession agreement binds both EU institutions and their member states. In doing so, Protocol No. 8 strongly emphasises the obligation to structure the accession agreement in such a way that its provisions preserve the specific features of the EU and the law it creates. The specific features are, first and foremost, the autonomy of the Union's legal order and the multilevel nature of the EU system, understood as the division of competences and responsibilities between national authorities and bodies that exist within the Union and are regulated by its law.[20] Within the EU law system, the exclusive competence of the CJEU under Article 344 TFEU to settle disputes arising from the interpretation and application of primary and derived EU law assumes particular importance. The obligation to preserve the specific characteristics of the EU and EU law is quite well characterised in the jurisprudence of the CJEU, particularly in the *Kadi* judgment.[21] This obligation means that an international agreement must not violate the competence structure set out in the Treaties, the exclusive competence of EU courts to decide disputes concerning the interpretation and application of EU law (including inter-state disputes) and the competence of national courts to rule on the interpretation and application of EU Law.[22]

4. Determinants of accession to the ECHR in the context of the CFSP as formulated in Opinion 2/13

Opinion 2/13 was issued on 18.12.2014 at the request of the EC. The EC asked, 'Is the draft agreement on the accession of the European Union to the ECHR compatible with the Treaties?' The CJEU formulated in Opinion

[20] Opinion of Advocate General Juliane Kokott, 13.06.2014, Opinion Proceedings 2/13, paras. 157–159.
[21] Joint cases C-402/05. P. and C-415/05. P., *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, 16 January 2008.
[22] Soltys, 2015, p. 40.

2/13 the key condition for EU's accession to the ECHR and the future regulation of relations between the EU, the ECtHR, and the Council of Europe. The proceedings before the CJEU were also of great interest to the EU institutions and Member States, which submitted their comments on, inter alia, the principles of the CFSP.

Advocate General Juliane Kokott presented her opinion on this matter.[23] It dealt with a number of issues emerging from EU's accession to the ECHR, but the Advocate General drew attention to two fundamental issues concerning the impact of accession to the ECHR on the functioning of the CFSP.

The fundamental question posed by the Advocate General was whether the Union's competence, particularly that of the CJEU, was sufficient to provide, in the field of CFSP, a level of legal protection that satisfied the requirements of Articles 6 and 13.[24] On the one hand, accession to the ECHR will have the effect that the EU will be obliged to comply with the fundamental rights guarantees of the ECHR and thus also the imperative of effective legal protection under Articles 6 and 13 of the ECHR in all areas of its activity, including the CFSP, from which the EU cannot derogate in any way. On the other hand, the CJEU has neither jurisdiction over the provisions of primary law relating to the CFSP nor over acts adopted on the basis thereof, with the exception of Article 275, paragraph 2, TFEU. This jurisdiction covers, first, the review of compliance with the so-called 'inviolability clause' (Article 40 TEU) and, second, actions for annulment brought by individuals (Article 263, fourth paragraph, TFEU) against restrictive measures adopted by the Council under the CFSP against natural or legal persons.[25]

However, the Advocate General concluded that EU's accession to the ECHR can be achieved without the need to create new competencies for the CJEU. According to Article 19(1) TEU, the legal protection system of the Treaties is supported by two pillars: the courts of the Union and national courts. In the field of CFSP, there is no possibility of direct action before the Union courts (with the exception of Article 275(2) TEU), while national courts retain their competence to assess the actions of the Member States.[26]

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[23] Opinion of Advocate General Juliane Kokott, 13.06.2014, Opinion procedure 2/13, ECLI:EU:C:2014:2475.
[24] Para. 82.
[25] Paras. 83–84.
[26] Para. 96.

Indeed, Article 19(1) TEU obliges Member States to establish the necessary means of judicial review to ensure effective legal protection in the areas covered by union law and thus also in the field of CFSP. This avenue should be used by individuals who wish to submit judicial review acts, measures, or omissions falling within the scope of the CFSP and that affect them in any (and not only direct and individual) way.[27] Moreover, even when the CFSP is implemented by the institutions, bodies, or other organisational units of the Union in a manner which affects the individual directly and individually, any individual's avenue of recourse to the national courts is not foreclosed unless, exceptionally, he or she can find legal protection directly before the courts of the Union based on Article 275(2) TFEU.[28] In the view of the Advocate General, effective legal protection of the individual, as required by Articles 6 and 13 ECHR, can thus be ensured without the preliminary ruling competence and the monopoly of jurisdiction of the CJEU, as in matters relating to the CFSP, effective legal protection of the individual is provided partly by the Union courts (Article 275, paragraph 2, TFEU) and partly by national courts (Article 19(1), paragraph 2, TEU, and Article 274 TFEU).[29]

The Advocate General also noted a difference in competence between the CJEU and the ECtHR. Following EU's accession to the ECHR, it will be incumbent on the ECtHR to examine all areas of Union law, as well as complaints brought by individuals and states on CFSP, and to determine possible violations of the ECHR for which the EU may be liable. By contrast, the Courts of the Union have limited powers in the field of CFSP, and it is, in principle, incumbent on the courts of EU Member States to provide effective legal protection in that field.[30] According to the Advocate General, the principle of autonomy of Union law does not prevent the EU from recognising the jurisdiction of an international court whose competence in a particular field is broader than that of the CJEU.[31] First, conflicts of jurisprudence and threats to the supranational structure of the Union arising from the deliberate exclusion of the CFSP from that structure must be ruled out.[32] In addition, the authors of the Lisbon Treaty

[27] Para. 98.
[28] Para. 99.
[29] Paras. 102–104.
[30] Para. 187–188.
[31] Para. 191.
[32] Para. 192.

consciously entrust the EU with the competence to accede to the ECHR without at the same time equipping the EU courts with the competence to decide on all issues arising from the functioning of the CFSP. Therefore, the authors of the Lisbon Treaty saw no contradiction between the severely limited jurisdiction of the Union's courts in CFSP and recognition of the jurisdiction of the ECHR as a result of EU's accession to it.[33] Moreover, the authors of the Lisbon Treaty relied on national courts as the second pillar of the EU's legal protection system, and it is incumbent on national courts to punish possible violations of the ECHR that could occur under the CFSP unless, exceptionally, the Union courts have jurisdiction pursuant to the second paragraph of Article 275 TFEU.[34]

The EC presented a different argument during the proceedings before the CJEU. It proposed a broad interpretation of the terms used in Article 275, paragraph 2, TFEU of the term 'decision providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union'. According to the EC, this provision encompasses not only CJEU's competence to rule on actions for annulment (Article 263 TFEU) brought by individuals against restrictive measures but also on actions for damages (Article 265 TFEU) and preliminary rulings by national courts in the field of CFSP.[35] Furthermore, it advocated the application of the possibility of legal protection of individuals in the field of the CFSP so that it covers not only acts within the meaning of Article 263, paragraph 1, TFEU, which has binding legal effects but also mere acts of fact, that is, acts without legal effects.[36]

The EC also submitted that, when an act is attributed to the Union or to a Member State for the purpose of establishing responsibility under the ECHR, the same criteria should be applied within the Union. The Commission argues that the first sentence of Article 1(4) of the draft Accession Agreement fulfils this requirement by providing that a measure of a Member State is imputed to that state even if it implements Union law, including decisions taken under the TEU and TFEU.[37] Military operations

[33] Para. 194.
[34] Para. 195.
[35] The position of the European Commission is discussed in the Opinion of Advocate General Juliane Kokott, 13.06.2014, Opinion Procedure 2/13, ECLI:EU:C:2014:2475, paras. 86–91.
[36] Para. 86.
[37] Opinion 2/13 CJEU (full), 18.12.2014, ECLI:EU:C:2014:2454, para. 93.

under the CFSP are carried out by Member States and the acts of Member States are attributed to the concerned Member State, not the Union. In this way, the draft Accession Agreement ruled out the application to relations between the Union and its Member States of the case law of the ECtHR on the responsibility of an international organisation with regard to actions taken by a state to implement decisions of that organisation.[38]

The CJEU did not share the views of the Advocate General or the EC in Opinion 2/13.[39] Regarding the CFSP, the CJEU noted that it only has jurisdiction to review compliance with Article 40 TEU and to review the legality of certain decisions provided for in Article 275, paragraph 2, TFEU. Therefore, it does not have general jurisdiction to review compliance with the law created in the CFSP, and some of the acts issued under the CFSP are not subject to the Court's judicial review.[40]

Pursuant to Article 275 TFEU, the Court has jurisdiction to rule on actions brought under the terms of the fourth paragraph of Article 263 TFEU concerning the review of the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council based on Chapter 2 of Title V TEU. The CJEU rejected the broad interpretation of Article 275 proposed by the EC. Indeed, the Commission's position distinguished between acts that produce binding legal effects and those devoid of such effects. Acts producing binding legal effects constitute, to the extent that they may infringe fundamental rights, 'restrictive measures' within the meaning of Article 275, paragraph 2, TFEU and may therefore be the subject of an action for annulment before the EU courts. By contrast, acts that do not have such effects cannot be the subject of an action for annulment or a reference for a preliminary ruling. The only remedy available within the Union against such acts is an action for damages under Article 340 TFEU, as such an action is not, in the Commission's view, precluded by the first paragraph of Article 275 TFEU.[41] EC's position broadly defined the scope of the CJEU's CFSP judicial review as covering all situations that could be the subject of action before the ECtHR. The CJEU commented on the EC's position by stating that it had not yet had the opportunity to define the exact scope of the limits of its CFSP competence.[42]

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[38] Para. 95.
[39] Opinion 2/13 CJEU (full), 18.12.2014, ECLI:EU:C:2014:2454.
[40] Para. 252.
[41] Para. 99.
[42] Para. 251.

Nevertheless, the position of the EC seems inappropriate for several reasons. First, Article 275 TFEU is an exception to the general rule that the CJEU does not have CFSP competence with the exceptions described in this provision. As exceptions are subject to restrictive interpretation, Article 275 TFEU should not be interpreted in an expansive manner. Second, Article 275 TFEU does not specify that the division of CFSP acts into acts that produce and do not produce binding legal effects. The provision only mentions acts providing 'restrictive measures'. Third, accepting the European Commission's argument would *de facto* lead to an extension of CJEU's adjudicatory powers and would, therefore, directly contravene the prohibition formulated in Article 6(2) and Protocol No. 8.

The CJEU ultimately refrained from interpreting Article 275 TFEU and contented itself by stating that it was sufficient to conclude that, in the current state of Union law, certain acts issued under the CFSP are not subject to judicial review by the Court.

The CJEU further noted that, in light of the draft agreement under assessment, the ECtHR would have the power to rule on the compatibility with the ECHR of certain acts, acts, or omissions taking place under the CFSP, including those with respect to which the CJEU has no jurisdiction to review their legality in light of fundamental rights.[43] Such a situation would entail entrusting the judicial review of those acts or omissions of the EU exclusively to a body external to the Union, even if that review was limited to compliance with the rights guaranteed by the ECHR.[44] Meanwhile, in Opinion 1/09, the CJEU noted that the jurisdiction to exercise judicial review of the acts, acts, or omissions of the EU, including in light of fundamental rights, cannot be entrusted exclusively to an international judicial body not embedded in the institutional and judicial framework of the EU.[45] This gave the CJEU reason to conclude that the envisaged accession agreement does not consider the specific characteristics of Union law with regard to the judicial review of the acts, actions, or omissions of the EU in the field of CFSP.[46]

[43] Para. 254.
[44] Para. 255.
[45] Para. 256.
[46] Para. 257.

5. Possible solutions to the CFSP judicial review deficit following the EU's accession to the ECHR

The most significant problem emerging from Opinion 2/13 was the regulation of CJEU's competence on judicial review in the CFSP area. This problem was perceived in the doctrine of European law even before the Opinion.[47] CJEU's competence in this area of European integration is, in principle, excluded, and it may exercise it in the two cases indicated in Article 24(1) TEU and Article 275 TFEU:

a. to monitor compliance with Article 40 TEU;
b. control the legality of decisions by providing restrictive measures against natural or legal persons, adopted by the Council (Article 275, paragraph 2, TFEU).

The acts and activities of the EU that do not fall within the aforementioned provisions are not subject to judicial review by the CJEU. This primarily concerns the creation of EU military and civilian missions and their activities, which may indirectly lead to violations of fundamental rights. At the same time (according to the wording of Article 340 TFEU), the legal admissibility of submitting a dispute concerning these acts and activities to the judgment of another international court is questionable.[48] The CJEU made it clear in Opinion 2/13 that the EU could not accede to the ECHR or grant the ECtHR the ability to hear cases without prior involvement. A situation in which the CJEU is not the first to hear cases of fundamental rights violations arising from the actions of the EU and/or its Member States under the CFSP (analogous to the national system) would be unacceptable to the CJEU. Discussions within the EU on how to provide the CJEU with the jurisdiction to exercise judicial review of CFSP acts and actions have been ongoing since 2019. During this time, there have been several proposals to address this issue.

The first proposal was presented by the EC during the proceedings for Opinion 2/13 and implied an expansive interpretation of Article 275(2) TFEU. While the CJEU and Advocate General did not accept EC's position, the Court itself did not explicitly reject the Commission's argument, merely stating that it had no jurisdiction to review certain acts. In this way, the Court left room for an extensive interpretation of Article 275, paragraph 2, TFEU in the future, in the absence of treaty changes to its CFSP

[47] Baere, 2008, p. 183.
[48] Hillon and Wessel, 2022, p. 78.

jurisdiction. The lack of a clear position of the CJEU on an expansive interpretation of this provision has been noted by some EU Member States who, in the course of the discussions on providing the CJEU with the competence to exercise judicial review in the area of the CFSP, have proposed the adoption of an intergovernmental declaration by all EU Member States. This declaration aims to extend CJEU's CFSP jurisdiction to cases of violation of fundamental rights caused by acts, actions, or omissions of the European Union, which will be subject to judicial review by the ECtHR after EU's accession to the ECHR. This would enable the legal impasse following Opinion 2/13 to be overcome without amending the EU Treaties. Based on such an intergovernmental declaration, the CJEU would acquire, in the field of CFSP, the competence to hear complaints brought by those who claim to be victims of fundamental rights violations caused by acts or omissions of the European Union, which would be subject to judicial review by the ECtHR after the Union's accession to the ECHR. According to the declaration, the Treaties would allow complainants who have standing to bring an action before the ECtHR to bring an action before the CJEU based on Article 263 TFEU (action for annulment) or Article 268 TFEU (action for damages).

When assessing a proposal to make an intergovernmental declaration, attention should first be paid to the legal form and procedures for the adoption of such a declaration. The declaration would be intergovernmental and would have to be agreed upon by the representatives of the Member States' governments. The EU practice is familiar with the format of the so-called Conference of Representatives of Member States, whereby, for example, in the margins of a COREPER meeting, CJEU judges are elected (under the Treaties, CJEU judges are appointed by common agreement by the governments of Member States). By means of a declaration accepted in the margins of COREPER, a rotating system for the election of CJEU Advocates General was adopted. Each of these declarations is of technical nature and serves to implement the treaty provisions (election of CJEU judges) or clarify their application in practice (rotation system for the positions of Advocates General). However, none of these declarations led to a *de facto* modification of the treaty provisions or an extension of the competences of EU institutions. Further, none of the abovementioned declarations adopted by the Conference of Representatives of Member States dealt with such an important issue as the extension of the jurisdiction of the CJEU to areas which, until now, according to the unanimous will of

Member States, were excluded from its jurisdiction. Articles 344 and 275 TFEU reveal the preference to exclude CFSP cooperation from any judicial proceedings, rather than a wish to ensure a uniform interpretation of the CFSP by the CJEU. Such a state of affairs should potentially be considered a specific feature of the Union's legal order. Article 1 of Protocol No. 8 of the Lisbon Treaty on Article 6(2) TEU on the accession of the EU to the ECHR dictates that the agreement applicable in this regard must reflect the need to preserve the specific features of the Union and Union law.

It is not clear whether an intergovernmental declaration takes the form of a reservation, an interpretative declaration, or another type of declaration. International practice is generally familiar with two types of declarations made by States or international organisations which have the effect of modifying treaty obligations. These are reservations and interpretative declarations.[49] Reservations may be made upon signature, ratification, acceptance, approval, or accession to a treaty, and have the effect of excluding or modifying the legal effect of certain provisions of a treaty in their application to that state or international organisation.[50] The time limitation for reservations precludes an intergovernmental declaration from taking this form. As the Declaration is intended to modify the jurisdiction of the CJEU, it should be attached to the TEU and TFEU, not to the Accession Agreement.

An interpretative declaration is a unilateral declaration, however phrased or named, made by a state or by an international organisation, whereby that state or organisation purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.[51] The character of a unilateral statement as a reservation or interpretative declaration is determined by the legal effect that its author purports to produce, and an interpretative declaration does not purport to exclude or modify the legal effects of any provision of the treaty in its application to the reserving state.[52] The interpretative declaration can be made jointly by

[49] Sozański, 2005, p. 74.
[50] See Article 2(1)(d) Vienna Convention on the Law of Treaties of 23.05.1969 and Article 2(1)(d) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21.03.1986, United Nations publication, Sales No. E.94.V.5.
[51] Guide to Practice on Reservations to Treaties, Yearbook of the International Law Commission, 2011, vol. II, Part Two.
[52] Idem.

several states or international organisations and may be formulated at any time.[53]

An intergovernmental declaration extending CJEU's CFSP jurisdiction can take the form of an interpretative declaration. However, it does not have binding force. Therefore, it could not effectively extend the jurisdiction of the CJEU into the areas of cooperation covered by the CFSP and would not fulfil the conditions indicated by the CJEU in Opinion 2/13.

The 1969 Vienna Convention on the Law of Treaties provides another solution to the nature of an intergovernmental declaration, which extends the jurisdiction of the CJEU. Article 31(3)(a) allows for subsequent agreements between parties concerning the interpretation of the treaty or the application of its provisions. Such agreements should be considered when interpreting treaties. Ultimately, however, given the specific and unique features of the EU legal order, it will be the CJEU to determine whether such a statement should be considered and to determine the meaning to be given to it, given that it was agreed upon by the signatories to the treaties. In this regard, the CJEU has already agreed to consider statements as instruments of interpretation of EU Treaties,[54] although it has confirmed that it has no jurisdiction to review the legality of such statements.[55] The CJEU has also emphasised the political nature of such declarations and stressed that recourse to them can only be made under very specific circumstances.

The amendment of the treaties forming the basis of the EU by means of an intergovernmental declaration must be assessed critically, as it is not mentioned in Article 48 TEU, which introduces mechanisms for amending the founding treaties. While such a procedure is not impermissible under the provisions of the 1969 Vienna Convention on the Law of Treaties, in practice, it will mean that the treaties forming the basis of the EU would be modified by a declaration attached to the 'ordinary' international agreement under which the EU accedes to the ECHR. This creates a precedent that could be used in the future to amend the treaties constituting the basis of the EU in a non-treaty mode unknown to Article 48 TEU. Since the treaties explicitly exclude the jurisdiction of the CJEU in the CFSP and introduce only two exceptions, the jurisdiction of the CJEU should be extended to new areas of the CFSP through the procedure indicated in Article 48 TEU.

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[53] Idem.
[54] C-135/08, *Janko Rottman v Freistaat Bayern*, 02 March 2010, § 40.
[55] C-684/20 P, *Eleanor Sharpston v Council of the European Union*, 16 June 2021, § 45.

An extension of the concept of an intergovernmental declaration extending the competence of the CJEU is the call for the development of an administrative procedure whereby the Council can hear complaints arising from the acts and actions of states under the CFSP, which violate the fundamental rights granted by the ECHR. A unilateral EU declaration attached to the accession agreement clarified that this procedure should be used to exhaust internal EU remedies. The concept is that a provision would be added to each decision establishing a military or civilian mission to regulate the administrative procedure in which the Council would be empowered to hear the complaints arising from CFSP actions. Once a complaint is received, it is addressed by a Council decision; a Council decision to accept or reject the complaint is subject to appeal before the CJEU. Failure by the Council to make a decision within the set time limit would be tantamount to the Council rejecting the complaint, thus opening the way for legal proceedings before the CJEU.

The main reason for this idea is that an administrative procedure would allow for the control of Council acts and actions on CFSP matters. Such a procedure would also occur without prejudice to subsequent judicial review. The argument against it is that the Council would acquire *quasi-judicial* competence, whereby it would be given the competence to receive complaints from individuals and to adjudicate violations of fundamental rights. However, these competencies are not available to the council under the functions currently conferred on them. Under Article 16 TEU, the Council has legislative and budgetary functions, as well as policymaking and coordination functions. The transfer of new competencies will lead to a change in the existing competencies of this body, which is prohibited by Article 6(2) TEU and Protocol No. 8.

A third proposal discussed within the EU to address CJEU's lack of jurisdiction in the CFSP was the concept of so-called 'reattribution of responsibility'. This implies the attribution of responsibility to a given EU Member State for a specific CFSP act based on legal fiction. However, this concept did not gain the support of EU Member States, inter alia, because of the high complexity of the possible procedure in practice and the difficulty in foreseeing its material and political consequences. It also did not gain support among the non-EU Member States of the Council of Europe.

The lack of consensus preventing EU's accession to the ECHR on resolving the deficit of judicial review of CFSP acts and actions should prompt Member States to return to the simplest way of resolving this issue.

As there is no consensus among EU Member States to amend the Treaties and extend the jurisdiction of the CJEU to acts and actions carried out under the CFSP, it would be appropriate to revert to the already existing treaty-based mechanisms for the control of respect for human rights, as described in Article 19(1) and (2) TEU, and to entrust the national courts of Member States with jurisdiction over CFSP matters that do not fall within the jurisdiction of the CJEU. This solution is supported by the doctrine of European law.[56] Ultimately, what remains is the procedure for amending the Treaties in Article 48 TEU, which would either give the CJEU new competence in the field of CFSP or repeal the provision obliging the EU to accede to the ECHR. The latter idea does not seem unreasonable, given that the EU has given binding force to the Charter of Fundamental Rights and obliged not only its institutions and bodies but also (albeit only to a limited extent) Member States to comply with it. The Charter has also established a link between the fundamental rights derived from it and the human rights guaranteed by the ECHR. After 2009, CJEU has developed a rich case law on the understanding and scope of individual fundamental rights.

6. Completion

The process of accession to the ECHR has shown that the introduction of an explicit legal basis in the treaties authorising the EU to do so has proven insufficient and created new problems which have in turn proved difficult to solve in practice. The idea of a non-binding intergovernmental declaration that has the strongest support among member states may not be sufficient. As the CJEU wants to remain the primary court to adjudicate on issues of respect for human rights arising from acts and actions implemented under the CFSP, it may not be content to grant it legally dubious competence or attempt to block accession to the ECHR until the Treaties are amended and it is granted jurisdictional competence covering the entire CFSP. In this respect, it is puzzling why the CJEU rejected the idea of entrusting national courts with the adjudication of cases of fundamental rights violations during military and civilian missions.

The current legal impasse does not serve any individual, that is, neither Member States who are unable to fulfil their obligation of EU accession to the ECHR nor individuals who may be deprived of judicial legal protection.

[56] Soltys, 2015, pp. 41–42; Hillon, Wessel, 2022, p. 77.

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