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## Four Points on the Court of Justice of the EU

by

Giuseppe Martinico\*

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## Abstract

This article addresses the role of the Court of Justice of the EU (CJEU) in possible scenarios of EU reforms. Despite its crucial role in the EU integration process the CJEU has been neglected in many of the proposals recently suggested to reform the EU. In this piece I shall try to explore some important issues that should be taken into account when advancing reform proposals with regard to this institution.

## Key-words

Court of Justice of the European Union, Preliminary Ruling Mechanism, reforms, European Convention on Human Rights, financial crisis, national courts



## 1. Introduction

When looking at some recent reform proposals of the EU Treaties from think tanks, the first impression is the very limited attention paid to the Court of Justice of the European Union (CJEU)<sup>I</sup>. This does not seem to be consistent with recent rounds of constitutional politics (on them see Alonso García 2010; Vătăman 2011). For the sake of clarity, here I am not underestimating the amendments introduced by the Lisbon Treaty: in certain cases one may have the feeling that the latter have been just indirect consequences of broader changes concerning the structure of EU law- for instance this is the case of the so called de-pillarization, but actually reforms like those introduced by means of Art. 255 TFUE (Alemanno 2014) are of crucial importance. This piece briefly identifies four “camps” or “challenges” that can be identified in current scenarios on the CJEU, and which should be kept in mind when proposing a new round of constitutional politics for the EU. Moreover when advancing reform proposals concerning the CJEU<sup>II</sup> one has to take its particular position into consideration; whatever the changes proposed, the CJEU will be at an advantage if compared to the other EU institutions, since it will also be the interpreter of those provisions aimed at reforming it. This partly explains why for instance provisions that have been over the years introduced to “hijack” the integration process (Curtin 1993), or to limit the CJEU’s activism, have rarely worked, as I have tried to point out elsewhere (Martinico 2012). Let me also write a couple of lines about what this piece is not about: it neither offers an organic account of the reforms introduced by the Lisbon Treaty, nor does it aim to give a complete overview of all the proposals previously advanced by scholars.

It is a piece which should be understood as being written to be included in a special issue like this, conceived as a moment of reflection upon some burning issues, and an opportunity to contribute to the debate with some concrete proposals.



## 2. National Autonomy versus EU Law Primacy: The case of the *res iudicata*

My first example of challenge is given by the struggle for a new equilibrium between the primacy of EU law and the national procedural autonomy after the emergence of the *Köbler*<sup>III</sup> doctrine (Wattel 2004; Zingales 2010) - which represents, according to some scholars (Komárek 2005), a rupture in the traditional cooperative relationship connecting national common (i.e. ordinary and administrative) judges and the CJEU.

Indeed, following decisions like *Köbler*,<sup>IV</sup> *Traghetti del Mediterraneo*<sup>V</sup> and *Kühne & Heitz*,<sup>VI</sup> Komárek wrote about the “end of the sincere cooperative relationship” (Komárek 2005: 21), and the judicial attempt to build coherence and unity by establishing a de facto hierarchy similar to that of classic federal judicial systems. This is at the core of the so-called appellate theory, according to which “one possible way of reading *Köbler* is to see the referral sent in the context of the claim of liability for a judicial breach as a special kind of an appellate procedure whereby the questions of Community law, improperly treated by the national court, the judgment of which gave rise to the liability action, may eventually reach the Court of Justice on the second attempt” (Komárek 2006) . Or, in other words, “liability action can be seen as an indirect possibility to appeal and reach the Court of Justice” (Komárek 2005:31). As Komárek has noted, the term “appeal” is used metaphorically, since “the decision whether to refer a preliminary question to the Court of Justice remains exclusively in the hands of the national judge, not the parties”. (Komárek 2005: 14). Irrespective of the acceptance of the “appellate theory”, it is unquestionable that the CJEU has chosen to counter centrifugal judicial forces by insisting on its authority and equating the infringement of EU obligations with the violation of its own case law.<sup>VII</sup>

In the wake of the *Köbler* and *Traghetti del Mediterraneo* cases, there was a huge debate over the possibility that the CJEU might threaten the principle of national *res iudicata* in order to ensure the uniformity of interpretation.

The problem of the equilibrium between the need for interpretive uniformity, and for respect of the principle of *res iudicata*, was tackled by the CJEU in the *Kühne & Heitz* case.<sup>VIII</sup> In that case (which concerned administrative decisions), the CJEU clearly expressed its preference for the overcoming of the national *res iudicata*, where the applicable national law allows it. This reference to national autonomy (suggested by the *a quo* judge



himself when raising the preliminary question) seems to mitigate the strong acceleration of the CJEU's interpretive uniformity. In *Kapferer*,<sup>IX</sup> the CJEU answered a preliminary question raised by the *Landesgericht Innsbruck* (Austria) in the proceedings *Rosmarie Kapferer versus Schlank & Schick GmbH*.

The *a quo* judge expressly proposed the possibility to extend the *Kühne & Heitz* principle to the case of *res indicata* in a judicial decision. The CJEU highlighted that:

“It should be added that the judgment in *Kühne & Heitz*, to which the national court refers in Question 1(a), is not such as to call into question the foregoing analysis. Even assuming that the principles laid down in that judgment could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied”.<sup>X</sup>

The *Kapferer* doctrine seemed to resolve the issue. Yet, a few months after that decision, the CJEU dealt with another interesting case, *Lucchini*<sup>XI</sup>. In *Lucchini* the CJEU, following the Opinion of General Advocate Geelhoed, concluded that “Community law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res indicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final”.<sup>XII</sup> As I have argued elsewhere (Martinico 2009), my first impression was that the final conclusion reached in *Lucchini* could be explained by the fact that the contested decision was issued *ultra vires*. Indeed, as the CJEU itself recalled, the challenged decision had been adopted on a subject of undisputed Community competence, given that national courts “do not have jurisdiction to give a decision on whether State aid is compatible with the common market”.<sup>XIII</sup> As Advocate General Geelhoed said, the principle of *res indicata* cannot permit the persistence of a judicial decision which amounts to a clear violation of the basic separation of competences between the ECs and the Member States.<sup>XIV</sup> *Lucchini* seemed to be an extra-ordinary judgment, unlikely to set a



precedent on the point; broadly speaking, the judicial autonomy of the Member States did not seem to be put in doubt. However, a few months ago, in *Fallimento Olimpiclub*<sup>xv</sup> the CJEU confirmed the point (but at the same time, curiously the Advocate General Mazák insisted on the “special” nature of *Lucchini*<sup>xvi</sup>) saying: “that Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a VAT dispute relating to a tax year for which no final judicial decision has yet been delivered, to the extent that it would prevent the national court seised of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of VAT”<sup>xvii</sup>.

However, case law on the national *res indicata* is just one of the ways in which the Luxembourg Court is challenging the principle of national procedural autonomy.

As we know the CJEU has always attempted to build a direct relationship with national (lower) courts, insisting on the fact that national judicial hierarchies cannot jeopardise the functioning of that direct channel represented by the preliminary ruling mechanism.

A confirmation of this trend is represented by the *Cartesio*<sup>xviii</sup> judgment whereby the Luxembourg Court “has opened the possibility for national Courts to make references and maintain them, even if they are quashed on appeal by a superior Court on points of EC Law”<sup>xix</sup> thus jeopardizing the “national judicial autonomy” of the States.<sup>xx</sup>

Eventually, despite the different suggestion coming from the Advocate General Cruz Villalón<sup>xxi</sup>, another harsh decision was given in the *Elchinov*<sup>xxii</sup> case, where the CJEU confirmed the *Rheinmühlen-Düsseldorf* doctrine<sup>xxiii</sup> by sacrificing the national procedural autonomy and stating that: “European Union law precludes a national court which is called upon to decide a case referred back to it by a higher court hearing an appeal from being bound, in accordance with national procedural law, by legal rulings of the higher court, if it considers, having regard to the interpretation which it has sought from the Court, that those rulings are inconsistent with European Union law”<sup>xxiv</sup>.  
Alongside these judgments - which once more raised the question whether the aim of the CJEU is to build a sort of judicial hierarchy to be considered as alternative to the national one - it might be helpful to consider other contested decisions, which led to several critiques against the CJEU’s case-law, as well as other more recent cases<sup>xxv</sup>. However for



the purpose of this article it is now necessary to say something on how to solve this thorny issue. I see two options, the first one would imply a reform of the preliminary ruling mechanism and was presented by Komárek in an important article some years ago (Komárek 2007). That piece was written in the pre-Lisbon scenario and in reaction to a Communication of the EU Commission entitled “Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection”<sup>xxvi</sup>. Briefly, the proposal advanced by Komárek consisted of a basic point, described as “the rule”, predicated on the need to limit the preliminary ruling procedure to courts of last instance. However, the author also proposed two exceptions to that rule: a *necessary* exception “when a lower court considers that one or more arguments for invalidity, put forward by the parties or as the case may be raised by it of its own motion, are well founded, it must stay proceedings and make a reference to the Court for a preliminary ruling on the act’s validity” (Komárek 2007: 468<sup>xxvii</sup>) and a *possible* exception “the Council can decide which EU law measures may be subject to preliminary references from lower courts” (Ibidem). The idea behind this proposal was to guarantee the importance of national judicial hierarchies against attack from the CJEU and in order to reinforce it the author considered in that article a series of possible counter-arguments. In his mind this would enhance the clarity, uniformity and authority of EU law;

“Narrowing down the possibility of lower courts to send preliminary references reflects the philosophy of the Court of Justice’s role as a veritable Supreme Court for the Union and its courts. Supreme, not because of its hierarchically superior position over the national courts – this article does not advocate such a position. The article believes that the fundamental Court of Justice’s task, when ensuring that in the interpretation and application of the Treaties the law is observed, is to provide national courts with authoritative guidance. However, to be able to speak with authority, the Court must speak clearly and persuasively. This cannot be done if it pulverizes its authority into hundreds of (sometimes) contradictory and (often) insufficiently reasoned answers” (Komárek 2007: 484).

I do not think this interpretation is consistent with the spirit and the traditional use of the preliminary ruling mechanism, the reasons for its success can most likely be ascribed to the direct relationship between lower courts and the CJEU. The second option would imply a change in the doctrine of the CJEU and was suggested by Advocate General Cruz



Villalón<sup>XXVIII</sup> (in his Opinion to the *Elchinov* case). The latter has the advantage of being flexible and might represent a possible new equilibrium in this field after the tensions caused by the above mentioned decisions.

The Advocate General suggested that “it does not appear to be necessary also for a lower court to consider it possible to disregard its internal hierarchical organization in order to preserve the effectiveness of European Union law, since, inter alia, an individual who holds rights conferred by European Union law may now bring an action for liability for judicial acts”<sup>XXIX</sup> against the Member State. If accepted in the future, this view could be interpreted as another example of softening of the absolute primacy of EU law over national law, thus another change in the structure of one of the constitutional principles of EU law after a confrontation between national and supranational judges. Between these two examples, I would go for the substance of the latter. One could even suggest to go a step further, by trying to codify *expressis verbis* prohibition for lower courts to disapply decisions based on a breach of EU law, but covered by *res iudicata*. However this might have possible shortcomings; the notion of *res iudicata* is not univocal when looking at comparative law and there are legal orders that allow the overcoming of the *res iudicata*. For these reasons it would be necessary to add to the wording of this provision, forbidding national judges to disapply national decisions covered by *res iudicata* with the inclusion of a line stating “in those cases where, according to the legal system of the referring judge, is not possible to overcome the *res iudicata*”. This would be consistent with preserving existing diversity present at the national level. However, I would be the first to be sceptical about a proposal like this, since it would make in any case too rigid a decision which should be handled by courts. This leads me to conclude that on balance the EU Treaties are not the place for a rule like this.

### 3. Preliminary Ruling Mechanism and Constitutional Courts

A second important challenge is exemplified by the relationship between the CJEU and national Constitutional Courts. On 26 February 2013 the Court of Justice of the European Union (CJEU) decided *Melloni*<sup>XXX</sup>, a very important case triggered by a preliminary question raised by the Spanish Constitutional Court. This preliminary question had attracted the attention of scholars for at least two reasons. First of all, it was raised by the Spanish



Constitutional Court, which for the first time had decided to use Article 267 of the TFEU. In this sense *Melloni* represented the latest link of a longer chain of preliminary questions raised by national Constitutional Courts. The second reason was because the CJEU was expected to say something important about Article 53 of the Charter of Fundamental Rights of the EU, concerning the burning issue of the relationship between the standard of protection ensured to the same right at different levels.

In this case the CJEU refused a minimalist interpretation of Article 53, by stating at par. 58 of that decision that the “Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution”. The Court then added at par. 60 “It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised”. This was seen as a return to an absolute conception of primacy<sup>xxxI</sup> and in general it sounded very harsh. More recently, on 13 February 2014, in its follow up to the *Melloni* decision of the Luxembourg Court, the Spanish Constitutional Court reversed its case law and abided by the indications of the CJEU<sup>xxxII</sup>. The Spanish follow up to the *Melloni* case was somewhat ambiguous, because “while the outcome does fulfil the mandates of EU law, the reasoning proves quite unsettling” (Torres Pérez 2014: 309).

This case gives a more general idea of the very difficult role played by national Constitutional Courts. This decision is in line with other recent rulings of the CJEU, whereby the Luxembourg Court did not show great deference towards national Constitutional Courts; I am referring to the *Filipiak*<sup>xxxIII</sup> and the *Winner Wetten*<sup>xxxIV</sup> cases for instance, as we will see later in this article. This does not seem to be coherent with another recent trend which sees Constitutional Courts more and more open to Article 267 TFEU and with another series of decisions which had been traced back to a sort of margin of appreciation doctrine of the CJEU<sup>xxxV</sup>. Other examples of this difficulty is given by cases like *Melki*<sup>xxxVI</sup> - a well-known case which originated from the reform introduced in France by Article 61-1 of the French Constitution, by which the *incidenter* control of constitutionality was introduced<sup>xxxVII</sup> - or *Križan*<sup>xxxVIII</sup>, *Chartry*<sup>xxxIX</sup> or, recently, *A v. B*<sup>XL</sup>.



For instance, *Križan* originated by a preliminary reference sent by the *Najvyšší súd Slovenskej republiky* (Supreme Court of Slovakia).

Among other things, the *a quo* judge asked whether Article 267 TFEU requires or enables the supreme court of a Member State to use the preliminary ruling mechanism

“even at a stage of proceedings where the constitutional court has annulled a judgment of the supreme court based in particular on the application of the EU framework on environmental protection and imposed the obligation to abide by the constitutional court’s legal opinions based on breaches of the procedural and substantive constitutional rights of a person involved in judicial proceedings, irrespective of the EU law dimension of the case concerned that is, where in those proceedings the constitutional court, as the court of last instance, has not concluded that there is a need to refer a question to the [Court of Justice] for a preliminary ruling and has provisionally excluded the application of the right to an acceptable environment and the protection thereof in the case concerned?”<sup>XL1</sup>

The answer delivered further proof of the strong conception of EU law employed by the CJEU in its relationship with national (constitutional) judges, stressing the autonomy to be left to the *a quo* judge to refer to the CJEU<sup>XLII</sup>.

Traditionally, Constitutional Courts have always been “pretty problematic” from the viewpoint of the CJEU; for many years they refused to employ the preliminary ruling mechanism (Martinico 2010). Now the situation has changed, at least apparently, since the Constitutional Courts of Germany<sup>XLIII</sup>, Belgium,<sup>XLIV</sup> Austria,<sup>XLV</sup> Lithuania,<sup>XLVI</sup> Italy,<sup>XLVII</sup> Spain<sup>XLVIII</sup> and France<sup>XLIX</sup> have agreed to make a preliminary reference to the CJEU. However, to date the majority of Constitutional Courts still have not accepted considering themselves as judges under Art. 267 TFEU, and even those Courts that have embraced the mechanism make it evident that they consider it as an *extrema ratio* (with the Belgian and Austrian exception, perhaps). The Austrian case is emblematic, because even in this case of a traditionally “friendly” and loyal Constitutional Court, the CJEU has recently produced a “Melki style” reaction in the already mentioned *A v. B.* case<sup>L</sup>. On that occasion, and this leads me to my proposal, the CJEU thought the case was similar to *Melki* and the question was not decided by the Great Chamber but by its fifth section. This was not the first time in which cases concerning established case law of national Constitutional Courts (questioned by the referring judges through the use of preliminary mechanism) had been decided in a composition different from the Great Chamber, another case is *Landtová*<sup>LI</sup>. In



this respect I do agree with scholars like Alonso García (Alonso García 2012: 7-8) who insisted on the fact that cases like these should be decided by the Great Chamber and in this sense the introduction of a specific provision in the Rules of Procedure of the CJEU could be advocated.

Another interesting proposal concerning Constitutional Courts and Art. 267 of the TFEU is presented by Tatham in his latest book and consists of the introduction of an “*actio popularis*” at EU level, “a constitutional reference which could eventually be sent to the CJEU. The use of this procedure would be available to natural and legal persons in EU Member States to raise a claim directly before their constitutional court on an issue of European law on the grounds that an essential element of national sovereignty was being impinged upon by an EU legal provision” (Tatham 2013: 314). The author also sketches out the possible revision of a new Art. 267 TFEU reading “Where the court or tribunal of a Member State against whose decision there is no judicial remedy under national law is a constitutional court or a supreme court or chamber thereof exercising final constitutional jurisdiction in that Member State, any natural or legal person in proceedings before such court or tribunal, either directly or indirectly as a party to a case referred from another court, may request a European constitutional reference to the Court where such person claims infringement, actually or potentially, by EU law of the constitutional identity of that Member State” (Tatham 2013: 315). Although this proposal was designed some years ago, it is still worthy of consideration, especially since it tries to take into account the problematic nature of Art. 4.2 TEU<sup>111</sup>, one of the most controversial novelties introduced by the Lisbon Treaty.

#### 4. The Accession of the EU to the European Convention of Human Rights

My third challenge is represented by the accession of the EU to the ECHR, at least for those who still believe in the accession after Opinion 2/13 CJEU<sup>1111</sup>. However, imaging that Opinion 2/13 will just delay the accession to the ECHR can be considered as the outcome of a process of gradual emergence of the issue of fundamental rights in EC/EU law; a step in the journey towards a more comprehensive system of protection of fundamental rights. It will also be a test for the EU institutions that will not only be



controlled “internally” (by the domestic actors operating at the national level) but also “externally”, according to a mechanism that will enable the European Court of Human Rights (ECtHR) to abandon the indirect control which, since the *Cantoni*<sup>LIV</sup> judgment, has always carried *de facto*, even on the “fundamental rights performance” of the EU.

With particular reference to the Court of Justice, the accession to the Convention may also mean the beginning of a period of downsizing and this could have consequences on the same doctrine of the autonomy of Union law. Relationships that are now managed through comity (see doctrine *Bosphorus*<sup>LIV</sup>) could be subject to a rigorous discipline, with obvious limitations of the scope of autonomy of the actors involved (more certainty, one might say, but also less flexibility).

Traditionally, as the *Mox Plant*<sup>LVI</sup> case demonstrates, the CJEU has always jealously guarded its monopoly of interpretation; how will it react to this new situation? This is not merely a hypothetical question, as Art. 1 and 3 of the Protocol concerning EU accession to the ECHR to the Treaty of Lisbon confirm<sup>LVII</sup>.

According to this Protocol, nothing in the agreement relating to the accession of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms provided for in Article 6(2) of the Treaty on European Union shall affect Article 344 of the TFEU (former Art. 292 ECT). Article 344 of the TFEU concerns the interpretive monopoly of the CJEU on EU law (and, as is well known, the agreements concluded by the European Union are considered as part of EU law due to the automatic treaty incorporation doctrine<sup>LVIII</sup>).

Indeed the attention paid by the CJEU in Opinion 2/13 has confirmed the importance of Art. 344 of the TFEU. Why was such an article recalled in the Protocol on the accession to the ECHR? Looking at some documents published on the CJEU’s website<sup>LIX</sup>, one can see how the Luxembourg Court seems to be worried about the need to preserve its interpretive autonomy (another pillar of its reasoning in Opinion 2/13) and this might induce the CJEU to present some thorny interpretive issues involving both the ECHR and the European Charter of Fundamental Rights (CFREU) as questions concerning only the second document in order to preserve its interpretive autonomy. This is just a hypothesis and the future will tell us more about that (again, imagining that Opinion 2/13 will just delay and not preclude the accession). What is interesting here is to demonstrate how the



results of the accession cannot be easily forecast, at least at this stage, without having a clear picture of the contents of the agreement evoked by Protocol No. 8.

This discussion confirms the interpretative competition between the European Courts and the risk of conflicts even after accession. The draft of the agreement on the accession (DAA)<sup>LX</sup> of the EU to the ECHR was made public and, from its wording (at least looking at its first version), according to some authors, it seemed to interpret the relation between the ECtHR and the CJEU as a hierarchical one.<sup>LXI</sup>

What should we do now after Opinion 2/13? In a provoking post Besselink argued that a new Protocol should be introduced whose wording would be as follows:

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014” (Besselink 2014).

This would be a sort of “Notwithstanding Protocol” (Besselink 2014) introduced with the specific purpose of circumventing the Opinion of the CJEU. I respectfully disagree, this does not seem to be feasible or even desirable, since it would represent a dangerous precedent in reaction to a bad decision. I think the only solution is to renegotiate the agreement, including some of the points made by the CJEU (since some of them seem reasonable after all, for instance the one concerning Protocol No. 16<sup>LXII</sup> aiming at creating a mechanism enabling highest national courts to request advisory opinions to the Strasbourg Court). There will be room for changes and adjustments, and the possibility has also been suggested of a mechanism similar to the preliminary ruling procedure that allows the European Courts (CJEU and ECtHR) to “converse” using a preferred mechanism for judicial cooperation.<sup>LXIII</sup> However, even in the case of confirmation of the “hierarchical” reconstruction of the relationship, the autonomy of interpretation of the CJEU would not suddenly disappear. Much will depend, for example, on how the CJEU would treat cases of potential “interest” to the Strasbourg Court. In the event that the CJEU considers that the interpretation to be given to the provisions of the Charter of Fundamental Rights is not perfectly coincident with that of a similar provision contained in the ECHR (which is not improbable, even in light of the explanations of the Charter drafted by the *Praesidium*), for



example, the Luxembourg court could “carve out” an area of non-interference, even in this area, from the control exercised by Strasbourg.

In any case, whereas it remains to be seen whether the new mechanism devised by the accession to the ECHR will increase the coherence of the system, it will certainly not decrease the interpretative competition between the European courts, giving birth to other potential conflicts.

In this respect the words pronounced by Sir Francis Jacobs are emblematic:

“Although competition is in general a valuable technique for achieving economic progress and is central to the concept of the common market, it is not clear that competition between fundamental rights instruments within the same legal order has a positive value. Moreover, in the particular case of the European Institutional complex, the constitutional entrenchment of the Charter might be seen as liable to cause confusion”<sup>LXIV</sup>.

Another problematic element provided in the draft agreement was the “co-respondent mechanism”<sup>LXV</sup> which allows “the EU to become a co-respondent to proceedings instituted against one or more of its member States and, similarly, to allow the EU member States to become co-respondents to proceedings instituted against the EU”<sup>LXVI</sup>. The DAA provided for another mechanism (“prior involvement”) which will give the CJEU the opportunity to “have a voice” in “cases in which the EU is a co-respondent” by assessing the compatibility with the Convention of the relevant provision of Union law, if it has not already had the possibility to do so at an earlier stage<sup>LXVII</sup>. Even before Opinion 2/13, scholars<sup>LXVIII</sup> had expressed their concerns about the introduction of these mechanisms that seemed to respond to logics of judicial politics and which did not seem to have anything to do with the real aim of the accession: the increase of coherence in European fundamental rights’ protection.

Referring to the excellent comments published soon after the release of the Opinion for more details (Peers 2014a; Douglas Scott 2014; Besselink 2014, Lock 2014), for the time being I would like to point out that very much will also depend on the use of the Charter of Fundamental Rights of the EU which contains many provisions inspired by (as recalled by the explanations to the Charter) those included in the ECHR. In this sense some of the cases brought before the ECtHR in the future could be solved by the CJEU



through reference to its own Charter: this would ensure that the CJEU maintains an important position in the architecture of the fundamental rights of the EU. However, in order to do so it is first necessary to clarify the scope of application of the Charter, and perhaps a restyling of Art 51 could be very helpful, with, moreover, a re-examination of ambiguous case law of the CJEU in this field<sup>LXIX</sup>.

## 5. The Financial Crisis

My fourth case arises from the financial crisis. As we know at the beginning of March 2012, 25 European leaders signed the new “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” (TSCG).

What will change with the entry into force of this new Treaty?

The issue of the innovative contents introduced in EU law by means of this international Treaty has been disputed among scholars. Within the contents of this Treaty, a particular problematic provision is Article 3. In particular Art. 3.2 provides for the necessity for the States to codify the budget rule in national law “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to”. It is debatable whether this last provision (Art. 3.2) is consistent with Art. 4.2 of the TEU stating the necessity to respect the national identity and constitutional structure of the EU Member States. Does this article imply a constitutional obligation for the Member States? Who is in charge of the control of the respect of this article? A situation which is somehow comparable to that characterizing Art. 4.2 TEU.

Who is in charge of defining what belongs to the idea of national identity or constitutional structure of Member States under Art. 4.2 TEU? National Constitutional Courts or the CJEU?<sup>LXX</sup> Similar considerations apply to other open provisions (i.e. provisions referring to national law in the interpretation of EU law<sup>LXXI</sup>) present in the recent product of EU constitutional politics. Here it suffices to recall the *Lissabon Urteil*<sup>LXXII</sup> where the German Constitutional Court specified the sensitive sectors that embody the national constitutional identity. In doing so, the German Constitutional Court made an important contribution to the definition of Article 4 of the TEU, in its problematic concept of “national identity”. However, one can see the risk of proceeding in this way –



interpretive anarchy, a context in which each Constitutional Court can express its own view on the notion of constitutional identity while pretending to participate in a “pluralist” interpretation. This episode confirms the risks present in a clause like Article 4.2. TEU and the impossibility of neutralizing conflicts by means of clauses like these. Even in the case of Art. 3 there will be an overlapping zone since this golden rule will be, at the same time, part of the TSCG and of some national constitutions and this might increase the interpretative competition between courts.

It is not a coincidence that more recently Constitutional Courts (or Supreme Courts in other cases) have been progressively involved in the domain of economic governance, which has traditionally been a domain of the political institutions<sup>LXXIII</sup>.

Another problematic provision is Art. 8, which gives the CJEU jurisdiction to rule on parties’ compliance with the requirements of Art. 3.2 of the Treaty. Is this provision compatible with the TFEU? The Preamble of the international agreement refers to Art. 273 of the TFEU and Art. 260 of TFEU, but Art. 273 of the TFEU seems to be very clear in anchoring the jurisdiction of the CJEU to the subject matter of the EU Treaties<sup>LXXIV</sup>. As the Court said, the extension of the competences of the Court is always possible, provided that the core of the Treaties<sup>LXXV</sup> is respected. The complicated picture of the TSCG is made even more problematic by the uncertain mandate of the CJEU, since it is not clear from Art. 8 TSCG whether the task of the Court only concerns the content of Art. 3 or all the contents of the TSCG (and this of course matters),<sup>LXXVI</sup> i.e. one of the most important actors in the process of EU integration, the guardian of those constitutional safeguards that inspire the life of the Union. In this sense the possible incorporation of the contents of these provision – consistently with Art. 16 of the TSCG<sup>LXXVII</sup> – into the body of the EU Treaties would overcome these doubts.

In conclusion, this piece has tried to present four major challenges for the CJEU and also identified some proposals to deal with them. In some cases these issues could be tackled by rewriting the EU Treaties while in other cases I looked at the Rules of Procedure of the Court as the most appropriate sources. Finally, there are cases where after having listed some options in terms of reform of the EU Treaties, I expressed my preference for a judicial *revirement* seen as the most viable way to overcome the issue at stake, especially in those circumstances where the solution seems to require a certain degree of flexibility.



\* Associate Professor of Comparative Public Law at the Scuola Superiore Sant'Anna, Pisa. Research Fellow at the Centre for Studies on Federalism, Turin. Expert of the Centre for Judicial Cooperation at the European University Institute. I would like to thank Leandro Mancano, Leonardo Pierdominici and the anonymous reviewers for their comments.

<sup>I</sup> See for instance Padoa Schioppa 2013. A slightly different approach is the example of “A Fundamental Law of the European Union” written by the Spinelli Group-Bertelsmann Stiftung where it is possible to find a couple of interesting provisions, for instance that empowering the Ombudsman “to advance the cause of the EU citizen, including the right to refer to the ECJ cases concerning a breach of the Charter”. Moreover “The Court is given full command of its own rules of procedure. Article 58 serves to widen access to the Court of Justice in important ways a change which will serve to develop the role of the ECJ as a federal supreme court. Article 64 makes it possible to attack in the Court a decision of the Parliament taken against a state charged with a breach of fundamental rights” (the Spinelli Group-Bertelsmann Stiftung 2013: 53).

<sup>II</sup> On some recent proposals see Peers 2014b.

<sup>III</sup> Case C-224/01, *Köbler* [2003] ECR I-10239.

<sup>IV</sup> Case C-224/01, *Köbler* [2003] ECR I-10239.

<sup>V</sup> Case C-173/03 *Traghetti del Mediterraneo Racc*, 2006, I-5177.

<sup>VI</sup> Case C-453/00, *Kühne & Heitz* [2004] ECR I-837.

<sup>VII</sup> In the *Köbler* case, for example, it acknowledges that: “The principle that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law, subject to the reservation that effective judicial protection be ensured, is applicable to actions for damages brought by individuals against a Member State on the basis of an alleged breach of Community law by a supreme court”. And before: “In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter”.

<sup>VIII</sup> Case C-453/00, *Kühne & Heitz*, 2004 ECR I-837.

<sup>IX</sup> Case C-234/04, *Kapferer*, 2006 ECR I-2585

<sup>X</sup> Case C-234/04, *Kapferer*, 2006 ECR I-2585, par. 23.

<sup>XI</sup> Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 ECR I-6199. About *Lucchini* see: Groussot- Minseen 2007.

<sup>XII</sup> Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 ECR I-6199, par. 63).

<sup>XIII</sup> Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, 2007 ECR I-6199.

<sup>XIV</sup> “In short, the key question is whether a final judgment which came about in the circumstances referred to above, which, as is evident from the previous point, may have serious implications for the division of powers between the Community and the Member States, as this results from the Treaty itself, and which would also make it impossible for the powers assigned to the Commission to be exercised, must be considered inviolable. To my mind, that is not the case” (par. 70- 71), Opinion of the AG Geelhoed on the *Lucchini* case, delivered on 14 Sept. 2006.

<sup>XV</sup> Case C-2/08 *Fallimento Olimpiclub*, ECR 2009, I-7501.

<sup>XVI</sup> Advocate General Mazák, Opinion to Case C-2/08 *Fallimento Olimpiclub*, ECR 2009, I-7501:”The approach taken by the Court in that line of cases concerning the obligation to review or reopen final decisions which are contrary to Community law is certainly characterised by its focus on the circumstances of the individual case. Ultimately, however, each of those judgments reflects a balance that had to be struck, in the particular factual and legal circumstances of the case, between legal certainty, which the finality of decisions is intended to serve, and the requirements of Community legality. Accordingly, I do not share the view suggested by the referring court that the line of cases outlined above reveals a general trend in the case-law of the Court towards eroding or watering down the principle of *res judicata*.” (par. 54- 55).

<sup>XVII</sup> Case C-2/08 *Fallimento Olimpiclub*, ECR 2009, I-7501, par. 32.

<sup>XVIII</sup> Case C-210/06, *Cartesio*, ECR, 2008, I-9641.

<sup>XIX</sup> See the point: “Where rules of national law apply which relate to the right of appeal against a decision making a reference to a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary



ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings”, Case C-210/06, *Cartesio*, ECR, 2008, I-9641, par. 98. On *Cartesio* see Sarmiento 2012.

<sup>XX</sup> “*Cartesio* raises many questions about the degree of interference that the ECJ is willing to inflict on national judicial autonomy, but it is clear from its wording that national Courts that engage in a preliminary discourse with the Luxembourg Court are protected from most appellate intrusions of superior domestic Courts. When the ECJ states that a revocation or an amendment from the appellate jurisdiction is a matter that the inferior court ‘alone is able to take a decision on’, it is conferring on the said Court a power to disregard a judgement delivered by an appellate Court, on a case that will eventually return to that same jurisdiction when the judgements of the ECJ and the referring court are dictated”, Sarmiento 2012: 303.

<sup>XXI</sup> Advocate General Cruz Villalón, Opinion to C-173/09 *Elchinov*.

<sup>XXII</sup> Case C-173/09 *Elchinov* [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>XXIII</sup> Case C-166/73 *Rheinmühlen-Düsseldorf*, ECR, 1974, 33.

<sup>XXIV</sup> Case C-173/09 *Elchinov* [www.curia.europa.eu](http://www.curia.europa.eu), par. 32.

<sup>XXV</sup> For instance, among others, Case C-416/10, *Krizan & Others -v- Slovenska Inšpekcia Životneho Prostredia*, [www.curia.europa.eu](http://www.curia.europa.eu); Case C-136/12, *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*, [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>XXVI</sup> COM(2006) 346, [http://www.astrid-online.it/--spazio-e/PROGRAMMA-/EUComm\\_TitleVI\\_JurisdictionECJ\\_28Jun.pdf](http://www.astrid-online.it/--spazio-e/PROGRAMMA-/EUComm_TitleVI_JurisdictionECJ_28Jun.pdf).

<sup>XXVII</sup> See also: Case C-344/04, *The Queen on the application of International Air Transport Association And European Low Fares Airline Association Department for Transport*, ECR, 2006 I-00403 (par. 30- 32).

<sup>XXVIII</sup> Advocate General Cruz Villalón, Opinion to C-173/09 *Elchinov* “The increased workload facing the Court of Justice warrants a final word in that connection. The high number of references for a preliminary ruling which arrive at the doors of this institution together with the creation of the urgent procedure, which is intended to provide a reply in a much shorter period, make it all the more pressing for the Court to share functions with the national courts. The introduction before national courts of remedies under European Union law, as occurred with State financial liability and the principles of effectiveness and equivalence, is a move which strengthens and promotes cooperation between the Court and its national counterparts. In addition, the increased number of Member States, allied to the ever more frequent and direct contact between individuals and European Union law, make the aim that the Court should deal alone with the task of supplying an authoritative interpretation of European Union law less and less realistic. In that regard, the judgment in *Rheinmühlen I*, which is a product of its time and of a particular context, may, paradoxically, end up impeding rather than safeguarding the effectiveness of European Union law. That is all the more so since, in the circumstances of the present case, Mr *Elchinov* could use other legal remedies before the national courts, remedies which, moreover, are guaranteed to him under European Union law...In contrast to the situation in the 1970s, it is possible to assert today that European Union law has reached a level of maturity which allows it to ensure its own practical effectiveness before the courts of the Member States with a lesser degree of involvement in the autonomy of national courts than that which indubitably results from *Rheinmühlen I*. That is why the time for reconsidering that case-law appears to have arrived” (par. 29-31).

<sup>XXIX</sup> Advocate General Cruz Villalón, Opinion to C-173/09 *Elchinov*, par. 27.

<sup>XXX</sup> Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, [www.curia.europa.eu](http://www.curia.europa.eu). Mr. Melloni, an Italian citizen living in Spain, was convicted in absentia for bankruptcy fraud by a sentence delivered by the Tribunale di Ferrara and arrested by the Spanish police. On the basis of the Council Framework Decision on the European Arrest Warrant (2002/584/JHA as amended by the Framework Decision 2009/299/JHA) the Italian authorities asked for the activation of the mechanism. Mr. Melloni opposed surrender to the Italian authorities, by arguing the violation of the right to defence. The Audiencia Nacional (a special Spanish high court) decided to surrender Mr. Melloni to Italy since it considered the right to defence was respected (Mr. Melloni, in fact, was aware of the trial, opted for the absentia and appointed two lawyers to defend himself). Against the order of the Audiencia Nacional, Mr. Melloni opposed a *recurso de amparo* (a direct action for the protection of constitutional rights guaranteed by the Constitution) before the Spanish Constitutional Court.

<sup>XXXI</sup> To quote the formula used, also recently, by some scholars: von Bogdandy - Schill 2011.

<sup>XXXII</sup> Available at: <http://s01.s3c.es/imag/doc/2014-02-20/sentenciaTCextradicion.pdf>.

<sup>XXXIII</sup> Case C-314/08, *Filipiak*, ECR, 2009, I-11049.



XXXIV Case C-409/06, Winner Wetten, available at [www.curia.europa.eu](http://www.curia.europa.eu).

XXXV “The ECtHR’s margin of appreciation doctrine plays a role similar to that of the reverse Solange jurisprudence of Schmidberger and Omega—allowing the court to acknowledge and defer to national specificities in the understanding of common principles—while the BVG’s Görgülü doctrine corresponds to Solange—allowing the national court to defer to judgments by the ECtHR, as long as the latter provides, in general, equivalent protection of fundamental rights” Sabel – Gerstenberg 2010: 519-520.

XXXVI “The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, Rheinmühlen-Düsseldorf, paragraphs 4 and 5, and Cartesio, paragraph 94). The lower court must be free, in particular if it considers that a higher court’s legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 *ERG and Others* [2010] ECR I-0000, paragraph 32)” (p. 42), Joined Cases C188/10 and C189/10, Case *Melki*, ECR 2010 I-05667.

XXXVII Art. 61-1: “If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d’État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period. An Organic Law shall determine the conditions for the application of the present article”. On this, see Fabbrini 2008.

XXXVIII Case C-416/10, *Krizan & Others -v- Slovenska Inspekcija Zivotneho Prostredia*, [www.curia.europa.eu](http://www.curia.europa.eu).

XXXIX Case C-457/09, *Chartry* available at [www.curia.europa.eu](http://www.curia.europa.eu).

XI Case C-112/13, *A v. B.*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-112/13>. On the differences between *Melki* and *A v. B* see: Guazzarotti 2014.

XI.I Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky, Case C-416/10, *Krizan & Others -v- Slovenska Inspekcija Zivotneho Prostredia* [www.curia.europa.eu](http://www.curia.europa.eu), par. 47.

XI.II “The national rule which obliges the Najvyšší súd Slovenskej republiky to follow the legal position of the Ústavný súd Slovenskej republiky cannot therefore prevent the referring court from submitting a request for a preliminary ruling to the Court of Justice at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the Ústavný súd Slovenskej republiky which might prove to be contrary to European Union law.” And see also: “Finally, as a supreme court, the Najvyšší súd Slovenskej republiky is even required to submit a request for a preliminary ruling to the Court of Justice when it finds that the substance of the dispute concerns a question to be resolved which comes within the scope of the first paragraph of Article 267 TFEU. The possibility of bringing, before the constitutional court of the Member State concerned, an action against the decisions of a national court, limited to an examination of a potential infringement of the rights and freedoms guaranteed by the national constitution or by an international agreement, cannot allow the view to be taken that that national court cannot be classified as a court against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 267 TFEU. In the light of the foregoing, the answer to the first question is that Article 267 TFEU must be interpreted as meaning that a national court, such as the referring court, is obliged to make, of its own motion, a request for a preliminary ruling to the Court of Justice even though it is ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court.”(par. 71-73), Case C-416/10, *Krizan & Others -v- Slovenska Inspekcija Zivotneho Prostredia*, [www.curia.europa.eu](http://www.curia.europa.eu).

XI.III German Constitutional Court, orders of 17 December 2013 and of 14 January 2014

2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvR 1824/12; 2 BvE 6/12.

XI.IV Among others see: *Cour d’Arbitrage*, 19 February 1997, no. 6/97, available at [www.arbitrage.be/fr/common/home.html](http://www.arbitrage.be/fr/common/home.html).

XI.V Among others see: *VfGH*, 10 March 1999, B 2251/97, B 2594/97, available at [www.vfgh.gv.at/cms/vfgh-site](http://www.vfgh.gv.at/cms/vfgh-site).

XI.VI *Lietuvos Respublikos Konstitucinis Teismas*, decision of 8 May 2007, available at [www.lrkt.lt/dokumentai/2007/d070508.htm](http://www.lrkt.lt/dokumentai/2007/d070508.htm).

XI.VII *Corte Costituzionale*, sentenza no. 102/2008 and ordinanza no. 103/2008, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it). The preliminary reference was raised during *principaliter* proceedings. More



recently the Italian Constitutional Court extended its *revirement* to *incidenter* proceedings, see: ordinanza 207/2013,

[http://www.governo.it/Presidenza/CONTENZIOSO/comunicazione/allegati/ordinanza\\_207\\_2013\\_completa.pdf](http://www.governo.it/Presidenza/CONTENZIOSO/comunicazione/allegati/ordinanza_207_2013_completa.pdf).

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86/2011,

<http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Auto.aspx?cod=10386>.

XLIX Conseil Constitutionnel, Décision n° 2013-314P QPC 4 April 2013, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2013/2013-314p-qpc/decision-n-2013-314p-qpc-du-04-avril-2013.136588.html>.

<sup>L</sup> C-112/13, *A v. B.*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-112/13>. On the differences between *Melki* and *A v. B* see: Guazzarotti 2014.

<sup>LII</sup> Case C-399/09, *Landtová*, [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>LIII</sup> On Art. 4.2 See: Guastaferrero 2012; Alcobarro- Saiz Arnaiz 2013; Millet 2013.

<sup>LIII</sup> Opinion 2/13, <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>.

<sup>LIV</sup> ECtHR, *Cantoni versus France*, 1996, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=cantoni&sessionid=79242172&skin=HUDOC-EN>.

<sup>LV</sup> ECtHR, *Turizym v. Irlanda*, [www.echr.coe.int/ECHR/FR/Header/Case-Law/Hudoc/Hudoc+database](http://www.echr.coe.int/ECHR/FR/Header/Case-Law/Hudoc/Hudoc+database). See also the judgement of the CJEU, C-84/95, *Bosphorus Airways*, ECR., 1996, I-3953. On the similarity between *Solange* and *Bosphorus*, see: Lavranos 2008.

<sup>LVI</sup> In the *Mox Plant* case the CJEU recalled that: “The obligation devolving on Member States, set out in Article 292 EC, to have recourse to the Community judicial system and to respect the Court’s exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of the Member States’ more general duty of loyalty resulting from Article 10 EC. It is for that reason unnecessary to find that there has been a failure to comply with the general obligations contained in Article 10 EC if a failure to comply with the more specific Community obligations devolving on a Member State pursuant to Article 292 EC has already been established”, Case C- 459/03, *European Commission c. Ireland*, ECR., 2006, I-4635.

<sup>LVII</sup> “Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms”, available at the following URL: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:EN:PDF>.

<sup>LVIII</sup> On this see: Mendez 2010.

<sup>LIX</sup> See “Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, available at [http://curia.europa.eu/jcms/jcms/P\\_64268/](http://curia.europa.eu/jcms/jcms/P_64268/) and the comments reported on the website *Adjudicating Europe*: (2010) <http://adjudicatingeurope.eu/?p=482>.

<sup>LX</sup> Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1%282013%29008rev2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf).

<sup>LXI</sup> See, for instance, Zucca 2011.

<sup>LXII</sup> Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms [http://www.echr.coe.int/Documents/Protocol\\_16\\_ENG.pdf](http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf). “In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.

It is indeed the case 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; 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. In particular, 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. 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. 200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy” (par. 196-200), Court of Justice of the European Union, Opinion 2/13, <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>.

LXIII On this see Lock 2011.

LXIV See the conclusions of Jacobs 2005.

LXV On this see: Lock 2011.

LXVI Art. 3 of the DAA “1. Article 36 of the Convention shall be amended as follows: a. the heading of Article 36 of the Convention shall be amended to read as follows:

“Third party intervention and co-respondent”;

b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

“4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”

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 European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents 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 the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party.

When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

6. 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. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is



established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible”.

8. This article shall apply to applications submitted from the date of entry into force of this Agreement.

LXVII Appendix V Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, p. 66: “Assessing the compatibility with the Convention shall mean to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments. Such assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that the parties involved – including the applicant, who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU”, [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1%282013%29008rev\\_2\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev_2_EN.pdf).

LXVIII For instance: Douglas Scott, 2011.

LXIX Case C-617/10, Åklagaren v Hans Åkerberg Fransson, 2013, [www.curia.europa.eu](http://www.curia.europa.eu), C-206/13 Siragusa, 2014, [www.curia.europa.eu](http://www.curia.europa.eu). On this and other cases see: Fontanelli 2014.

LXX See Ruggeri 2005. See also: Kumm 2005.

LXXI For instance the many provisions of the Charter of Fundamental Rights of the EU. I reflected on these clauses in another piece: Martinico 2012.

LXXII *BVerfG*, cases 2 BvE 2/08, at par. 249.

LXXIII On this see Fabbrini 2014; Delledonne 2012.

LXXIV ”Professor Craig, for instance, agreed that Article 273 was sufficient to give the Court jurisdiction, but that Article 8 of the proposed treaty caused difficulties because even though the Commission would not bring a case in name, the provisions meant that it might do so in effect, and there is no provision under the EU treaties for the Commission to bring such a case”, House of Lords, 2012.

LXXV On the involvement of EU’s institutions outside the scope of EU law see Case C-316/91 EP v Council and C-181/91, ECR, 1994 p. I-625. On the possibility of giving the CJEU a jurisdiction not referred to in the Treaties see Opinion 1/00, ECR, 2002 I-3493. For an overview of these issues see: Peers 2012.

LXXVI On this see: Ferreres Comella 2013: 236.

LXXVII “Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union”.

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