ARTICLES

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ON THE ACCESSION OF THE EU TO THE ECHR
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SHADES OF TRUST: THE ECTHR, THE ECJ AND THEIR EVOLVING RELATIONSHIP IN LIGHT OF THE 2023 REVISED DRAFT ACCESSION AGREEMENT

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ABSTRACT: The EU accession to the ECHR has been a complex and at times politically charged topic. Questions of trust and distrust between the two protagonists, namely the supranational courts that will be called upon to cooperate for the enhancement of human rights protection in Europe (but also more generally between the Union and its Member States), were extremely important for the successful conclusion of this second round of negotiations. Nevertheless, the obsession of control that underpins the CJEU's *Opinion 2/13* and many of the EU proposals in the renewed negotiation do not bode well for the establishment and furtherance of trust between the two institutions. Additionally, the ECtHR is called upon to show blind trust to the EU and its Court under the revised Draft Accession Agreement. Ultimately, trust will be (re)built only if the CJEU and the ECtHR adopt a constructive attitude by, respectively, following due process/rule of law guarantees or showcasing jurisprudential consistency and accommodating mutual trust.

KEYWORDS: EU accession to the ECHR – trust – distrust – Draft Accession Agreement – Court of Justice of the European Union – European Court of Human Rights.

I. INTRODUCTION

While the European Union's (EU) tortuous trajectory towards accession to the European Convention on Human Rights (ECHR) has been examined through multiple prisms, the concepts of trust and distrust have taken a back seat; perhaps because speaking in sociological

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terms brings to light a bundle of subjective feelings, such as insecurity, antagonism or suspicion, which should not be blended into a technical discussion on the arrangements that would make the accession possible. Yet, there is no doubt that much of the negotiation and its background events revolve(d) around the notions of trust and distrust.[1]

In this *Article* I will first flesh out the content of trust and distrust and how they both relate to the current topic (II), before going on to highlight those elements of *Opinion 2/13* and the subsequent renewed negotiations that express the Court of Justice of the European Union's (CJEU) deep distrust towards the accession proposal (III). Afterwards, I will analyse how much trust the European Court of Human Rights is required to showcase towards the EU and its Court for the EU accession to function under the revised accession instruments (IV), before laying down the prospects and challenges in terms of trust dynamics regarding the relations between the two Courts *post*-accession (V). Section VI concludes.

II. Trust and distrust: delineations and reflections on the protagonists of the EU accession saga

Research on trust and distrust has only recently expanded to the legal field.[2] This might be due to the fact that trust is a feeling that develops at the interpersonal level and does not concern non-living legal subjects. Yet nowadays it is widely admitted that considerations of trust are equally pertinent to interinstitutional relations, trust specifically being a necessary component for the effective collaboration of judicial organs in the context of multilevel governance.[3]

Trust is employed not when dealing with the familiar but with the unknown, namely in situations involving risk due to the lack of sufficient information, when a "leap of faith" is required.[4] This is precisely the case of judicial institutions, which are by design geared to function independently and are not always fully transparent, two elements that render more challenging but also necessary the embeddedness of trust *vis-à-vis* other judicial institutions when cooperation is warranted. Of course, increased transactions between judicial institutions usually reduce frictions and create a common language and greater familiarity, allowing the trustor to grant more discretion to the trustee.[5] This highlights another

[1] E Dubout, 'Une question de confiance: nature Juridique de l'Union européenne et adhésion à la Convention européenne des droits de l'homme' (2015) Cahiers de droit européen 73.

[2] R Barradas de Freitas, 'Introduction: The Virtue of Trust' in R Barradas de Freitas and S Lo Iacono (eds), *Trust Matters: Cross-disciplinary Essays* (Hart 2021) 1, 4.

[3] V Pergantis, 'The Advent and Fall of Trust as a Cornerstone of Judicial Cooperation in Multilateral Regimes in Europe: A Cautionary Tale' in L Gruszczynski, M Menkes, V Bilkova and P Farah (eds), *The Crisis of Multilateral Legal Order: Causes, Dynamics and Implications* (Routledge 2022) 146, 149. This part draws from that contribution.

[4] S Van de Walle and FE Six, 'Trust and Distrust as Distinct Concepts: Why Studying Distrust in Institutions is Important' (2014) Journal of Comparative Policy Analysis 158, 159.

[5] See, in the specific context of the CJEU preliminary reference mechanism, JA Mayoral, 'Impact through

important facet of trust – namely, that trust is most fragile at the "constitutive moments" establishing the transactional relationship between the trustor and the trustee, rather than during the cooperation, when the "rules of the game" have already been set. At that moment, familiarity becomes prevalent and there is less room for manoeuvre. This is crucial in the case at hand, where accession is perceived as such a "constitutive moment", whereas considerations of trust might not be so evident once accession is concluded and the relationship between the two Courts starts evolving within the set framework.

Moreover, through trusting, the transaction costs are reduced, but this is only achieved by embracing the vulnerability that trusting – that is, depending on someone not controlled by you – induces.[6] Such vulnerability is more pronounced if the trustor is conscious that the cooperation with the trustee creates an element of hierarchy. This hierarchical conundrum has been constantly present in the various stages of the saga that might lead to the EU's accession to the ECHR: The subjection of the EU to an external judicial authority has certainly stirred some negative feelings in Kirchberg, reflected in *Opinion 2/13*,[7] while the revised draft accession instruments[8] bestow upon the CJEU the final say in numerous questions related to the EU's participation in proceedings before the European Court of Human Rights (ECtHR).[9]

Additionally, trust evokes a choice; instead of isolation and inaction, a trustor opts for cooperation. In that, trust distinguishes itself from confidence, where no alternative exists.[10] In our case concerning the relations between the ECtHR and the CJEU, this should be complemented with a discussion on the trust-specific traits of both the trustor and the trustee that shape their relationship. On the one hand, it is important to examine a trustor's general, but also contextual, propensity to trust.[11] In other words, the question should be raised whether the trustor is construed in a way that favours trusting and whether it has showcased in the specific context of human rights protection a tendency to trust. To start answering this question, there is no denying that the CJEU had and still has a conflictual relationship with national high courts that has not facilitated its capacity to trust other judicial institutions.[12] The EU legal order's autonomy and the CJEU's

Trust: The CJEU as a Trust-enhancing Institution' in M Wind and A Follesdal (eds), *International Courts and Domestic Politics* (CUP 2018) 160, 170 ff.

[6] A Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart 2020) 12.

[7] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

[8] 46+1 ad hoc group Report to the CDDH, 46+1(2023)35FINAL of 30 March 2023 on the Accession of the European Union to the European Convention on Human Rights.

[9] See *infra*.

[10] N Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Regimes* (OUP 2000) 94, 97.

[11] P Popelier, M Glavina, F Baldan and E van Zimmeren, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System' (2022) Maastricht Journal of European and Comparative Law 351, 356.

[12] MA Pollack, 'The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence' in N Grossman, HG Cohen, A Føllesdal and G Ulfstein (eds), *Legitimacy and International Courts* (CUP

concomitant one, were partly embedded as an answer to the aforementioned troubled relationship, making the Luxemburg Court an institution that is geared to not easily trust.[13] Additionally, the EU's external autonomy has been deployed to shield the CJEU from any hierarchical subjection to an external source of control, in our case regarding human rights protection.[14] Thus, one can safely conclude that the CJEU's propensity is not necessarily to trust other judicial institutions.

On the other hand, the trustworthiness of the trustee is equally important for the construction of a smooth relationship of trust. A series of elements must be satisfied for someone to be deemed trustworthy:[15] the capacity to serve the interests of the trustor; a notion of co-responsibility in the sense of shared norms and values; the trustee's willingness to preserve its reputation by complying to the trustor's requests; and the benevolence (good faith) of the trustee, which is crucial to build lasting trust.[16] The ECtHR shares many of these attributes, and the draft accession instruments provide for some of them, but most importantly, the Strasbourg Court has oftentimes accommodated the special features of the EU legal order, particularly on the basis of the *Bosphorus* doctrine of equivalent protection, showing benevolence towards the CJEU and, more generally, the EU.[17]

A final variant of the trust equation relates to the question of constraints and controls imposed upon the trustee. It is suggested that if the trustee is subjected to a strict system of legal deference or if the trustor imposes a system of heavy monitoring, trust cannot develop; instead the trustee might feel resentment for these limitations and this surveillance.[18] In contrast, a system of graduated control, encompassing institutionalised mechanisms, sanctions and incentives, might help enhance trust between the two parties.[19]

2018) 143, 163; KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP 2001).

[13] G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (3rd ed. OUP 2021) 480, 489.

[14] Opinion 2/13 cit. paras 180-183; Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* ECLI:EU:C:2016:84, paras 45-47.

[15] RC Mayer, JH Davis and FD Schoorman, 'An Integrative Model of Organizational Trust' (1995) Academy of Management Review 709, 717.

[16] M Levi, 'A State of Trust' in M Levi and V Braithwaite and M Levi (eds), *Trust and Governance* (Russell Sage 1998) 77; FD Schoorman, R Mayer and JH Davis, 'An Integrative Model of Organizational Trust: Past, Present and Future' (2007) Academy of Management Review 344, 346.

[17] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App n. 45036/98 [30 June 2005] para. 155. See also R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' (2024) European Papers 647 www.europeanpapers.eu.

[18] J Mayoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe' (2017) JComMarSt 551, 554; K Jones, 'Trust: Philosophical Aspects' in JD Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier 2015) 668, 671.

[19] M Levi, 'Trust, Sociology of' in JD Wright (ed), *International Encyclopedia of the Social and Behavioral Sciences* cit. 664, 665.

The balance between overtly surveying and a system of gradual monitoring is not easy to attain, as we will see regarding the draft accession instruments.

Turning now to distrust, this should not be simply conceptualised as the absence of trust. Distrust is a much more negative stance *vis-à-vis* the other and has the potential of self-reinforcement, where distrust is amplified through the creation of a distorted image of the other.[20] Distrust usually stems from value incongruence and an attribution of negative motives, antagonistic or injurious ones, on the other side of the cooperation scheme.[21] In such a context, distrust leads to mobilisation and participation of the trustor in the common endeavour instead of letting the trustee proceed alone according to the agreed terms. It can equally lead to a lack of cooperation, conflictual relations, instances of misinformation, and the impossibility of shifting back to trust.

The stance of the CJEU regarding the EU accession to the ECHR is illustrative of such distrust, as we will see: its lack of flexibility is palpable in *Opinion 2/13*,[22] while its constant insistence on being involved in human rights protection, as exemplified in the current draft, showcases either a very low level of trust or an utter distrust not only *vis-à-vis* the ECtHR, but equally towards the EU Member States and their national courts.[23]

III. *Opinion 2/13* and its aftermath: The politics of distrust

Whereas *Opinion 2/13* raises a series of valid points on how the EU accession to the ECHR should be effectively implemented, it also presents glimpses of distrust *vis-à-vis* the ECtHR and the EU Member States. In the next few lines, I will analyse how iterations of distrust can be found both in *Opinion 2/13* and during the renewed negotiations. Two caveats are crucial. Our analysis will take as granted that much of EU's representations in the renewed negotiations was aimed at dissecting CJEU's views as expressed in *Opinion 2/13* and at presenting solutions that could allegedly be deemed admissible by the Luxemburg court in the event of a new opinion.[24] Thus, EU negotiators served primarily as

[20] SB Sitkin and K Bijlsma-Frankema, 'Distrust' in RH Searle, AMI Nienaber and SB Sitkin (eds), *The Routledge Companion to Trust* (Routledge 2018) 50, 52-53.

[21] K Bijlsma-Frankema, S Sitkin and A Weibel, 'Distrust in the Balance: The Emergence and Development of Intergroup Distrust in a Court of Law' (2015) Organization Science 1018, 1020.

[22] Editorial Comments, 'The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) CMLRev 1.

[23] E Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) Maastricht Journal of European and Comparative Law 35, 46.

[24] General Secretariat of the EU Council, Summary of Discussion, Doc. 7977/15 of 16 April 2015 1 ff; Presidency of the EU Council, Accession of the European Union to the European Convention for Protection of Human Right and Fundamental Freedoms (ECHR) – State of Play, Doc. 12528/15 of 2 October 2015, para. 20; General Secretariat of the EU Council, Accession of the European Union to the European Convention for Protection of Human Right and Fundamental Freedoms (ECHR), Doc. 12349/19 of 20 September 2019, para. 3. See also F Ronkes Agerbeek, 'EU Accession to the European Convention on Human Rights: A New Hope' (2024) European Papers 695 www.europeanpapers.eu; A Chablais, 'EU Accession to the ECHR: The Non-EU Member States Perspective' (2024) European Papers 715 www.europeanpapers.eu.

interlocutors of the CJEU, which did not and could not participate in the negotiations or give direct instructions to the EU negotiators. As a result, proposals of EU negotiators will indirectly be attributed to the Luxemburg court.

Additionally, the analysis will shed light on the complex interactions between different actors, beyond the two courts, pursuing different goals that influence the CJEU-ECtHR relationship. In other words, an institutional dialogue at the level of supranational judicial governance in Europe might hide a wider conversation "between multiple direct and indirect actors with different purposes", which shapes the trust dynamics.[25] In the case at hand, such other actors comprise the national courts of EU Member States, the EU institutions, or the applicants before the ECtHR, all of which might play an important role on the trust/distrust shown by the CJEU towards the ECtHR and *vice versa*, as we will see.

Having said that, CJEU's distrust *vis-à-vis* the Strasbourg Court is not always easy to pinpoint, since it frequently blends with the autonomy discourse that underpins much of the Luxemburg Court's jurisprudence on the compatibility with Union law of international agreements reached by the EU that include dispute settlement mechanisms.[26] However, some of the stances adopted by the CJEU and the negotiators go beyond what is strictly required by the principle of autonomy, and illustrate the Court's distrust towards the ECtHR. For instance, the CJEU insists on being fully informed of all pending cases involving an EU Member State in order to decide if any case touches upon EU law.[27] In the affirmative, the Court of Justice should then be empowered to examine if it has already ruled on the topic or not in order for the prior involvement mechanism to be activated.[28] The requirement of a constant information flow aims at reducing the risks inherent in the trust that must be displayed by the CJEU to the ECtHR, and showcases that the CJEU is suspicious about the ECtHR proceeding to an even superficial assessment of whether a case has been decided by the CJEU or not. Nevertheless, this assessment would not have been a substantive one, like the *acte clair* doctrine, but only a procedural one that could have been considered compatible with the autonomy of the EU legal order, as explained in the 2013 Draft Accession Agreement (DAA).[29] In the same context of the prior

[25] P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' in M Belov (ed), *Judicial Dialogue* (Eleven International 2019) 51, 52.

[26] See, indicatively, Opinion 1/91 *EEA Agreement* ECLI:EU:C:1991:490; Opinion 1/92 *EEA Agreement II* ECLI:EU:C:1992:189; Opinion 1/00 *ECAA Agreement* ECLI:EU:C:2002:231; Opinion 1/09 *Agreement creating a Unified Patent Litigation System* ECLI:EU:C:2011:123.

[27] AG Kokott stressed that without a system of automatic communication of all the cases involving EU Member States to the EU and *vice versa*, the co-respondent mechanism could not function; Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2475, opinion of AG Kokott, para. 224.

[28] Opinion 2/13 cit. para. 241.

[29] 47+1 ad hoc group, Final Report to the CDDH of the Fifth Negotiation Meeting 47+1(2013)008rev2 of 10 June 2013 between the CDDH and the European Commission on the Accession of the European Union to the European Convention on Human Rights, (2013 DAA) art. 3(6); Draft Explanatory Report, *ibid*., Appendix V, para. 66. See the analysis by KS Ziegler, 'The Second Attempt at EU Accession to the ECHR: Opinion

involvement procedure, the CJEU demanded the amendment of the 2013 DAA with regard to the notion of assessment of compatibility so as to encompass equally the interpretation of EU secondary law that was left out of the Draft Explanatory Report, whereas AG Kokott suggested that a clarification would have been sufficient on this point – this point equally highlighting the Luxemburg court's inflexible position.[30]

Questions about the ECtHR's trustworthiness are also indirectly posed in *Opinion 2/13*. Specifically, the CJEU focuses on the issue of mutual trust, raising concerns about how the ECtHR's case law might impede the proper functioning of EU rules in the Area of Freedom, Security and Justice.[31] The CJEU's warnings were surely related to the tensions regarding the asylum case law of the two supranational courts, which were very pronounced at that time.[32] Such tensions exacerbated the CJEU's doubts as to whether the ECtHR shared the same values and norms as the CJEU, and could serve the Union's interests – two very important traits for a trustee. Consequently, the CJEU insinuated that additional constraints upon the ECtHR should be put in place when mutual trust was at play as a guarantee that the latter will not force EU Member States to disregard Union law on human rights grounds. This has been the goal of the EU representation in the renewed negotiations,[33] despite the fact that the case law of the two courts had in the meantime converged and only minor issues remained outstanding.[34] And while the Secretariat proposal reverted to a formula of *non-automatic and mechanical application of mutual trust*, it still attempted to impose specific standards of review on the ECtHR in order to accommodate EU's concerns.[35] Hence, the EU took some time before waiving its distrust over

2/13' in G Butler and R Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022) 755, 765.

[30] Cf. the linguistic difference between Opinion 2/13 cit. para. 243 and opinion AG Kokott cit. paras 132 ff; see also the comments on the CJEU's bad faith reading of the DAA/Explanatory Report on this point in H Labayle and F Sudre, 'L'avis 2/13 de la Cour de justice sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: pavane pour une adhésion défunte?' (2015) Revue française de droit administratif 3, 11; JP Jacqué '*Pride and/or prejudice*? Les lectures possibles de l'avis 2/13 de la Cour de justice' (2015) Cahiers de droit européen 19, 37.

[31] Opinion 2/13 cit. para. 194.

[32] L Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On *Opinion 2/13* on EU Accession to the ECHR' (2015) HRLRev 485, 507 ff.

[33] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 of 25 March 2021 on the Accession of the European Union to the European Convention on Human Rights, para. 4, suggesting a clause that would require EU Member States to "consider…that fundamental rights have been observed by the other EU member states", which would have restricted the evolution of the ECtHR's case law (*Ibid*. para. 7).

[34] Cf. case C-404/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198 para. 92, and ECtHR *Avotiņš v Latvia* App n 17502/07 [23 May 2016] paras 113–6. See also R Lawson, 'Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law since Opinion 2/13' cit.

[35] 47+1 ad hoc group, Report of the 10th Meeting, 47+1(2021)R10 of 2 July 2021 on the Accession of the European Union to the European Convention on Human Rights, Appendix III, 20.

the ECtHR's approach to the principle of mutual trust, acceding to language that could allow the Strasbourg court's case law to evolve.[36]

In the same vein, the CJEU unjustifiably perceived Protocol No. 16 ECHR, providing for the possibility of the highest courts of Member States to submit a request for an advisory opinion to the ECtHR, as antagonistic to the CJEU's role and functions, particularly to the preliminary ruling procedure.[37] This seemed to be an indication that the CJEU did not trust that the ECtHR will prevent Member States from abusing Protocol No. 16.[38] That was confirmed when the EU delegation presented its proposal in the renewed negotiations, where it insisted upon the establishment of a new mechanism, beyond that of prior involvement, that would bestow upon the CJEU the power to assess if a request for an advisory opinion under Protocol No. 16 involved matters of EU law.[39] It was only after persistent objections by various delegations[40] that the EU ceded to the pressure and introduced a proposal that clearly left to the national courts and the ECtHR to determine if the request involved an EU law question.[41] It remains to be seen if the CJEU will find this compromise acceptable when it again takes on the revised DAA.

More broadly, there is a general impression throughout *Opinion 2/13* that the CJEU viewed the ECtHR with suspicion.[42] Writing in his private capacity, then CJEU Judge Malenovský observed, in the aftermath of *Opinion 2/13*, that "*il serait illusoire de croire que la Cour européenne se comportera toujours et invariablement avec retenue et n'affectera jamais le droit de l'Union, les compétences de la Cour de justice et l'acquis de sa jurisprudence*".[43] This is reflected, for instance, in the CJEU's suggestion that the ECtHR will "encourage" EU Member States to lay down higher standards *via* art. 53 ECHR or that the plausibility test for the co-respondent mechanism would necessarily mean an ECtHR assessment on the division of

[36] 47+1 ad hoc group, Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states"), 47+1(2021)14, of 10 September 2021, para. 6; 47+1 ad hoc group, Report of the 12th Negotiation Meeting 47+1(2021)R12 of 10 December 2021, Appendix V.

[37] Opinion 2/13 cit., paras 197–8.

[38] See the observations of AM Guerra Martins, 'Opinion 2/13 of the Court of Justice in the Context of Multilevel Protection of Fundamental Rights and Multilevel Constitutionalism' (2016) Zeitschrift für öffentliches Recht 27, 50.

[39] 47+1 ad hoc group, Report of the 7th Negotiation Meeting 47+1(2020)R7 of 26 November 2020 on the Accession of the European Union of the European Convention on Human Rights, para. 14.

[40] 46+1 ad hoc group, Report of the 13th Negotiation Meeting 46+1(2022)R13 of 13 May 2022, para. 24.

[41] 46+1 ad hoc group, Report of the 14th Negotiation Meeting 46+1(2022)23 of 20 June 2022, para. 8, stressing the responsibility incumbent upon the requesting court and the ECtHR under the new proposal – a sign of trust shown towards both of them.

[42] D Dero-Bugny, *Les rapports entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme* (Bruylant 2015) 99.

[43] J Malenovský, 'Comment tirer parti de l'avis 2/13 de la Cour de l'Union européenne dur l'adhésion à la Convention européenne des droits de l'homme' (2015) RGDIP 705, 712: "it would be illusory to believe that the ECtHR will always and invariably behave with restraint and will never affect Union law, the CJEU's competences and the *acquis* of its case-law".

powers between the EU and the EU Member States.[44] In other words, the CJEU did not try to accommodate some of those difficulties by presenting the ECtHR as a good faith trustee that will be conscious of EU's concerns, as it had shown with the invention of the *Bosphorus* doctrine, and consequently, take those concerns into account when adjudicating cases involving the EU and its Member States after the accession. This is the opposite of what can be observed, for example, in Opinion 1/17. There, the Luxemburg Court scaled back the ambit of the principle of autonomy and adhered to the view of an external dispute settlement body interpreting EU law as a "matter of fact" rather than law.[45]

Moreover, both *Opinion 2/13* and the draft accession instruments showcase the deep distrust of the CJEU and the EU *vis-à-vis* EU Member States.[46] At times, such distrust is palpable. For instance, while art. 4 of the revised Draft Accession Agreement on interparty cases clearly admits that EU Member States "can be expected to act in accordance with Article 344 [TFEU]", a safeguard clause is added that enables the Union to monitor such interparty cases that are brought before the ECtHR and assess if some of them involve – and to what extent – the interpretation or application of EU law.[47] Here, the distrust towards EU Member States leads the Union to closely monitor them, negating in a way the trust that should be the cornerstone of the EU's accession to the ECHR, and diminishing the role of the Strasbourg Court, since it is up to the Union to decide the extent to which an interparty case can be adjudged by the ECtHR.

In the case of advisory opinions under Protocol No. 16 to the ECHR, distrust is reflected in the "downgrading" of the highest courts of EU Member States that should not be considered as highest courts and consequently, as having the power to submit a request for an advisory opinion before the ECtHR, when the question involves the application of European Union law.[48] A different kind of "downgrading" of the national dimension in the EU judicial system takes place in the most challenging issue of the negotiation regarding the Common Foreign and Security Policy (CFSP). In this framework, the CJEU highlighted that judicial review of EU acts that fall outside the review ambit of the Court

[44] Opinion 2/13 cit. paras 189, 194 and 223–4. See, for instance, how stylistically different the approach of AG Kokott is with regard to the plausibility test, while reaching the same conclusion, where she starts by saying that "[e]ven if the ECtHR can generally be expected to approve requests for leave to become a co-respondent, it is not inconceivable that it could, in some cases, deny the plausibility of the reasons put forward in support of such request" (Opinion 2/13 cit., AG Kokott para. 231).

[45] Opinion 1/17 *CETA)* ECLI:EU:C:2019:341 paras 130 and 136; C Contartese and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' (2021) European Papers www.europeanpapers.eu 621, 624; C Rapoport, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) CMLRev 1725. See also J Buckesfeld and RA Wessel, 'The Effect of Opinion 1/17 on the EU-ECHR Draft Accession Agreement: Lessons Learned?' (2024) European Papers 769 www.europeanpapers.eu.

[46] S Besson, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme après l'avis 2/13' (2014) Annuaire suisse de droit européen 423, 445.

[47] Draft Accession Instruments cit. para. 84.

[48] *Ibid*. art. 5.

of Justice should not be exclusively reviewed by a non-EU body,[49] conveniently taking out of the picture national courts,[50] which can review issues pertaining to the CFSP and perhaps even ask for preliminary rulings thereon.[51] Such downgrading of the trustee in reality distorts its role (here, that of national courts) and constitutes one of the most common effects of distrust according to the relevant jurisprudence.[52]

IV. The *mirage* of trust: The ECtHR and the revised Draft Accession Agreement

Whereas the CJEU's distrust has led to further concessions towards it during the negotiation, the ECtHR is required to show a considerable amount of trust on the basis of the draft accession instruments.[53] This aspect is crucial because the Strasbourg court will equally be called upon to express its own opinion on the draft accession instruments.[54] Hence, demands of blindly trusting the Union and its court might render more challenging a positive opinion by the ECtHR. Having said that, trust issues arise at four different levels.

First, the absence of checks and balances, which are essential in judicial cooperation networks when trust is low and must be enhanced,[55] is particularly glaring in the co-respondent mechanism, where the Draft Explanatory Report to the revised DAA introduces two fully self-judging clauses on activating and terminating co-respondentship.[56] Specifically, it provides that EU assessments on those two steps are determinative and authoritative.[57] Moreover, in the case of activation, self-judgment becomes even more palpable,

[49] Opinion 2/13 cit. paras 252–6.

[50] See the different approach by Opinion 2/13 cit., AG Kokott paras 96–101 and 195.

[51] JP Jacqué, 'CJUE-CEDH: 2-0' (2014) RTDE 823, 829. For the evolution of the CJEU's case law on its jurisdiction over CFSP matters, see G Butler, 'Public and Private Enforcement Possibilities within the EU's Common Foreign and Security Policy' in M Scholten (ed), *Research Handbook on the Enforcement of EU Law* (Edward Elgar 2023) 199; C Hillion and RA Wessel, "The Good, the Bad and the Ugly': Three Levels of Judicial Control over the CFSP' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) 65.

[52] R Kramer, 'The Sinister Attribution Error – Paranoid Cognition and Collective Distrust in Organizations' (1994) Motivation and Emotion 199, 225.

[53] Trust is here employed not as a unidirectional parameter, but as a reciprocal tool, where the two judicial institutions, namely the CJEU and the ECtHR, shift from the position of trustor to that of trustee and back in our analysis; for this reciprocal logic, see P Cramér, 'Reflections on the Roles of Mutual Trust in EU Law' in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart 2009) 43, 43.

[54] 46+1 ad hoc group, Report of the 15th Negotiation Meeting 46+1(2022)R15 of 7 October 2022, para. 24.

[55] P Popelier, M Glavina, F Baldan and E van Zimmeren, 'A Research Agenda for Trust and Distrust in a Multilevel Judicial System' cit. 359.

[56] On the problematic aspect of self-judging clauses generally, see ICJ *Certain Norwegian Loans (France v Norway)* [6 July 1957], separate opinion of judge Sir Hersch Lauterpacht 48; S Schill and R Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) MaxPlanckUNYB 61.

[57] Draft Accession Instruments cit. paras 61, 66, 76.

since the report provides that in case of objections by the applicant, the EU is not subjected to an obligation to reconsider its assessment in light of the critical comments but enjoys discretion as to whether to do so or even to reply thereto in the first place.[58] Such is the extent of self-judgment, that one wonders what is the purpose of the reasoned opinion by the EU, when there will be no judicial instance that can review this reasoning and override it.[59]

One might pose the question what will happen if a bad faith Union or its court determine that the co-respondent mechanism should not be activated in a case, where it seems evident or necessary, for the adoption of the most effective remedial action, to adjudicate on the basis of the co-respondent mechanism and for the Union and its MS to jointly share responsibility.[60] Moreover, how can the ECtHR react if the Union decides to terminate the co-respondent mechanism in order to avoid being found in violation of the ECHR? Granting to the one that will be found accountable the power to decide whether a gap in accountability should be filled[61] might not be the best strategy for the effective protection of human rights after the EU's accession to the ECHR. Besides, such a solution might undermine the compulsory jurisdiction of the ECtHR,[62] as I explain elsewhere.[63]

Second, the effectiveness of the co-respondent mechanism and the fairness of prior involvement hinge on soft promises of the trustee, which this time is the CJEU and the Union, more generally. The draft declaration in Appendix 2 proves this point, since the Union simply vows that it will ensure to become co-respondent when the conditions of art. 3(2) of the revised DAA are fulfilled or that other High Contracting Parties to the draft accession instruments will be able to submit observations when the CJEU will be assessing EU law's compatibility with the Convention according to art. 3(7) of the revised DAA on prior involvement.[64] This interpretation of the draft declaration is, in a way, confirmed by AG Kokott, who in the previous iteration of the draft agreement had considered that no contracting party was obliged to become co-respondent under the 2013 DAA.[65]

[58] *Ibid.* para. 63.

[59] For instance, *ibid.* para. 66.

[60] See D Franklin and VP Tzevelekos, 'The 2023 Draft Agreement on the EU Accession to the ECHR: Possible "Gaps" and "Cracks" in the Co-respondent Mechanism and the Implications for the *Bosphorus* Doctrine' (2024) European Papers 745 www.europeanpapers.eu.

[61] *Ibid*. para. 47.

[62] T Lock, 'The Future of EU Accession to the ECHR after Opinion 2/13: Is it still possible and is it still desirable?' (2015) EuConst 239, 249.

[63] V Pergantis, 'The Third Party Effects of IO Internal Rules for Responsibility Allocation with Reference to the EU Accession to the ECHR: A *Lex Specialis* Torn between Third Party Consent and Human Rights Safeguards?' in R Deplano, R Collins and A Berkes (eds), *Reassessing the Articles on the Responsibility of International Organizations: From Theory to Practice* (Edward Elgar 2024, forthcoming).

[64] Draft Accession Instruments cit. Annex 2.

[65] Opinion 2/13 cit., AG Kokott para. 217, though there is some ambivalence in her stance (*Ibid*., para. 219).

In other words, the Union is granted wide discretion without having shown beforehand that it is a trustworthy partner.[66]

Third, at various instances, the explanatory report defers the detailed regulation of various matters to EU internal rules,[67] creating gaps in the whole picture of the EU accession that render the ECtHR's assessment of the agreement much more difficult. From the beginning, the dilemma was whether the EU should externalise its internal power struggles and reflect them on the agreement or whether it should internalise issues that touched upon the function of the external dispute settlement mechanism. Both choices (externalising problems or controlling the external judicial actor) highlight a heightened distrust. *Opinion 2/13* surprisingly insisted on further externalisation,[68] but the negotiators opted for increased internalisation as a solution to the impasse of the negative CJEU opinion.

Specifically, this idea of internalisation of processes at the EU level was floated around already before *Opinion 2/13* and repeated afterwards,[69] and when the renewed negotiations were launched, it was embraced as a solution both by the Chair's paper[70] and, by non-EU Member States of the Council of Europe.[71] These matters include, for instance, the activation and termination of the co-respondent mechanism and, consequently, also questions of attribution, or the more innocuous issue of the referral to the Grand Chamber.[72] The same applies for the prior involvement mechanism or the problem of interparty cases, where procedures and assessments pertain exclusively to the EU realm.[73]

In the last two situations, the ECtHR must show trust under conditions that are problematic in respect of due process guarantees. For instance, in both cases it is not clear which EU organ will proceed to the requisite assessments,[74] and there are ambiguities on the procedure and the timeframe. Regarding interparty disputes, the Draft Explanatory Report

[66] A Baier, 'Trust and Antitrust' (1986) Ethics 231, 236-238.

[67] Draft Accession Instruments cit. para. 25.

[68] It was surprising, because the more it is included in the DAA the broader ECtHR's review powers thereon would be; see V Pergantis and S Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question. Between a Rock and a Hard Place' in C Kaddous, N Levrat, and RA Wessel (eds), *The EU and Its Member States' Joint Participation in International Agreements* (Hart 2022) 231, 246.

[69] T Lock, 'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR' (2012) Yearbook of European Law 162, 171; B de Witte and S Imamovic, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) ELR 683, 698-699; JP Jacqué, 'Encore un effort camarades…l'adhésion de l'Union à la Convention européenne des droits de l'homme est toujours à votre portée' (2020) Europe des Droits & Libertés/Europe of Rights & Liberties 27, 35.

[70] 47+1 ad hoc group, Report of the Sixth Negotiation Meeting 47+1(2020)2 of 31 August 2020, paras 26 and 41.

[71] 47+1 ad hoc group, Report of the Sixth Negotiation Meeting 47+1(2020)R6 of 22 October 2020, Appendix III 21.

[72] Draft Accession Instruments cit. para. 72.

[73] *Ibid*. paras 75 and 84.

[74] See, however, 46+1 ad hoc group, Report of the 17th Negotiation Meeting 46+1(2023)R17 of 2 February 2023, para. 19, where the EU representative insinuates that the assessment for prior involvement will be made by the CJEU.

provides both for "sufficient time" to make the assessment and for avoiding "undue delays", whereas for prior involvement it is stipulated that the EU would make the necessary assessment at the time of examining the need to trigger the co-respondent mechanism "[i]nsofar as possible".[75] Ultimately, this mobilisation and claim for participation in the assessment procedure on the part of the EU is a clear sign of distrust towards the way the ECtHR is expected to exercise its functions after accession. In this context, the ECtHR is called upon to trust that the EU internal procedures will be respectful of the essence and judicial function of the ECHR. In other words, the Strasbourg Court is asked to show trust without having any information whatsoever on how the EU will shape the relevant rules, placing the ECtHR in a unique position of extraordinary vulnerability.[76]

Finally, the ECtHR and the non-EU Member States of the Council of Europe are perhaps most exposed to a claim of unconditional trust in the case of the Common Foreign and Security Policy conundrum.[77] There, a protracted negotiation led to an EU proposal, according to which CFSP acts would be attributed by the Union to one or more EU Member States in case the CJEU determines that it lacks jurisdiction to review them,[78] a proposal heavily criticised by various delegations and finally dropped.[79] Instead, under the current state of affairs the negotiating parties have delegated to the EU the task to resolve the issue *internally*, carving it out of the work of the "46+1 Group". These stakeholders will only need to be informed of the solution reached and consider the way the issue was arranged, meaning that even if there are objections, any further solution will always stem from intra-EU negotiations.[80]

This option is unsatisfactory because it removes the issue of the CFSP altogether from the negotiations and, *perhaps*, from the text of the revised DAA, not allowing the ECtHR to review or comment upon the solution reached, since its eventual opinion will possibly concern only the DAA, excluding any arrangements external to it. In this case, the ECtHR's trust is ethereal or, alternatively, blind, since there is no substance to what the trustee has undertaken to perform, on the basis of which the trustor can then exercise control and measure said performance.

[75] Draft Accession Instruments cit. paras 76 and 84, respectively.

[76] The vague *renvoi* to internalization had caused concern even to the EU judicial organs when they assessed the 2013 DAA; see Opinion 2/13 cit., AG Kokott paras 20–2; Opinion 2/13 cit. paras 71 and 92.

[77] Generally, on this conundrum, see SØ Johansen, 'The (Im)possibility of a CFSP "Internal Solution"' (2024) European Papers 783 www.europeanpapers.eu.

[78] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 cit. para. 11; 47+1 ad hoc group, Negotiation Document of the 12th Meeting on the Accession of the European Union to the European Convention on Human Rights submitted by the European Union, Proposals in the Area of Basket 4 ("Common Foreign and Security Policy") 3 ff.

[79] 47+1 ad hoc group, Report of the Ninth Negotiation Meeting 47+1(2021)R9 cit. paras 12–3.

[80] Steering Committee for Human Rights, Interim Report to the Committee of Ministers for information, on the negotiations on the accession of the European Union to the European Convention on Human Rights, including the revised draft accession instruments in appendix, CDDH(2023)R_EXTRA ADDENDUM, 4 April 2023, p. 4, para. 8.

V. The road ahead: (re-)building trust *post*-accession

Having examined in detail the trust dynamics between the CJEU and the ECtHR as well as other involved actors in relation to *Opinion 2/13* and the current draft accession instruments, it is appropriate to (re)build trust *post*-accession. There is no denying that a lot needs to be done to embed trust, yet glimpses of trust are already present in the draft accession instruments. In relation to Protocol No. 16, for instance, the EU delegation accepted the assessment about whether issues of EU law are implicated to be made by the competent national courts and the ECtHR. Moreover, in the case of the prior involvement mechanism the EU representative has objected to the idea of imposing strict time limits on the CJEU by stating that the two courts "could be relied to act and co-operate in good faith". But what exactly does good faith entail?

On a micro-level, embedding trust will depend on how the various mechanisms established by the draft accession instruments will function. Respecting due process in the sense of short delays[81] and fully reasoned assessments on the part of the EU in the case of co-respondentship triggering and termination, prior involvement initiation and inter-party disputes, is of primordial importance. Moreover, the CJEU can gradually articulate a series of doctrines that will give more leeway to the ECtHR in the aforementioned assessments, in the mould of the *acte clair* and *acte éclairé* doctrines,[82] especially concerning the co-respondent mechanism. Shifting responsibilities back to the ECtHR will be a sign of increased trust and will allow the Strasbourg Court to reciprocate.

Conversely, the ECtHR's *post*-accession take on the *Bosphorus* doctrine[83] and the principle of mutual trust[84] will equally contribute to enhancing or undermining trust. In respect of the *Bosphorus* doctrine, recently the ECtHR has twice warned, though ambivalently,[85] that the European Economic Area (EEA) Agreement and its law do not ensure equivalent human

[81] For the idea that long procedures frustrate trust, see P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' cit. 61.

[82] See, case 283/81 *CILFIT v Ministero della Sanità* ECLI:EU:C:1982:335 paras 16–21 and 14, respectively.

[83] See, in this *Special Section*, D Franklin and VP Tzevelekos, 'The 2023 Draft Agreement on the EU Accession to the ECHR: Possible "Gaps" and "Cracks" in the Co-respondent Mechanism and the Implications for the *Bosphorus* Doctrine' cit.

[84] A Rosas, 'The Court of Justice of the European Union: A Human Rights Institution?' (2022) Journal of Human Rights Practice 204, 210-211.

[85] ECtHR *Konkurrenten.No AS v Norway* App no 47341/15 [5 November 2019] para. 43, where the lack of equivalence was pronounced in an *obiter dictum*; ECtHR *Norwegian Confederation of Trade Union (LO) and Norwegian Transport Workers' Union (NTF) v Norway* App no 45487/17 [10 June 2021] para. 108, where the Court declares that there is no equivalence in the case at hand, namely *prima facie*, leaving a full review of equivalence for another occasion. Scholars have also split between recognizing equivalence (HH Fredriksen and SØ Johansen, 'The EEA Agreement as a Jack-in-the-box in the Relationship between the CJEU and the European Court of Human Rights?' (2020) European Papers www.europeanpapers.eu 707, 735) and rejecting it (U Lattanzi, 'The Inapplicability of the *Bosphorus* Presumption to the European Economic Area Agreement: A Risk for the Coherence of Legal Systems in Europe' (2023) EuConst 441, 459).

rights protection. Consequently, it proceeded in the context of the EEA Agreement to an indirect, full review of EU law *qua* EEA law regarding the strained relationship between human rights and fundamental freedoms.[86] Should the Strasbourg Court recognise equivalence for the EEA Agreement *post*-accession, thus narrowing its standard of review only to manifest deficiencies, this could be seen as a conciliatory gesture by the Luxembourg court. Moreover, granting a wide margin of appreciation to the EU *post*-accession, when the latter "balances" fundamental rights and fundamental economic freedoms, will reduce the distrust remaining in the relations between the two courts.[87]

Regarding mutual trust, the jurisprudential evolution of the relationship between this principle and fundamental rights will equally impact on the trust dynamics between the two institutions. Whereas only minor differences remain in their respective case law on this front, there is still potential for further building or undermining trust. Two points are worth considering. First, and very schematically, the CJEU persistently pursues a two-step methodology for the rebuttal of the presumption of other EU Member States' human rights compliance, which is premised on mutual trust, requiring both systemic or generalised deficiencies *and* individual risk. Conversely, the ECtHR consistently declares that cooperation premised on mutual trust should be suspended when there is an individual risk for the basic fundamental rights of the applicant, even if there are no systemic or generalised deficiencies observed.[88] This difference might remain a source of tension *post*-accession, thus weakening trust. Second, it remains to be seen whether the case law of the ECtHR could create awareness about systemic violations of fundamental rights by an EU Member State, on which the CJEU and the EU, in general, could rely in order to suspend mutual trust and to initiate the art. 7 TEU procedures, particularly on instances of rule of law backsliding.[89] Such a development could serve as a trust-building mechanism,[90] though it must be observed that the ECtHR's contribution to the determination of systemic deficiencies is rather minimal considering that its main function revolves around the paradigm of individual rather than collective/constitutional justice.[91]

[86] HP Graver, 'The *Holship* Ruling of the ECtHR and the Protection of Fundamental Rights in Europe' (2022) ERA Forum 19.

[87] H Ellingsen, 'Reconciling Fundamental Social Rights and Economic Freedoms; The ECtHR's Ruling in *LO and NTF v Norway* (the *Holship* Case)' (2022) CMLRev 583, 601-602.

[88] Cf. Case C-158/21 *Puig Gordi and Others* ECLI:EU:C:2023:57 paras 109–11; ECtHR *Bivolaru and Moldovan v France* App nos 40324/16 and 12623/17 [25 March 2021] paras 106 and 114. See also the pertinent observations by J Callewaert, 'Two-Step Examination of Potential Violations of Fundamental Rights in the Issuing Member State: Towards "Systemic or Generalised" Differences with Strasbourg? (13 September 2022) johan-callewaert.eu.

[89] L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3, 41.

[90] I would like to thank Professor Andreas Føllesdal for suggesting this point.

[91] P Leach, 'Resolving Systemic Human Rights Violations – Assessing the European Court's Pilot Judgment Procedure' in S Besson (ed), *The European Court of Human Rights after Protocol 14 – Preliminary Assessment and Perspectives* (Schulthess 2011) 223, 227 and, specifically, on rule of law backsliding, L Potvin-Solis, 'L'équilibre fragile des rapports entre le droit de l'Union et le système de la CEDH' in D Petrlik, M Bobek, JM

Furthermore, an improved framework of direct and indirect dialogue should be established with a view to increasing cross-references to the case law of the two courts.[92] In this context, the ECtHR will also need to abandon its piecemeal approach and proceed to a more principled evolution of its case law, creating clear precedents that can be relied upon by the CJEU. To put it differently, jurisprudential consistency is an indispensable condition for building trust between judicial institutions,[93] and this should be kept in mind by both courts, particularly the ECtHR, which has a penchant for tailor-made reasonings.[94] Moreover, judicial dialogue equally means regular exchanges of views between the judges of the two courts, which can be further systematised despite their current frequency.[95] For example, the *Dialogue between Judges* initiative by the ECtHR can be replicated with an exclusive focus on the CJEU.[96]

On a macro-level, the CJEU must recognise and embrace the partial value incongruence that may exist between itself and the ECtHR, the first prioritising the fundamental freedoms of the internal market whereas the latter is dedicated to the protection of fundamental rights.[97] Accepting a certain shift of emphasis towards the second goal will facilitate the reception of the Strasbourg case law by the CJEU and will allow the cooperation of the two supranational courts to move forward.[98]

VI. Conclusion

The EU's accession to the ECHR has been a complex and at times politically charged topic. Questions of trust and distrust between the two protagonists – namely, the supranational courts that will be called upon to cooperate for the enhancement of human rights protection in Europe (but also more generally between the Union and its Member States) – are extremely important for the successful conclusion of this second round of negotiations.

Passer and A Masson (eds), *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiri Malenovsky* (Bruylant 2020) 381, 403.

[92] For the current, insufficient reference to the ECtHR's case law by the CJEU, see S O'Leary, 'The EU Charter Ten Years On: A View from Strasbourg' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 37, 42-43; V Davio and E Muir, 'Introduction. The ECtHR in the ECJ's Case Law Post-Charter: A Dual Perspective' (2023) European Papers www.europeanpapers.eu 317, 320.

[93] P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' cit. 61.

[94] See E Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights' (2020) EJIL 73, 84, who argues that tailor-made reasoning is the default function of the ECtHR.

[95] See Copenhagen Declaration [2018], para. 63. The last meeting took place on 16 October 2023.

[96] For the last relevant document, see ECtHR, Proceedings of the Seminar of 27 January 2023, 'Judges preserving democracy through the protection of human rights', www.echr.coe.int.

[97] Opinion 2/13 cit., AG Kokott. para. 206.

[98] P Popelier and C van de Heyning, 'Constitutional Dialogue as an Expression of Trust and Distrust in Multilevel Governance' cit. 69.

Nevertheless, the obsession of control that underpins the CJEU's *Opinion 2/13*[99] and many of the EU proposals in the renewed negotiation does not bode well for the establishment and furtherance of trust between the two institutions. Additionally, the ECtHR is called upon to show blind trust to the EU and its court under the revised DAA. Ultimately, trust will be (re)built only if the CJEU and the ECtHR adopt a constructive attitude by respecting due process/rule of law guarantees or showcasing jurisprudential consistency and accommodating mutual trust, respectively. It thus remains to be seen if the revised accession instruments will contribute to the embedment of trust and to a new chapter of cooperation for the protection of human rights between the CJEU and the ECtHR.

[99] N Petit and J Pilorge-Vrancken, 'Avis 2/13 de la CJUE: l'obsession du contrôle?' (2014) Revue des affaires européennes 815.