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European Union Accession to the European Convention on Human Rights. Outline of the Theoretical Framework

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Słowa kluczowe: Unia Europejska, Rada Europy, Trybunał Sprawiedliwości Unii Europejskiej, Europejska Konwencja Praw Człowieka

Abstract

Attempts of the European Union for accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms have been made for years, which proves the task is very difficult in the context of the institutional and legal issues. In view of the complexity of the issue and limitations as to the scope of this paper the focus is on selected legal acts *sui generis*, as passed by the EU institutions and by the Council of Europe. The analysis covered the stance of the Court of Justice of the European Union and it was based on the legal opinions formulated on the basis of the primary law. The question whether the said accession is still possible remains unanswered.

Streszczenie

Przystąpienie Unii Europejskiej do Europejskiej Konwencji Praw Człowieka. Zarys problematyki

Już od lat jesteśmy świadkami podejmowania prób przystąpienia Unii Europejskiej do Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności jak się okazuje jest to za-

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danie szczególnie skomplikowane ze względu na problemy instytucjonalno-prawne. Z uwagi na złożoność zagadnienia i na ograniczenia objętościowe niniejszej publikacji skupiono się na analizie wybranych aktów *sui generis* wydanych przez instytucje UE jak i organy Rady Europy. Przeanalizowano stanowisko Trybunału Sprawiedliwości Unii Europejskiej opierając się na wydanych przez niego opiniach prawnych, podpartych aktami prawa pierwotnego. Pozostawiając otwarte pytanie Czy przystąpienie do konwencji jest nadal możliwe?

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The concept of the protection of human rights² in the European Community / European Union (hereinafter referred to as EC and EU respectively) has undergone extensive evolution. At the early stage of the functioning of the ECs no legal provisions relating directly to the fundamental rights are to be found. Only those rights were guaranteed to the citizens of the EC that were compliant with the economic objectives of the international organization in question³. Likewise, neither the institutions nor the Court of Justice (hereinafter referred to as CJ) addressed these issues⁴. CJ claimed that it falls in the domain of the constitutional law of the Member States⁵. Furthermore, the Council of Europe signed the European Convention of Human Rights (here-

² The term “human rights” is used in the context of European Union parallel to the term “fundamental rights, basic rights”. It is claimed in the literature of the subject that these terms are referentially equivalent. For more on this issue please see C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki, volume I*, Warsaw 2000, p. 440; C. Mik, *Ochrona praw człowieka w europejskim prawie wspólnotowym*, [in:] *Szkola praw człowieka, Helsińska Fundacja Praw Człowieka*, Warsaw 1996, p. 110.

³ Notably the Treaty of Paris provides for the prohibition of discrimination on grounds of nationality (currently Art. 18 TFEU, earlier 12 TEC) equal pay discrimination based on sex (currently Art. 157 TFEU, earlier 141 TEC). These rights were, however, treated as a complementation of the Community economic freedoms. P. Filipek, *Art. 6*, [in:] *Traktat o Unii Europejskiej. Komentarz*, ed. K. Lankosz, Warsaw 2003, p. 118.

⁴ This tendency in adjudication is confirmed by the following cases: Case 1/58, F. Stork Co. against Wysoka Władza, Case Report 1959, p. 17; Case 40/59, Geitling Ruhrkhlen – Verkaufsgesellschaft GmbH against Wysokiej Władzy, Case Report Zb. Orz. TS 1960, p. 423, Case 40/64, M. Sgarlata and others against the Commission, Case Report 1965, p. 215

⁵ L. Garlicki, *Unia Europejska a Europejska Konwencja Praw Człowieka (aktualny stan dyskusji)*, [in:] *Sześć lat Konstytucji Rzeczypospolitej Polskiej – doświadczenia i inspiracje*, Warsaw

inafter referred to as ECHR) which fell in the realm of international law⁶. In principle, it was to significantly affect the international system of law with regard to human rights' protection. Hence, the Member States which were the parties to ECHR did not see a need to establish special mechanisms for the protection and control of human rights within the framework of the Communities. However, as the European integration was developing and with the adoption of the direct effect principle⁷ and the principle of primacy⁸ politicians and institutions claimed there is a need to regulate the issues related to the protection of human rights.

The idea of EU accession to the ECHR had emerged for the first time in the Community institutions. It was, in particular, the Commission and the European Parliament which insisted on it. The European Commission spoke in favor for the accession of the Communities to ECHR in the Memorandum of the 4th April 1979⁹, in the Memorandum of the 19th November 1990¹⁰ and the working document as of 26th October 1993¹¹. In the resolution of 11th March 1993 on respecting human rights in the European Community, and in the resolution of 18th January 1994 and of 11th April 1995¹², the Parlia-

2003, p. 84; S. Hambura, M. Muszyński, *Od góry masła do Karty Praw Podstawowych*, "Rzeczpospolita", 25 August 2003, No. 197.

⁶ It entered into force on 3.09.1953. *The text of the Convention*, [in:] *Prawo międzynarodowe publiczne. Wybór dokumentów*, ed. A. Przyborowska-Klimczak, issue VII, Lublin 2005, pp. 270–287; "Journal of Laws" 1993, No. 61, item 284. The Convention adopted a special system which enables effective control of respect for the rights and freedoms it guaranteed.

⁷ For more on this issue see: Judgement in the case 26–62, *NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: *Tariefcommissie – Netherlands*. Reports of Cases. TS 1963, p. 1. ECLI:EU:C:1963:1.

⁸ For more on this issue see: Judgement in the case 6/64, *Flaminio Costa v. ENEL*, Reports of Cases 1964, p. 1141. ECLI:EU:C:1964:66.

⁹ Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the European Commission 4 April 1979, Bull EC, Supp. 2/79.

¹⁰ SEC (1990) 2087, 19 November 1990; also "Biuletyn Wspólnot Europejskich" 1990, No. 10, No. 11.

¹¹ Accession of the Community to the European Convention on Human Rights and the Community Legal Order. An analysis has been carried out with regard to the legal basis for EC accession to the Convention and the impact this would have on the ETS.

¹² OJ C 44/32 (1994).

ment reacted positively to the initiative of the Commission, as expressed in both Memorandums¹³, and unequivocally supported the efforts undertaken by the Commission.

The postulates related to the accession to the Convention were put forward not only by the Communities, but also the Council of Europe. As early as in 1995, the Parliamentary Assembly of the Council of Europe in its Resolution No. 1068 called the European Communities to take formal steps to enable the accession. It was pointed out that the accession would close the gap in the protection of human rights, as people whose rights have been infringed by the EU law could benefit from the protection of the ECHR, and this would lead to the creation of one coherent and effective system of human rights' protection. It would also help to avoid the risk that the provisions of the Convention are interpreted in a parallel way by the ECtHR and by the ECJ. The willingness of the Parliamentary Assembly to accept the accession of the ECs to the ECHR was later confirmed, for example, in its Resolution No. 1210 (2000), including the observations on the European Council's decision on establishing the Charter of Fundamental Rights of the European Union¹⁴.

The intention was, among others, to prevent the monopoly and autonomy of CJEU in the adjudication procedure by subjecting CJEU to the control mechanisms resulting from the Convention. It was also noted that the necessity to amend the very text of the Convention, including the amend-

¹³ OJ C 115 as of 26.IV.1993, p. 178.

¹⁴ Parliamentary Assembly Council of Europe, Resolution 1068 (1995) on the Accession of the European Community to the European Convention on Human. A. Dzięgieł, *Przystąpienie Unii Europejskiej do Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności – unifikacja standardów w zakresie ochrony praw człowieka w Europie*, [in:] *Prawo międzynarodowe-problemy i wyzwania. Księga pamiątkowa. Profesor Renaty Sennenfeld-Tomporek*, ed. J. Menkes, Warsaw 2006, pp. 157–158. The initiative of preparing the Charter was started during the German presidency of the European Council. The decision on its preparation was taken by the European Council during the meeting in Cologne 2–3.06.1999. The body that was to be held responsible for drawing up the Charter was appointed during the meeting in Tampere, 15–16.10.1999. The first organizational meeting of the team took place in Brussel on 17 December 1999. During the second meeting, which was also held in Brussel on 1–2.02.2000, it was decided that the team will be referred to as Convention. The Charter of the Fundamental Rights of the European Union was proclaimed by the European Parliament, the Council of the European Union and the Commission during the meeting in Nice on 7 December 2000.

ments to the provisions stipulating that only the Member States of the Council of Europe may accede to the Convention¹⁵. For example, in the paper of the 8 February 2001 on the accession of the EU to the ECHR, as prepared by the Secretariat of the Council of Europe¹⁶ three issues were emphasized as being significant. These involved the objective of the accession, its effects and the necessity to conduct novelization of the very Convention¹⁷. The Steering Committee for Human Rights (hereinafter referred to as SCHR) of the Committee of Ministers set up a working group for the legal and technical issues related to the accession which in 2002 presented an activity relevant report. The report contained various options related either to the EU accession process or to the Convention (protocol amending the Convention or the accession agreement). The provisions of the ECHR that needed to be amended were reviewed, and a discussion was held on Art. 46, item 2, relating to the enforcement of judgements and supervision of the Committee of Ministers in this field, in the context of the participation of an EU representative involved in this process. Additionally, a debate was held whether a representative of the EU should participate in the court proceedings and what should be the position of the EU judge in proceedings before the ECtHR¹⁸.

The researchers were also divided over the issues of the accession. Some of them considered the accession of the Community/EU to the Convention to be unnecessary, since in its current shape the ECHR is already an 'European Charter of Rights', and the ECtHR has become a constitutional court (e.g. D.J. Harris, M. O'Boyle, C. Warbrick¹⁹). Others considered the commitment of the Communities to obey high standards of human rights' protection at the Convention level would be a better solution (e.g. A. Drzemcze-

¹⁵ Cf. *Art. 59, item 1 Convention*, [in:] *Prawo międzynarodowe publiczne. Wybór dokumentów*, ed. A. Przyborowska-Klimczak, Issue VII, Lublin 2005, p. 287.

¹⁶ *Accession of the EU to the European Convention on Human Rights. Reflection paper prepared by the Sekretariat, DG-II (2001) 02.*

¹⁷ For more on the issue of novelization of ECHR see A. Dziegiel, *Przystąpienie...*, pp. 161–165.

¹⁸ H. Machińska, *Umocnienie aksjologii przyszłej UE*, [in:] *Przyszły Traktat Konstytucyjny. Zagadnienia prawno-polityczne, instytucjonalne i proces decyzyjny w UE*, ed. J. Barcz, Warsaw 2004, p. 321.

¹⁹ D.J. Harris, M. O'Boyle, C. Warbrick, *The Convention and the European Union*, [in:] *Law of the European Convention on Human Rights*, London-Dublin-Edinburgh 1995, p. 28.

wski²⁰, I. Persand²¹, F.G. Jacobs²²). According to A.G. Toth the accession of the Communities to the ECHR would have advantages such as, among others, demonstrating the EU's continued commitment to the protection of human rights by accepting the binding international agreement, subjecting the Communities to the same control under the Convention as its Member States have been subjected to as parties to it for a long time (or since its entry into force), strengthening legal certainty through an already existing catalogue of rights, as interpreted on several occasions by the judicial practice of the ECHR. CJEU would be given a legal basis for judgements in cases related to human rights and the Convention would be incorporated, albeit indirectly, into the legal order of the Communities and consequently into the legal systems of all Member States²³.

It was important for the case under discussion that the CJ took a stance with regard to the issue of accession. On the 26 April 1994 the Council of the European Union approached the CJ of the European Union to issue a legal opinion on the admissibility of the accession of the Communities to the ECHR pursuant to the provisions set forth in the Art. 300, item 6 of the TEC²⁴. The European Court of Justice (hereinafter referred to as ECJ) delivered the opinion on the matter on the 28 March 1996²⁵, stating that “in line with the

²⁰ A. Drzemczewski, *The Domestic Application of the Convention and European Community Law*, [in:] *European Human Rights Convention in Domestic Law, A. Comparative Study*, Oxford 1983, p. 258.

²¹ I. Persaud, *Where do We go from Here? Fundamental Rights in the Post – Maastricht Legal Order*, “Vortrage, Reden und Berichte aus dem Europa-Institut- Sektion Rechtswissenschaft” 1994, No. 322, p. 12.

²² F.G. Jacobs, *European Community Law and the European Convention on Human Right*, [in:] *Human Rights and Constitutional Law. Essays in Honor of Brian Walsh*, ed. J. O'Reilly, Dublin 1992, p. 567.

²³ A.G. Toth, *The European Union and Human Rights: The Way Forward*, “Common Market Law Review” 1997, vol. 34, p. 492.

²⁴ Art. 300, item 6 TEC (substituted by Art. 218 TFEU) stipulates that “The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only according with Art. 48 of the Treaty on European Union”. Cf. *Dokumenty europejskie*, op.cit., vol. V, p. 353.

²⁵ Opinion 2/94 as of 28.03.1996, Reports of Cases 1996 I-01759; ECLI identifier: ECLI:EU:C:1996:140.

binding regulations now the Community has no competence to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty empowers the Community to legislate or conclude agreements for the protection of human rights, nor can the accession be effectuated on the basis of Art. 235 of the TEC. (...) Accession to the Convention would entail introducing substantial changes to the current Community system of human rights' protection (...) it would go beyond the scope of Art. 235 of TEC and it would require introducing amendments to the Treaty²⁶. According to A. Wyrozumska, the argumentation of the ECJ does not seem to be obvious, in part also in the light of the provisions provided for in TEU and TEC, as were binding at that time²⁷. Moreover, it needs to be stated that in the next revision the European legislator did not introduce any provisions to the TEC that would enable effectuating the accession²⁸.

European Institutions were consistently seeking to have this provision implemented. Shortly ahead of the Intergovernmental Conference, that was held in 2000, the European Parliament summoned its participants to enable the EU to access the ECHR, to initiate closer cooperation with the Council of Europe and take appropriate actions in order to avoid potential conflicts which might arise between the ETS and the ECtHR²⁹.

Furthermore, it is worth noticing that the issue of the accession was raised also in the Laeken Declaration on the future of the European Union, as adopted at the session of the Council of Europe held by the European Council on 14–15 December 2001³⁰. One part of this Declaration included provisions related to establishing a Convention on the future of Europe which would work

²⁶ W. Czaplinski, R. Ostrihansky, P. Saganek, A. Wyrozumska, *Prawo Wspólnot Europejskich, Orzecznictwo. Wydanie nowe z suplementem*, Warsaw 2005, p. 353.

²⁷ A. Wyrozumska, *Jednostka w Unii Europejskiej*, [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, ed. J. Barcz, Warsaw 2002, p. 341.

²⁸ J. Plánarová-Latanowicz, *Trybunał Sprawiedliwości Wspólnot Europejskich i ochrona praw podstawowych*, Warsaw 2000, pp. 60–61.

²⁹ Resolution A5–0064/2000 of March 2000 on the drafting of a European Union Charter of Fundamental Rights.

³⁰ Annexe I to the Applications of the Presidency is composed of three parts: Europe at the crossroads; Challenges and reforms in the reconstituted European Union; Convention, as convened regarding the future of Europe. The text is to be found in: *Konwent Europejski, "faza słuchania"*, "Monitor Integracji Europejskiej" 2002, No. 56, p. 145 et seq.

on the main issues regarding the future development of the EU and on the identification of various, admissible solutions. A working group was established within the framework of the Convention (II Working Group) and it was supposed to consider, among others, the consequences of the EU accession to the ECHR. In the Final Report³¹ the II Working Group advocated the constitutional authorization which would enable the EU to access the Convention, stating that it would ensure “harmonious development of the adjudication process of the two courts”. It was emphasized that the EU is not present when cases are adjudicated by the Court in Strasbourg indirectly and – sometimes – directly and these are related to the community law. Moreover, it was pointed out that the accession to the Convention will not endanger the autonomy of the legal community order since the role of the CJ adjudicating cases related to the community law will not change. The ECtHR “will not be considered as superordinate but as any special court exercising external control over the obligations of the European Union under the international law that result from the accession to the European Convention”. The situation connected with the accession was compared with the situation of a Member State in which the primary laws are specified by the constitution and – on the other hand – it is subject to the system of human rights protection, as exercised in Strasbourg. It was also emphasized that the legal ground for the accession should be included in the Constitutional Treaty³². Finally, the Convention advocated the accession of the EU to the ECHR, which was reflected in the provisions set forth in Art. 7, item 2 of the Draft Treaty establishing the European Constitution. Subsequently, these provisions were introduced, unchanged in Art. I-9 of the Treaty establishing the Constitution for Europe³³. This established the constitutional ground for the accession, which was found missing by the CJEU, as stated in the opinion 2/94 issued in 1966. The issue of political decision regarding the accession to the Convention, relevant procedures and specific solutions in the accession were the tasks to be performed in the

³¹ Final report of Working Group II, CONV 354/02 Brussels, 22 October 2002.

³² H. Machińska, *Umocnienie aksjologii ...*, p. 311.

³³ Official act of signing the Treaty establishing a Constitution for Europe (TCE) by the heads of the states and governments took place in Rome on 2.10.2004. The text of the Treaty found in *Prawo Unii Europejskiej*, Bielsko Biała 2006, pp. 419–622, further quoted in *Prawo Unii*.

future, and these should be settled by virtue of agreements of the European Union with the Council of Europe³⁴.

Article I-9 of the Constitutional Treaty provided that “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. Such accession shall not affect the Union’s competences as defined in the Constitution. Item 3 of this article states that “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”³⁵. The authors of the draft document in that time paid attention to the fact that accession of the EU to the ECHR implies thorough reconstruction of the legal system. This problem was raised in the next debates and academic analyses, as well as in the works undertaken by the Council of Europe. The aim of the undertaken initiatives was to strengthen the system preventing infringement of the provisions stipulated in the ECHR in the Member States, establishing the system for analyzing the claims as to the substance, eliminating claims of lower significance and – finally – strengthening the supervision over the execution of judgements³⁶.

The works resulted in the change of the conventional system of control, as introduced in the Protocol No. 14 to the European Convention on Human Rights³⁷. Additionally, this Protocol introduced amendments to the provisions of the European Convention which directly corresponded to the provi-

³⁴ E. Dynia, *Reformy ustrojowe w Traktacie ustanawiającym Konstytucję dla Europy*, [in:] *Ustroje, doktryny, instytucje polityczne. Księga jubileuszowa Profesora zw. dra hab. Mariana Grzybowskiego*, Cracow 2007, p. 69.

³⁵ *Prawo Unii...*, p. 423.

³⁶ A. Machińska, *Umocnienie aksjologii...*, p. 321. Extensive discussion on the works related to the reform of ECtHR is to be found in J. Jaskiernia, *Projekty zmian struktury i kompetencji Europejskiego Trybunału Praw Człowieka w celu zwiększenia efektywności systemu kontroli Europejskiej Konwencji Praw Człowieka*, “Prawa Człowieka. Humanistyczne Zeszyty Naukowe” 2003, No. 9, pp. 57–69.

³⁷ *Protocol No. 14*, [in:] *Prawo...*, pp. 303–309. For more on the reform introduced by virtue of the Protocol 14 see K. Drzewicki, *Reforma Europejskiego Trybunału Praw Człowieka filozofia zmian czy zmiana filozofii?*, “Europejski Przegląd Sądowy” 2006, No. 6, pp. 4–13; M. Cymerman, *Ewolucja europejskiego systemu kontroli przestrzegania praw człowieka*, [in:] *Prawo międzynarodowe publiczne*, eds. A. Przyborowska-Klimczak, W.Sz. Staszewski, “Studia i materiały” 2006, vol. I, issue KUL, pp. 9–27.

sions set forth in Art. I-9 of the Treaty establishing a Constitution for Europe. The new wording of Art. 59, item 2 was changed and it was given new wording, as follows: “European Union may accede to this Convention”³⁸. Failure to adopt the Constitution for Europe caused that the potential works on the EU accession to the ECHR were postponed again till 2009. Additional problems were encountered in connection with the ratification of the Protocol No. 14³⁹. By the virtue of the Treaty of Lisbon⁴⁰, Art. 6, item 2 of TEU provided that “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences, as defined in the Treaties”. At the same time Art. 1 of Protocol No. 8 attached to the mentioned primary law states that “(...) the agreement related to the accession should reflect the necessity of preserving specific features and the law of the Union”⁴¹. The accession-related negotiations started in 2010 and lasted for three years. The European Commission was designated by the Council to act as the main negotiator regarding the Union’s accession to the ECHR. The role of the negotiator acting on behalf of the Council of Europe was assigned to the Steering Committee for Human Rights. The parties involved in the negotiations included also the experts designated by the Member States of the European Union and by the countries-parties to the ECHR⁴².

The Cooperation allowed for the development of an agreement as of 5 April 2013 on accession, including the set of declarations and explanations of legal and technical nature, as related to the accession. It is pointed out that the re-

³⁸ A. Przyborowska-Klimaczak, *Prawo...*, p. 308.

³⁹ Russia was the last country in which the Protocol No. 14 was not ratified. After its ratification based on the decision by the Council as of 4.06.2010 it was decided that negotiating mandate will be adopts. For more on this issue see <https://www.consilium.europa.eu/pl> (5.05.2020).

⁴⁰ Treaty of Lisbon introducing amendments to the Treaty on European Union and the Treaty Establishing the European Community was signed on 13 December 2007 and it entered into force on 1 January 2009, OJ EU 2007/C 306/02, p. 1, hereinafter referred to as TL.

⁴¹ For more on this issue see *Traktat z Lizbony. Podstawy prawne Unii Europejskiej*, ed. J. Barcz, Warsaw 2010, p. 342, hereinafter referred to as *Podstawy prawne UE. Podstawy prawne UE...*, p. 393; Art. 52, item of the Charter of Fundamental Rights.

⁴² For more on this issue see Official website of the European Commission: European Commission and Council of Europe start negotiations on EU accession to the European Convention of Human Rights, IP/10/906.

sult of the negotiations was possible to be achieved largely by virtue of many compromises, both on the side of the European Union and on the side of the Council of Europe. The process of negotiations was determined by the stance of the states represented in the Council of Europe which are not members of the European Union. These states were far more sensitive to any possible manifestations of “putting the Union in a privileged position” as a party to the ECHR⁴³. The contentious issues had already been subjected to previous debates and, as before, they concerned, among others, autonomy, EU legal system, including the competencies of the CJEU, the co-respondent mechanism of the EU and of the Member States, such institutional issues as, for example, representation in the Committee of Ministers of the Council of Europe⁴⁴.

The end of the negotiations started the procedure in which the European Commission, acting pursuant to the provisions set forth in the Art. 218, item 11 of the TFEU submitted a request to the CJ asking for issuing the opinion regarding the following question: “Is the draft agreement regarding the EU accession to the compliant with the treaties”?

The decision issued in this case by CJEU on 18 December 2015 was negative. It stated that “the Agreement providing for the accession of the EU to ECHR is not compatible with art 6, item 2 of TEU nor with the Protocol No. 8 related to Art. 6, item 2 of TEU concerning the accession”⁴⁵. Within the framework of the proceedings on issuing the Opinion 2/13 the Court analyzed the compliance of the intended agreement with the EU primary law. The focus was on specific features and autonomy of the EU law. The criticism related to the non-compliance with the provisions set forth in the Art. 344 of TFEU and it was stated that “the Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured

⁴³ B. Wóscisły-Białek, *Proces negocjacyjny porozumienia dotyczącego przystąpienia Unii Europejskiej do Europejskiej Konwencji Praw Człowieka*, “Europejski Przegląd Sądowy” 2015, No. 12, p. 13. For more on this issue see R. Grzeszczak, *Zupełny i efektywny system ochrony praw podstawowych w Unii Europejskiej*, [in:] *Unia Europejska w roli gwaranta i promotora praw podstawowych*, ed. D. Kornobis-Romanowska, Sopot 2016, pp. 77–101.

⁴⁴ B. Wóscisły-Białek, *Proces negocjacyjny...*, p. 12.

⁴⁵ Case Opinion of the Court of Justice of the European Union 2/13 – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms EU:C:2014:2454, hereinafter referred to as Opinion 2/13.

by the Court⁴⁶. The co-respondent mechanism was also criticized⁴⁷. The CJ had doubts regarding the gap in law related to the procedure of early involvement of the Court and with regard to the specific characteristics of the EU law in relation to the court control over Common Foreign and Security Policy (CFSP)⁴⁸. Significantly, the objections voiced by CJEU in relations to the draft agreement are systemic and they undoubtedly require not only renegotiation of the agreement but also introducing amendments to the very treaties⁴⁹. According to the general spokesperson J. Kokott re-negotiation should primarily involve making the agreement more precise and this relates first of all to Art. 3⁵⁰. It is emphasized that the imperative force of Art. 6, item 2 of

⁴⁶ Opinion 2/13, point 201.

⁴⁷ Opinion 2/13, point 216–217.

⁴⁸ Opinion 2/13, points 239, 241, 252 and 255.

⁴⁹ D. Kornobis-Romanowska, *Prawa podstawowe w orzecznictwie TSUE jako czynnik konstytucjonalizacji czy umiędzynarodowienia prawa UE?*, [in:] *Unia Europejska w roli gwaranta i promotora praw podstawowych*, ed. D. Kornobis-Romanowska, Sopot 2016, p. 39.

⁵⁰ According to the View of Advocate General Kokott, delivered on 13 June 2014 the draft agreement requires having some provisions revised and this hold true in particular to the six critical points. First of all, “having regard to the possibility that they may request to participate in proceedings as co-respondents pursuant to Art. 3(5) of the draft agreement, the European Union and its Member States are systematically and without exception informed of all applications pending before the ECtHR, in so far and as soon as these have been served on the relevant respondent”. Secondly, the mentioned requests, as submitted “by the European Union and its Member States pursuant to Art. 3(5) of the draft agreement for leave to become co-respondents are not subjected to any form of plausibility assessment by the ECtHR”, Thirdly, as provided for in Art. 3, item 6 of the draft agreement “the prior involvement of the Court of Justice of the European Union pursuant to Art. 3(6) of the draft agreement extends to all legal issues relating to the interpretation, in conformity with the ECHR, of EU primary law and EU secondary law”. Fourthly, “the conduct of a prior involvement procedure pursuant to Art. 3(6) of the draft agreement may be dispensed with only when it is obvious that the Court of Justice of the European Union has already dealt with the specific legal issue raised by the application pending before the ECtHR”. Fifthly and finally, “the principle of joint responsibility of respondent and co-respondent under Art. 3(7) of the draft agreement does not affect any reservations made by contracting parties within the meaning of Art. 57 ECHR; and the ECtHR may not otherwise, under any circumstances, derogate from the principle, as laid down in Art. 3(7) of the draft agreement, of the joint responsibility of respondent and co-respondent for violations of the ECHR found by the ECtHR”. For more on this issue see: View of Advocate General Kokott delivered on 13 June 2014, proceedings regarding issuing opinion 2/13, initiated upon the request by European Commission, EU:C:2014:2475, point 280.

TEU causes that the EU should continue its efforts to effectuate the accession, which – in this case – implies the necessity to renegotiate the rejected version of the agreement⁵¹. The negative opinion exerts extensive political and legal implications on the whole system of human rights' protection in Europe. The future process of the EU accession to the ECHR may become a real challenge for both the legal systems and its success may be conditioned largely by the extensive consensus to be arrived at by the EU and by the Council⁵².

Summarizing, we need to positively assess the efforts made both by the Council of Europe and by the EU. However, the conclusions *de lege ferenda* should involve the postulates to have the currently existing standards of human rights' protection in the EU analyzed again, with specific focus on the reviewed conclusions. At this stage, it is difficult to unequivocally foresee the next steps of the EU regarding the issues covered in this study.

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⁵¹ A. Łazowski, *Opinia 2/13 a wzrost znaczenia Karty Praw Podstawowych UE*, "Europejski Przegląd Sądowy" 2015, No. 12, p. 26.

⁵² B. Wćisły-Białek, *Proces negocjacyjny...*, pp. 9–13.

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