1. Introduction

Opinion 2/13, released on 18 December 2014, looked to be a very big surprise for almost everyone dealing with European law matters. The answer of the CJEU was negative as the Draft accession agreement – which was previously seen as a result of a consensus by most leading scholars and practitioners - failed to give regard to the specific characteristics of EU law. This ‘specificity’ was previously summarized by the Lisbon Treaty, Protocol No. 8 and the CJEU case-law as follows: an external autonomy, supranational character, as well as the monopoly of the Court of Justice to decide on the distribution of competences between the EU and its Member States, and to interpret and review the legality of EU acts. One of the reasons for this approach was the development of the EU legal order autonomy doctrine in Opinion 2/13. This work aims to explore the CJEU’s approach to Protocol 16 ECHR and Art. 344 TFEU in Opinion 2/13 in the light of such famous judgments as MOX Plant, A v. B and Melki and Abdeli cases. The paper develops a critique of Opinion 2/13, analyzing if and how

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this new Court of Justice approach to the EU legal order autonomy may influence the prospective developments in the Court’s practice, as well as the future of the EU accession to the ECHR.

The most sensitive aspects that touched upon the Opinion were the position of preliminary rulings procedure in the light of Protocol 16 ECHR and the CJEU monopoly on dispute settlement in inter-state cases. Indeed, Arts. 344 TFEU and 267 TFEU together create the legal framework for the functioning of the independent legal system of the European Union and reaffirm the role of the Union Courts in general: the former precludes the EU Member States from submitting a dispute concerning the interpretation or application of the Union Treaties to any method of settlement ‘other than those provided for therein’, while the latter confers upon each national court an ‘autonomous jurisdiction’ to make a reference to the CJEU and constitutes ‘the foremost institutional expression of the national courts’ role in the EU legal order and their collaboration with the CJEU’. This article tries to give an answer to the following research questions: What are the developments of the EU legal order autonomy doctrine brought by the CJEU’s approach to Protocol 16 ECHR and Art. 344 TFEU in Opinion 2/13? What can be the perspectives of the EU accession to the ECHR in the light of these innovations? The scholarship on effects of historical Opinion 2/13 on the development

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of the EU legal order autonomy concept is quite extended. The different aspects of the CJEU’s approach to the EU autonomy have already been mentioned by many scholars. Halberstam, for instance, notes the further development of the Kadi line of reasoning which may be seen as a manifestation of the EU autonomous federal-type nature in relationship with international law. Others, like Eeckhout, see the Opinion as a background for potential judicial dialogue between the CJEU and international courts aimed at the EU legal order autonomy protection, which is quite similar to the Solange approach. Lambrecht even notes that Opinion 2/13 opens a question about the difference between the ‘threat’ to the autonomy of EU law by the possibility of external control by the Strasbourg Court and that of the national legal orders, which may result in possible counter-dynamics against the ECHR system among Contracting Parties.

However, more light shall be shed on such important and interfacing issues as the CJEU’s interpretation of Art. 344 TFEU and Protocol 16 to the European Convention on Human Rights. Opinion 2/13 is one of few documents clarifying the scope of Art. 344 TFEU and de facto connecting it with the Protocol 16 ECHR provisions via the notion of EU law


primacy. In the ‘Preliminary considerations’ part the CJEU makes a great emphasis on inviolability of provisions creating EU judicial system\(^9\) and its importance for the protection of EU law ‘primacy over the laws of the Member States’ and ‘the direct effect’.\(^{10}\) Further, the CJEU sheds light on the essence of two basic elements of the EU judicial system, i.e. the preliminary rulings procedure (the analysis of Arts. 267 TFEU and Protocol 16 ECHR)\(^{11}\) and interpretative monopoly of the CJEU (the analysis of Art. 344 TFEU).\(^{12}\) I claim that this approach of the CJEU shall be seen as the development of such previous lines of reasoning as in the \textit{A v. B, Melki} and \textit{MOX Plant} cases. I do not pretend to fully describe and analyze all aspects of the EU legal order autonomy touched upon by Opinion 2/13 due to the limited volume, but rather to focus on comparison of the CJEU’s interpretation of the ‘autonomy’ notion in Opinion 2/13 with one in above-mentioned cases, as well as to trace the Opinion 2/13 influence on the future perspectives of the Union accession to the ECHR. This paper is structured as follows: Part 2 – to the Court’s approach to Protocol 16 ECHR in relation to the EU Law primacy, Part 3 - is devoted to the analysis of the CJEU’s approach to Art. 344 TFEU interpretation and its comparison with landmark \textit{MOX Plant} decision, Part 4 – presents my conclusions on the future of the EU accession to the ECHR in the light of these developments of the EU legal order autonomy.

2. Protocol 16 ECHR: a ‘threat’ to the EU law primacy

As widely known, Protocol 16 ECHR allows highest courts and tribunals of the State’s Parties to request the ECtHR to give advisory opinions on questions relating to the interpretation of the Convention rights. The CJEU is discussing it as the third argument in the part of Opinion 2/13 devoted to the specific characteristics and the autonomy of EU law. While the first argument on the prohibition of the external control over the EU institutions and the notion of mutual trust in Justice and Home Affairs matters are quite predictable, the


critique on Protocol 16 ECHR looked quite unexpected. One shall remember that this Protocol was optional for the CoE Member States signature, and the Draft accession agreement did not envisage the EU joining that Protocol in the course of accession, that is why it was not previously considered relevant for the proceedings. Moreover, the work on the final Draft accession agreement from 5 April 2013 and Protocol 16 ECHR took place at the same period of time, and some authors even saw it as one of the means to accommodate the co-respondent mechanism within the EU legal order.

The CJEU motivation in this part of judgment expresses the concern that Protocol 16 ECHR may undermine the effectiveness of the preliminary ruling procedure guaranteed by Art. 267 TFEU. In accordance with Art. 1 of Protocol No. 16, ‘the highest courts and tribunals of a High Contracting Party … may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto’. At the same time, Art. 267 (3) TFEU *oblige* the same courts (i.e. ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’) to bring the matter before the Court of Justice of the European Union. As a result, the supreme courts or tribunals of the EU Member States will be allowed to submit the questions concerning, for example, the interpretation of rights guaranteed by the Charter corresponding to those secured by the ECHR – to the ECtHR instead of the CJEU. The Draft Accession Agreement does not include any provisions in respect of the relationship between the mechanism established by Protocol No. 16 and the preliminary ruling procedure provided for in Article 267 TFEU, which (at least in the eyes of the CJEU judges) makes a Protocol 16 ECHR a threat to the external autonomy of the EU legal order. This approach of the Court quite evidently demonstrated the awareness of the


interpretative competition between the European Courts and the risk of conflicts after accession.\textsuperscript{16}

Evidently, the CJEU connected the influence of Protocol 16 ECHR with two fundamental theoretical issues – the importance of the preliminary reference procedure as an integral part of the EU judicial system and its role in the protection of the EU Law primacy within the EU legal order. In my perception, the position of the CJEU expressed in Opinion 2/13 illustrates the development of the previous lines of reasoning in the \textit{Melki and Abdeli}\textsuperscript{17} and \textit{A v. B}\textsuperscript{18} cases – both of these cases deal with the goals and the role of the preliminary reference procedure for the EU law development.

In the \textit{Melki and Abdeli} case, involving a reference for the preliminary ruling from the French Court of cassation (\textit{Cour de Cassation}) as to whether a provision of French constitutional law, requiring national courts to rule, as a matter of priority, on the submission to the French Constitutional Council (\textit{Conseil Constitutionnel}) of questions constitutionality put before them, was compatible with Art. 267 TFEU. The Court of Justice provided a balanced answer, stating that the national courts cannot be prevented from referring questions to the Court, and therefore, if an interlocutory procedure giving priority to the review of constitutionality of national law effectively prevents these courts from referring questions to the Court, such a procedure shall be prohibited under Art. 267 TFEU. In \textit{Melki}, the CJEU proclaims the special importance of Art. 267 TFEU stating that the national courts shall remain free to submit a reference for a preliminary ruling to the Court, at whatever stage of proceedings they consider appropriate, on any question they consider necessary.\textsuperscript{19}

In Opinion 2/13, the Court of Justice goes even further, describing the preliminary reference procedure as the ‘the keystone of the judicial system established by the Treaties’. It will be affected if no special provisions are made to balance the relationship between Protocol 16 ECHR and the preliminary ruling procedure of Art. 267 TFEU, as it will affect the autonomy and effectiveness of the latter procedure.\textsuperscript{20}

\begin{footnotesize}
\begin{enumerate}
\item Giuseppe Martinico, ‘Four Points on the Court of Justice of the EU’ (2014) 6, Perspectives on Federalism (Issue 3) 102-125 114.
\item Joined cases of C-188/10 and C-189/10, \textit{Aziz Melki and Sélim Abdeli} [2010] ECR I-5667.
\item Case \textit{A v. B and Others} [2014] Judgment of the Court (Fifth Chamber) of 11 September 2014 (nyr).
\item Joined cases of C-188/10 and C-189/10, \textit{Aziz Melki and Sélim Abdeli} [2010] ECR I-5667, para. 57.
\end{enumerate}
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Moreover, in Opinion 2/13 the CJEU supports the Melki line of reasoning ruling that the primary purpose and objective of the preliminary ruling procedure is to guarantee the uniformity and effectiveness of European Union law, making the legal protection of individuals merely secondary to this goal,\textsuperscript{21} which looks quite amusing in the context of the accession to one of the main Human Rights Law treaties. Opinion 2/13 therefore may be considered a milestone in the discussion on the ‘re-positioning the Strasbourg Court’\textsuperscript{22} in light of the EU accession to the ECHR and the ongoing reform of the Convention system.

It is quite likely that this approach of the CJEU will be continued in its further jurisprudence protecting the Union legal order from the Strasbourg Court interventions, and therefore the role of the ECtHR will become less influential, at least for the 28 Member States of the European Union.

Such a kind of dual membership in two international bodies, i.e. the Council of Europe and European Union at the same time, may be a reason for the further constitutional conflicts in the future (caused, for example, by the ratification of Protocol No. 16 by the EU Member State).

It is also worthy to mention that Opinion 2/13 is reflecting very recent A v. B judgment which develops the Melki case’s line of reasoning. While the Melki case elaborates on the inviolability of the right of the national courts to submit preliminary references, A v. B also touches upon the issue of the European Union law primacy in the cases where the parallel provisions of the ECHR and the Charter are invoked (in A v. B case it was the right of defense guaranteed by Art. 47 of the Charter and Art. 6 of the ECHR, while the latter had a constitutional status in Austria).

At first glance, in the A v. B case the CJEU seems to make a step back from the Melki overprotective approach, stating that the obligation to apply to the Constitutional Court for the general striking down of statutes inconsistent with the Constitution/ECHR provisions of


Hypothetically, this statement of the CJEU could raise a question about the disapplication of the national laws of the Member States, including the legislation implementing the EU Law, only on the basis of the Convention provisions — under the condition that the ECHR has a constitutional status within national legal system.

At the same time, the Court of Justice precludes national Constitutional Courts from such kind of behavior, connecting the right of the national courts to submit applications for the preliminary rulings in accordance with Art. 267 TFEU with the principle of effectiveness and primacy of the EU Law.

In the light of these principles’ crucial importance for the EU legal order as such, the Court of Justice lays down the priority of the preliminary reference procedure and holds that a national court must refer a question on the validity of national law implementing the EU legislation even before initiating the interlocutory review of the constitutionality of a law.24

Evidently, the Court of Justice has chosen a similar path in its Opinion 2/13, maybe even making the Melki and A v. B approach more restrictive for the protection of the direct effect, unity and primacy of the European Union law. The CJEU makes an attempt to protect the EU legal order autonomy even from the optional Protocol No. 16 which only ‘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’.25

One shall also remember that Art. 1 of Protocol 16 ECHR only provides the highest courts and tribunals of a High Contracting Party with the discretion to submit the questions to the European Court of Human Rights, while the scope of requests for a preliminary ruling to the Court of Justice is much wider as a principle – optional for any court or tribunal of the EU Member State and mandatory for the

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26 Article 1(1) of Protocol 16 to the ECHR is worded as follows: ‘Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto’.
court or tribunal of a Member State against whose decisions there is no judicial remedy under national law. Moreover, the ECtHR opinions shall not be binding for the highest courts of a High Contracting party to the ECHR,\(^{27}\) while the CJEU preliminary rulings remain a primary legal source not only for the national court that submitted the reference but also for the rest of the EU Member States.\(^{28}\)

3. Art. 344 TFEU in Opinion 2/13: MOX Plant revised?

After having presented my view on the CJEU’s approach to the position of Protocol 16 ECHR, I would like to shed some light on the inter-connected issue of the interpretation of Art. 344 and its comparison with the earlier MOX Plant judgment. The Court of Justice moves to this point right after discussing the content and possible effects of Protocol No. 16 on the EU legal order autonomy - which seems quite logical in light of the preliminary observations made. It is evident that the issue of the possibility of the external control of the ECtHR over the EU institutions (including the CJEU itself) was the most controversial issue even before the accession and gave rise to lively academic debate.\(^{29}\) Art. 344 TFEU refers to the disputes between the Member States in the context of the ECHR which can involve interpretation or application of the ECHR, rather than the EU Treaties; consequently, in cases where the content of ECHR and EU provisions is similar, Article 344 TFEU could be infringed.\(^{30}\)

In paras. 201-214 of Opinion 2/13, the CJEU stresses that the monopoly of the CJEU on the interpretation of the EU law and the inviolability of the competences allocation fixed by the Treaties are the conditions for the adoption of the international agreements (this statement re-appeals the earlier CJEU findings in Opinions 1/91, 1/00, 1/09). The CJEU monopoly on

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dispute settlement between Member States and interpretation of the EU law are regarded as the main guarantees of the EU legal order external autonomy.

Despite that, Art. 5 of the Draft agreement allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation by a Member State or the EU, respectively, even in conjunction with EU law. Art. 5 of the Draft Agreement merely reduces the scope of the obligation laid down by Art. 55 of the ECHR while distinguishing the proceedings before the CJEU from the procedures of international investigation or dispute settlement within the Strasbourg system.

However, from the point of view of the CJEU, only the fact that Member States or the EU are able to submit an application of this type to the ECtHR may undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law.31

The CJEU directly refers to the Commission v. Ireland (‘MOX Plant’) case starting the discussion on Art. 344 TFEU.32 In the MOX Plant case the Court of Justice dealt with the United Nations Convention on the Law of the Sea – until Opinion 2/13 it was the leading case interpreting the position of the so-called mixed agreements (to which both the Union itself and its Member States are parties) in the EU Law. Ireland has brought proceedings against the United Kingdom within the framework of the Convention on the Law of the Sea to solve the conflict between Ireland and the United Kingdom about the building and operation of the MOX Plant at Sellafield, on the Irish Sea. The Court of Justice of the European Communities has considered Ireland liable for the violation of the EU law, as only the CJEU give exclusive jurisdiction to rule on disputes concerning the interpretation and application of the provisions of the Convention which form part of the EU legal order.

Indeed, the logic of Opinion 2/13 follows the MOX Plant line of reasoning, in which the CJEU acts in an especially jealous way to protect the uniformity of the EU law in inter-state cases – while precluding Member States from initiating proceedings to any other court for the settlement of disputes within the scope of the EU law. Paul Gragl expressed quite an interesting point of view about the future development of the CJEU jurisdiction after the EU

accession to the ECHR in light of this case: ‘…under Art. 19 (1) TEU, the CJEU will have the corresponding jurisdiction to interpret and apply the provisions of the Convention. This jurisdiction, most importantly, is exclusive as the Member States are prohibited under Art. 344 TFEU from submitting a dispute to any method of settlement other than provided for therein’.

As a principle, Art. 3 of the Protocol No. 8 and the Explanatory report to the draft accession agreement did not expressly contradict this point of view, but one can see that the CJEU has ignored these arguments for some reason. The Court of Justice also does not touch upon the argument of the MOX Plant judgment about the principle of sincere and loyal cooperation enshrined by Art. 4(3) TEU, which also prohibits the application to the non-EU Treaty bodies in inter-state cases. Maybe it was because the Court was trying to avoid an interpretation of the corresponding provision of Art. 4(2) TEU precluding the EU legislator and institutions from the disproportionate interferences, especially interferences in the essential core of the national constitutions (especially in light of the ECHR provisions), and in this case the discussion on the essence of the EU legal order autonomy could go too far.

Opinion 2/13 is also developing the MOX Plant line of reasoning in one more important way. In MOX Plant, the Court of Justice found that Ireland was in breach of the obligation ‘not to submit a dispute concerning the interpretation of the Treaties to any method of settlement other than those provided for therein’ and that Member States would be in breach of the duty of loyal cooperation by bringing proceedings before a dispute settlement body other than the Court of Justice, such as an arbitral tribunal, without first informed and consulted the competent Union institutions.

Nevertheless, the vague wording of Art. 344 and its interpretation in MOX Plant did not give a precise answer to the question if the expressions ‘a dispute’ and ‘any method of settlement’ may include the ECHR compliance mechanism. In Opinion 2/13, the Court of Justice gives an answer to these questions.


The Court states that ‘the disputes (a) between Member States or between Member States and the EU (b) in relation to the application of the ECHR within the scope *ratione materiae* of EU law’ shall be directly excluded from the ECtHR’s jurisdiction under Article 33 of the ECHR to make the next Draft accession agreement compatible with Art. 344 TFEU. Having in mind that the earlier CJEU interpretation of the word ‘Treaties’ for the purposes of Art. 344 TFEU not only refers to primary EU Law, but also encompasses secondary EU legislation and international agreements concluded by the EU, it is possible to see that the *MOX Plant* approach was given much broader interpretation in the Opinion to justify the skepticism of the CJEU towards the accession.

4. Conclusions

In this paper I tried to focus on developments brought by Opinion 2/13 in the interpretation of the position of Protocol 16 ECHR within the system of EU Law and the Art. 344 TFEU content. First, I analyzed the *Melki* and *A v. B* lines of reasoning to trace their influence on the Opinion 2/13 approach, then I tried to compare the seminal *MOX Plant* with the Opinion 2/13 to compare the way these decisions interpret the position of so-called mixed agreements in European law. The main argument presented was that the Opinion 2/13 shall be seen as a major step in the development of the EU legal order autonomy concept, which will definitely influence the case-law of the CJEU and Member States’ practice in the next few years. There are several crucial points which are worthy of being mentioned.

*Firstly*, while interpreting the content and purpose of Art. 344 TFEU, the CJEU gives a final answer to the question if the ECHR compliance system falls within the ambit of this Treaty provision. The CJEU finally includes the Strasbourg court in the phrase ‘*any method of settlement*’ and clarifies that the expression ‘*a dispute*’ for the purposes of Art. 344 TFEU in this case – which now shall mean the dispute (a) ‘between Member States or between Member States and the EU’ (b) ‘within the scope *ratione materiae* of EU law in relation to the application of the ECHR’. This approach at least casts light on a main point of academic debate during negotiations for the previous versions of Draft accession agreements, but also makes the EU accession extremely problematic from a technical point of view (maybe even a

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revision of Art. 33 of the European Convention?). At the same time, we can also expect that the CJEU may continue this line of reasoning, including other international courts in the scope of Art. 344 TFEU, and therefore restricting Member States to selecting only an EU dispute settlement system.

Secondly, the Court of Justice is taking an extremely protective approach given its interpretation to the role of preliminary rulings procedure guaranteed by Art. 267 TFEU in the light of Protocol 16 to the ECHR. The Court continued the Melki and A v. B line of reasoning emphasizing the importance of the preliminary references for the unity and efficiency of the European Law, making even the legal protection of the individual secondary to these purposes. Moreover, Opinion 2/13 may be considered a manifestation of European Law primacy even in the area of human rights protection – it may be considered a step back from the virtue of Article 52(3) of the Charter of Fundamental Rights, by which the EU law has previously limited the scope of its autonomy, namely as regards those rights which the Charter has borrowed directly from the Convention.

As for the future perspectives of the European Union accession to the ECHR, it is possible (at least in my perception) to agree with the viewpoint expressed by Martin Scheinin, Catherine Barnard and Daniel Halberstam that the CJEU’s negative decision and therefore the postponement of accession may be a wise and even unavoidable political move under current circumstances, i.e. the influence of financial crisis on the economies of several Member States, current tensions between the Council of Europe State Parties as well as a need in a pause to adopt a pro-human rights CJEU line of reasoning and to think over effective ways to protect constitutional plurality of the Union in the next version of the Draft accession agreement. It is possible to say that the EU has the potential to handle these tasks successfully with no revision of existing Treaty provisions, namely the Protocol No. 8 relating

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to article 6(2) of the Treaty on European Union. The possible solutions for the ‘autonomy-friendly’ Draft version may be: a Member States agreement not to exceed the ECHR level of protection in the cases where the EU law is implemented, internal implementing measures on the use of Protocol 16 ECHR and on the scope of EU law interpretation in prior involvement procedure.

Even the controversial situation when Opinion 2/13 de facto precludes the EU Member States from joining Protocol No. 16 shall not necessarily be seen as a negative. By doing that, the Court of Justice excluded the possibility for the supreme courts of the EU Member States to ask for the advisory opinion of the ECtHR after the previous national court have already been given the CJEU preliminary ruling in the same procedure. Moreover, it postpones the possible issues which could arise because of different national treatment of the ECHR provisions (for example, constitutional rank in Austria and higher/lower status in the other Member States) in conjunction with the Protocol No. 16 application. It allows avoiding the conflicts in the interpretation of the analogous ECHR and Charter provisions by the Strasbourg and Luxembourg Courts – at least until the necessary legal environment for the use of Protocol 16 ECHR within the EU legal order is created.

It is quite likely that the accession will be delayed for an indefinite period of time – due to the probable impossibility to reach a consensus on a new version of the Draft accession agreement with all members of the Council of Europe (such as Russia, Ukraine and Turkey) in the near future. At the same time, the European Union accession to the European Convention on Human Rights and Fundamental freedoms remains a legal duty in accordance with Art. 6 TEU, Protocol No. 8 to the TEU and to the TFEU, and a declaration No. 2 on Article 6(2) TEU. My guess is that the EU may choose other tactics in the next round of negotiations – focusing on internal implementing measures and creating the legal mechanisms for the Protocol No. 16 use within EU Member States’ legal systems – but only time will

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show which direction the Luxembourg and Strasbourg negotiators will take to further protect the autonomy of the EU legal order.