
The EU Accession to the ECHR and the Responsibility Question

*Between a Rock and a Hard Place**

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I. Introduction

The relaunch of the negotiations on EU accession to the ECHR elicits an inescapable feeling of *dejà-vu*, in that the EU's negotiation directives are replete with references to the conditions of accession laid down in Article 6§2 TEU and Protocol No 8 to the Lisbon Treaty, as well as to the additional issues raised in Opinion 2/13 by the CJEU.¹ It is worth recalling those terms, since they illustrate the near-impossible task facing the negotiators. Specifically, any adjustments to the ECHR regime in order to accommodate the Union's accession thereto must be limited to what is strictly necessary,² while respecting as much as possible the equality between the ECHR High Contracting Parties (the principle of equal footing).³ Moreover, the draft accession agreement (DAA) should preserve the specific characteristics of the Union, addressing applications to the correct respondent, as well as not affect EU competences or EU institutions' powers. In other words, it must protect the autonomy of the EU legal order.⁴

*The text takes into account developments until December 2020. The authors acknowledge the editing assistance of Christos Zois.

¹See Presidency of EU Council, 'Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)' (20 September 2019) EU Council Doc 12349/19, para 1, referring to the previous negotiation directives (Council of EU, 'Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR)' (8 June 2010) EU Council Doc 10817/10 declassified on 10 June 2015), Annex II, para 1), which mentioned the above documents, and to the CJEU Opinion 2/13 (paras 3ff).

²Ibid, EU Council Doc 12349/19, para 3.

³Presidency of EU Council, 'Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of Play' (2 October 2015) EU Council Doc 12528/15, para 17, <https://db.eurocrim.org/db/en/doc/2379.pdf>, last accessed 4 September 2021.

⁴Whereas autonomy has been placed at the heart of the CJEU's negative opinion on EU accession to the ECHR, it has been argued that autonomy's scope should be circumscribed in the case at hand because

These autonomy troubles are a direct consequence of the fact that, post-accession, the Union will become party to the ECHR alongside its Member States – effectively transforming the ECHR into a mixed agreement that strings together areas of exclusive or shared (coexistent and concurrent) competences, as well as parallel ones.⁵ That said, even pre-accession the ECHR constitutes an example of indirect joint participation because EU decisions may impact Member States' ECHR obligations.⁶ Nevertheless, the questions of autonomy and competence division will be raised with urgency post-accession since the ECtHR may then be called on to decide cases where both the Union and (one or more) Member States are co-respondents.

This contribution will explore the effects of the principle of autonomy on accession, focusing particularly on its interaction with the DAA's responsibility allocation provisions. Initially, we explain the cause of the CJEU's 2014 negative opinion, as far as it concerns issues of responsibility. To do so, we first outline the contours of the EU law principle of autonomy as applied to international dispute settlement mechanisms in treaties where the Union participates jointly with its Member States (section II). We then attempt to untangle the rather convoluted provisions on the attribution of conduct and shared responsibility in the 2013 DAA⁷ and explain why the CJEU found them to be a threat to the autonomy of the EU legal order (section III).⁸ We argue that any allocation of responsibility by the ECtHR between the Union and its Member States will necessarily imply an assessment of competence allocation between them. Consequently, the only obvious option for avoiding this appears to be the further simplification of these rules, so that they can be applied more or less automatically.

EU primary law *via* Art 6 para 2 TEU imposes upon the Union a duty to accede to the Convention. See B de Witte and S Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *EL Rev* 683, 696; T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' (2011) 48 *CML Rev* 1025, 1033. Nevertheless, it must be borne in mind that the obligation in the said Article is an imperfect one since its fulfilment does not depend on the Union and its Member States alone (see A Łazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 *German Law Journal* 179, 183) or, alternatively, it is an obligation of means, not one of result, meaning that if the Union and its Member States make every effort possible to accede, the obligation is not breached in case of an outcome of non-accession, provided an even theoretical option of accession remains on the table (L Besselink et al, 'A Constitutional Moment: Acceding to the ECHR (or not)' (2015) 11 *European Constitutional Law Review* 2, 3; R Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50 *CML Rev* 1305, 1305).

⁵For this classification, see A Rosas, 'Mixity Past, Present and Future: Some Observations' in M Chamon and I Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Leiden, Koninklijke Brill NV, 2020) 8.

⁶See the chapter by Casteleiro and Contartese in this volume, section I.

⁷Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, reproduced in CDDH 47+1 Ad Hoc Negotiation Group, 'Final Report to the CDDH' (5 April 2013) CoE Doc 47+1(2013)008 rev2, App I (hereinafter *2013 DAA*). Any reference to the 2013 DAA indicates this version, while the acronym DAA is employed as a generic term and as a reference to pre- and past-2013 DAA versions.

⁸We use the term 'shared responsibility' as an umbrella term, in accordance with how it is defined in Principles 2 and 3 in A Nollkaemper et al, 'Guiding Principles of Shared Responsibility in International Law' (2020) 31 *EJIL* 15.

This will, in turn, shift any requisite regulation of the responsibility allocation question and the consequences of wrongfulness to EU internal rules. Having explained how such a simplified system may operate, we will then evaluate whether it would sufficiently preserve the idea of the EU acceding to the Convention on equal footing (section IV). We conclude that such a simplified system has its own set of problems, which cannot be fully mitigated. The DAA negotiators are thus stuck in no man's land, with no obvious way out. The principle of autonomy thus serves to hinder the joint participation of the Union and its Member States in treaties that confer rights on individuals and give them access to judicial dispute settlement mechanisms.

II. The Contours of the Principle of Autonomy vis-à-vis International Dispute Settlement Mechanisms

The principle of autonomy of the EU legal order has attracted much attention over the last few years, becoming a cornerstone of EU external relations law. In a series of cases, the CJEU has, by elaborating this principle, effectively shaped the relationship between the Union's legal order and the international legal order.

In particular, autonomy has played a crucial role in determining the compatibility of international dispute settlement mechanisms with EU law. On the one hand, the Court has repeatedly declared that an international agreement providing for a judicial system of dispute settlement is not *in principle* contrary to the autonomy of the EU legal order, since the competence to conclude international agreements 'necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards interpretation and application of its provisions'.⁹ On the other hand, it has gone to great lengths to preserve the nature of the EU legal order and the scope of its authority to interpret and apply EU law.

Three main aspects of the CJEU's autonomy jurisprudence are directly relevant to mixed agreements containing dispute settlement mechanisms – which is what the ECHR will become post-accession.¹⁰

Firstly, the CJEU insists that no external dispute settlement mechanism can be granted the power to bind the EU and its Member States to a particular interpretation of Union law included in an external agreement, either through direct *renvoi* or in the form of provisions with a wording identical to Union law. In the case of the Agreement on the European Economic Area, the Court of Justice found it unacceptable that the EEA Court would have had the power to interpret *core provisions* of Community law incorporated virtually *verbatim* in the EEA Agreement. That would have endangered

⁹ Opinion 1/91 (*EEA Court*) [1991] ECR I-06079, paras 40 and 70 [Opinion 1/91]; Opinion 1/09 (*Patent Court*) [2011] ECR I-01137, paras 74–76 [Opinion 1/09]; Opinion 1/17 (*CETA*) [2019] OJ C 369, para 106 [Opinion 1/17]; Opinion 2/13 (*EU accession to the ECHR*) [2015] OJ C 65/2, paras 182–83 [Opinion 2/13].

¹⁰ T Lock, 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg' (2010) 35 *EL Rev* 777, 796.

the interpretational uniformity of Union law, prejudicing the CJEU's exclusive and definitive interpretational authority in relation to corresponding Community rules.¹¹

This requirement was recently revisited by the CJEU in *Opinion 1/17*. In confirming the compatibility of the CETA and its Tribunal with Union law, the CJEU stressed that the said Tribunal only has the power to interpret the CETA and cannot determine 'the legality of a measure ... under the domestic law of a party'. This domestic law (and reflectively Union law) can be considered only as a matter of fact by the Tribunal when assessing the consistency of a measure with the CETA (Article 8.31.2 CETA).¹² Accordingly, the CETA does not impinge upon the autonomy of the Union legal order since 'any meaning given to domestic law by the Tribunal shall not be binding upon the courts or authorities of that Party' (and reflectively upon the CJEU).¹³

To what extent are these findings applicable to the case of the EU accession to the ECHR is yet unclear. The ECtHR, in its long-established case-law, avoids interpreting (and is obviously precluded from invalidating) domestic law.¹⁴ Yet, the ECtHR does assess whether the interpretation offered by domestic authorities is consistent with the ECHR, and, at times, it might review that interpretation by offering its own.¹⁵ The latter may also occur post-accession vis-à-vis Union law. Even in those cases, however, its judgments would not 'have the effect of binding the [Union] and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of [Union] law', which is the litmus test applied by the CJEU when reviewing the compatibility of mixed agreements with the EU legal system.¹⁶ In other words, they will bind the Union only *externally*, as an international legal person. How far will the EU and its Court be bound *within* the Union's internal legal order to follow ECtHR judgments is strictly speaking an issue of EU law, over which the CJEU is the final arbiter. We will, therefore, revert to this issue in section IV when discussing whether further internalising the responsibility question is the way forward.

Secondly, the principle of autonomy requires that international agreements providing for the establishment of a dispute settlement mechanism do not change the essential powers of EU institutions. Thus, for instance, if a clause is inserted in an agreement limiting the function of the CJEU within that agreement to that of an advisory body, this could violate EU law.¹⁷ EU accession to the ECHR does not appear to cause issues in this regard. While the so-called 'prior involvement procedure' would, in practice, give the CJEU a new power – to give preliminary rulings to the ECtHR – it is not an inherent threat to autonomy. Hence, the CJEU in *Opinion 2/13* found fault with this

¹¹ *Opinion 1/91*, para 29; B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Implications* (Oxford, Hart Publishing, 2014) 33, 37.

¹² *Opinion 1/17*, paras 123 and 130.

¹³ *Ibid.*, para 131.

¹⁴ F Benoît-Rohmer, 'L'adhésion à la Convention européenne des Droits de l'Homme, un travail de Pénélope?' (2015) 51 *Revue Trimestrielle de Droit Européen* 593, 604.

¹⁵ *Nejdet Şahin and Perihan Şahin v Turkey* App no 13279/05 (GC, 20 October 2011), para 49, with further references.

¹⁶ *Opinion 1/00 Proposed Agreement Between the European Community and Non-Member States on the Establishment of a European Common Aviation Area* [2002] ECR I-03493, para 15.

¹⁷ *Opinion 1/91*, paras 61–65.

procedure only in relation to an ambiguity that had crept into the Explanatory Report to the 2013 DAA.¹⁸

Then there is a third, and for our purposes, most crucial, aspect of the principle of autonomy: The international agreement cannot confer upon the external dispute settlement mechanism the jurisdiction to rule on the competence allocation between the Union and its Member States. The CJEU has clearly said so when confronted with the EEA Agreement, which stipulated that the EEA Court would settle disputes between Contracting Parties (Article 96(1)(a) EEA), which translated into a power to decide whether ‘Contracting Party’ meant the Union and the Member States jointly, or each one separately. This stipulation, the CJEU held, granted the EEA Court the power to determine the division of competences between the EU and the Member States, thus undermining the exclusive jurisdiction of the CJEU over such matters.¹⁹ Since the judgments of such an external dispute settlement mechanism may bind the Union and its Member States, the principle of autonomy requires that the CJEU remain the exclusive arbiter with regard to competence allocation.²⁰

The CJEU has revisited this requirement on multiple occasions, most recently in *Opinion 1/17*. There, the CJEU ruled that CETA Article 8.21, which stipulates that it is up to the Union to determine in a binding fashion who will be the respondent in an application by an investor before the CETA Tribunal, is compatible with Union law since it preserves the autonomy of the Union legal order and the exclusive jurisdiction of the CJEU in matters of competence allocation and responsibility determination.²¹

Post-accession, the ECtHR would have the final say on allocating responsibility between the Union and its Member States unless the DAA provides otherwise. In fact, even at present (pre-accession), where the EU is not a Contracting Party to the ECHR, the ECtHR must occasionally assess the existence and scope of the EU Member State discretion under Union law. That is because a key requirement for applying the ECtHR’s famous ‘equivalent protection doctrine’ to a case is that the respondent state acted in compliance with strict legal obligations flowing from Union law.²² This seems problematic in light of the existing CJEU case-law on the principle of autonomy.²³

¹⁸ According to the text of the relevant paragraph, the CJEU was only to rule on the ‘validity’ of secondary law; see Draft Explanatory Report to the 2013 DAA, para 66, annexed to *Final Report* (n 7) [hereinafter *Draft Explanatory Report*]. The CJEU read this as narrowly as possible, so as to exclude interpretation of secondary law; see Opinion 2/13, paras 242–48. Renewed negotiations from 2020 onwards are in the process of remedying this inadvertent omission; see CDDH 47+1 Ad Hoc Negotiation Group, ‘Report of the Seventh Negotiation Meeting’ (26 November 2020), §11.

¹⁹ Opinion 1/91, paras 34–35.

²⁰ I Govaere, ‘Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order’ in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, Hart Publishing, 2010) 187, 193.

²¹ Opinion 1/17, para 132; see also P Koutrakos, ‘The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle’ in ECB, *Building Bridges: Central Banking Law in an Interconnected World* (ECB Legal Conference, 2019) 90, 97.

²² *Bosphorus Airways v Ireland* [GC], no 45036/98 (2005) paras 154–55; *MSS v Belgium and Greece* [GC], no 30696/09 (2011) para 338.

²³ This insistence by the CJEU on being final arbiter over the responsibility allocation between the Union and its Member States under international agreements has been fiercely criticised, notably for ‘confus[ing] attribution of international responsibility with the EU law division of powers’; see P Eeckhout, ‘Opinion 2/13

This need to preserve the autonomy of the EU legal order with regard to responsibility allocation was also at the forefront of the negotiators' minds in 2013. Indeed, the joint participation of the Union and its Member States in international agreements with judicial dispute resolution procedures is bound to challenge the CJEU's strict notion of autonomy. In the next section, we will analyse how the 2013 DAA attempted to preserve the autonomy of Union law and explain why the CJEU rejected that attempt.

III. The 2013 DAA: Preserving Autonomy with a Light Touch on the Responsibility Question

Drafting provisions on responsibility allocation in the 2013 DAA was no easy task. That is because the strict conditions concerning responsibility allocation that the CJEU has set for Union participation in international agreements providing for external judicial control of Union actions are exacerbated by two specific traits of the EU legal order. First, the delineation of competences between the Union and its Member States constantly evolves on the basis of the successive amendments of EU treaties, the ever-expanding exercise of powers by the EU in areas of shared competences, and the prolific case-law of the CJEU. The complexity is reflected in the Union's external relations, where the tool of mixed agreements is favoured in case of disputes between the Union and the Member States concerning the division of competences.²⁴ However, mixity simply shifts intra-EU competence allocation wrangling to the field of external relations, where the Union's treaty partners – and, as the case may be, individuals to whom the treaty confers rights – are confronted with increased legal uncertainty over who will be implementing the agreement and who will be responsible in the case of a breach of the agreement.²⁵

Second, this uncertain state of affairs is compounded by the so-called 'executive federalism' that imbues the implementation of Union policies.²⁶ What distinguishes the EU from other international organisations is that while the Union exercises regulatory powers to an unprecedented extent, much of the implementation thereof is undertaken by Member State authorities. As a result, it is not always clear whether the Union, who adopted the act under consideration, or the Member States that have implemented it, should be responsible for a consequent violation of an international obligation.

This entanglement was evident in the EU's comments to the Draft Articles on the Responsibility of International Organizations (DARIO) of the International Law

on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 *Fordham International Law Journal* 955, 981–85. While this view has its merits, we assume, for the purposes of this paper, that the CJEU will follow its own case law.

²⁴ E Paasivirta and PJ Kuijper, 'Does One Size Fit All? The European Community and the Responsibility of International Organizations' (2005) 36 *Netherlands Yearbook of International Law* 169, 177–78.

²⁵ A Delgado Casteleiro, 'The International Responsibility of the European Union – The EU Perspective: Between Pragmatism and Proceduralisation' (2013) 15 *Cambridge Yearbook of European Legal Studies* 563, 573; M Chamon and I Govaere, 'Introduction: Facultative Mixity, More than Just a Childhood Disease of EU Law?' in Chamon and Govaere (n 5) 1, 6.

²⁶ See Casteleiro and Contartese (n 6) s 2.2 b).

Commission (ILC).²⁷ There, while the ILC opted for ‘an organic model’ on the attribution of conduct, reflected in Articles 6 and 7 DARIO, the latter supplemented by a factual criterion of ‘effective control’,²⁸ the EU argued that on the basis of the Union’s particular traits responsibility should lie where the competence is according to the internal rules of the organisation.²⁹

However, competence allocation may be irrelevant for purposes of attribution. This is most obvious in the case of *ultra vires* acts, which are attributable as long as they are performed by an organ of the state or organisation in question.³⁰ This follows from the fact that the attribution rules concern the link between certain *conduct* (acts and omissions) and (one or more) *international legal persons*.³¹ What matters for attribution is who performed the conduct in question and on whose behalf. Competence allocation is, of course, a relevant factor when determining to whom to attribute a course of conduct, but it is not alone decisive. It simply does not tell the full story. Furthermore, in certain sub-fields of international law, various criteria have been suggested for determining the Union’s responsibility, such as the existence of EU norms governing the subject-matter at hand;³² the degree of normative control exercised by the EU over the Member States and the consequent degree of discretion enjoyed by the latter;³³ or the division of competences as declared to the other contracting parties, which might eventually diverge from the actual competence allocation within the EU legal order.³⁴ Still, attribution is determined factually in reliance on the act and/or the provision at the origin of the breach.³⁵

It is on such a factual basis that Article 1 2013 DAA is apparently construed. The first sentence of Article 1(3) stipulates that ‘acts, measures or omissions of [EU] institutions, bodies, offices or agencies, or of persons acting on their behalf’ shall raise the Union’s responsibility. Conversely, the first sentence of Article 1(4) states that ‘acts, measures

²⁷ ‘Report of the International Law Commission on the Work of its Sixty-third Session (26 April–3 June and 4 July–12 August 2011)’ [2011] ILCYb II/2, Ch 5 (DARIO).

²⁸ F Salerno, ‘International Responsibility for the Conduct of “Blue Helmets”: Exploring the Organic Link’ in M Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden, Martinus Nijhoff, 2013) 415, 423.

²⁹ ‘Documents of the Fifty-sixth Session’ [2004] ILCYb vol II/1, 26, paras 1–5. See also PJ Kuijper and E Paasivirta, ‘EU International Responsibility and its Attribution: From the Inside Looking Out’ in M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013) 35, 54–55.

³⁰ S Talmon, ‘Responsibility of International Organizations: Does the European Community Require Special Treatment?’ in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Koninklijke Brill NV, 2005) 405, 409.

³¹ SØ Johansen, ‘Dual Attribution of Conduct to Both an International Organisation and a Member State’ (2019) 6 *Oslo Law Review* 178, 181–82.

³² C Contartese, ‘Competence-Based Approach, Normative Control, and the International Responsibility of the EU and its Member States: What Does Recent Practice Add to the Debate?’ (2019) 16 *International Organizations Law Review* 339, 351.

³³ T Lock, ‘Accession of the EU to the ECHR: Who Would be Responsible in Strasbourg’ in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union after the Lisbon Treaty* (Cambridge, CUP, 2012) 109, 117.

³⁴ Talmon (n 30) 418.

³⁵ G Gaja, ‘The “Co-Respondent Mechanisms” According to the Draft Agreement for the Accession of the EU to the ECHR’ (2013) 2 *ESIL Reflections* para 6. For a comprehensive presentation of this question, see Casteleiro and Contartese (n 6) *passim*.

or omissions of organs of an [EU] member state or of persons acting on its behalf shall be attributed to that state, even if the latter merely implements EU legislation. Hence, post-accession, any application should continue to be directed against the party that has proceeded to the contested act, measure or omission.³⁶ Such assessments allow the ECtHR to decide on a mere factual basis to whom conduct should be attributed,³⁷ that is, without reviewing or affecting the competences or powers of the institutions.³⁸

The just-quoted first sentence of Article 1(4) restates a foundational part of *Bosphorus*, where the ECtHR held that

a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.³⁹

That the first sentence of Article 1(4) was intended as a mere restatement of this line of case-law is confirmed by the provision's rather complex negotiating history. The provision's origin is found in the aftermath of the first rounds of accession negotiations when several of the EU Member States had reservations about the original drafts drawn up by an expert group.⁴⁰ France, in particular, was worried about the ECtHR having jurisdiction over the Common Foreign and Security Policy (CFSP).⁴¹ After internal negotiations between the EU Member States, the Union eventually suggested a detailed, two-part provision on attribution as a 'solution' to this CFSP issue.⁴² The first part is virtually identical to what is today Article 1(4), minus the explicit reference to decisions under the TEU and TFEU.⁴³ The second part read as follows:

acts or measures shall be attributable only to the member States of the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established within the legal order of the European Union.⁴⁴

This latter part, which essentially provided that conduct in the implementation of CFSP acts, was attributed exclusively to the EU Member States except where Union law provides otherwise, received a lukewarm reception from the non-EU High Contracting

³⁶ Benoit-Rohmer (n 36) 596.

³⁷ E Wenneström, 'EU Accession to the European Convention on Human Rights – the Creation of a European Legal Space for Human Rights?' in J Nergelius and E Kristoffersson (eds), *Human Rights in Contemporary European Law* (Oxford, Hart Publishing, 2015) 91, 95.

³⁸ Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 'Final Report of the CDDH' 47+1(2013)008 rev 2, para 22 (Final Report to CDDH).

³⁹ *Bosphorus Airways v Ireland* [GC], no 45036/98 (2005) para 152. This also followed implicitly from earlier case law, see eg European Commission on Human Rights, *M & Co v Germany* (dec), no 13258/87 (1990).

⁴⁰ Presidency of the EU Council, 'Accession of the EU to the ECHR – State of Play' (8 November 2011) Council Doc 16385/11 at 1–2, a leaked copy of which can be obtained at <https://www.statewatch.org/media/documents/news/2011/nov/eu-council-echr-accession-16385-11.pdf>, last accessed 4 September 2021.

⁴¹ *Ibid.*, at 2.

⁴² See suggested amendment 'c1' in CDDH 47+1 Ad Hoc Negotiation Group, 'Report of the Third Negotiation Meeting' (11 March 2012) CoE Doc 47+1(2012)R03 at 14 (fn 1).

⁴³ *Ibid.*, suggested amendment 'c1 (aa)'.

⁴⁴ *Ibid.*, suggested amendment 'c1 (bb)'.

Parties to the ECHR.⁴⁵ And, after further consideration, most of the non-EU parties circulated a common paper entirely rejecting the idea of establishing an exclusive attribution rule for the CFSP.⁴⁶ After this forceful rejection, this second part was dropped at the next negotiation meeting.⁴⁷ At the same meeting, the reference to decisions under the TFEU and TEU was added to the remaining (first) part – likely to further underline that violations arising out of the CFSP were to be treated in the same manner as other violations.⁴⁸

This negotiation history demonstrates that the impetus for a provision on attribution was an attempt by the EU side to establish *lex specialis* rules on attribution for the CFSP. When drafting such a rule, it made sense also to restate the general rules on attribution. When the CFSP-specific attribution rule was rejected, however, the remaining part of Article 1(4) served no purpose other than to restate the obvious. The negotiators should, therefore, have taken up the suggestion by one delegation to delete Article 1(4), since it was unnecessary.⁴⁹

Whether these rules on attribution of conduct would have been sufficient in a post-accession *Bosphorus*-like scenario is difficult to say.

On the one hand, the DAA attribution rules may be interpreted as being quite open to the idea of shared responsibility, thus recognising the complex and intertwined relationship between the Union and its Member States. Applied to the *Bosphorus* scenario, post-accession, this view would entail attributing the conduct of the Irish officials (the impounding of the aircraft) to Ireland under an organic link, according to Article 1(4).⁵⁰ If both the Union and Ireland were respondents in the case, the next question for the ECtHR would be whether the Union is *also* responsible. That shared responsibility is possible follows from the second sentence of Article 1(4), which provides that the first sentence ‘shall not preclude the European Union from being responsible ... for a violation resulting from [a member state] act, measure or omission’.

In the *Bosphorus* case, Ireland was acting on a direct instruction – in the form of Regulation 990/93 – that is clearly attributable to the Union.⁵¹ The Regulation and the actual impoundment of the aircraft may be seen as cumulative contributions to the same (alleged) injury. Shared responsibility would thus arise due to there being two distinct courses of conduct leading to a single indivisible injury.⁵² Alternatively, shared responsibility could arise due to the normative act of the Regulation being a form of control over, or aid and assistance to, the physical act of the impoundment. While the 2013 DAA does not include explicit rules on these forms of derived responsibility, that gap can be filled by drawing on the general international law laid down in DARS/DARIO. In both

⁴⁵ Ibid, para 7.

⁴⁶ Fourteen non-EU parties to the ECHR, ‘Common Paper on Major Concerns Regarding the Draft Revised Agreement on the Accession of the EU to the ECHR’ (11 March 2013) CoE Doc 47+1(2013)003 para 9.

⁴⁷ CDDH 47+1 Ad Hoc Negotiation Group, ‘Report of the Fourth Negotiation Meeting’ (23 January 2013) CoE Doc 47+1(2013)R04 para 8.

⁴⁸ Ibid, paras 8–9 and Annex IV.

⁴⁹ Ibid, para 8.

⁵⁰ DARS Art 4.

⁵¹ DAA Art 1(3) – which mirrors Art 1(4), and thus also merely restates general international law.

⁵² Principle 2(1) in A Nollkaemper et al (n 8) 15.

scenarios, and on the basis of the co-respondent mechanism, the EU and its Member State(s) would have been found jointly responsible under Article 3(7) 2013 DAA.

On the other hand, the above reconstruction of the *Bosphorus* case outcome using the 2013 DAA rules might be objected to on several grounds. First, the enactment of the Regulation is not per se wrongful conduct, and the Union cannot be found responsible for merely enacting the Regulation or for obliging its Member State to act accordingly. Second, while the aircraft's wrongful impounding is attributed to a Member State, the responsibility for it should be attributed exclusively to the EU. Any other solution piercing the Union's institutional veil would increase the risk of the Member States disobeying Union law under the pretence that they might be held responsible even if they blindly implement strict Union obligations.

In other words, in the case of strict obligations, such as the ones under consideration in the *Bosphorus* case, only the EU should be held responsible for the wrongful conduct of the Member State (even if the acts are factually attributed to the latter). This outcome is, however, not supported by the current phrasing of Article 1(3)–(4), which does not accommodate an attribution of responsibility scenario and cannot be supplemented by general international law rules to that effect, since Article 1(3)–(4) does not recognise the possibility of such rules filling the relevant gaps of the 2013 DAA.⁵³ Consequently, a basic scenario of indirect EU responsibility is left unregulated.⁵⁴

Moreover, the last sentence of Article 1(4) together with Article 3(7), to which it refers, cannot serve as a separate and sufficient basis for attribution because Article 3(7) is *not* a rule on attribution but merely establishes a presumption of joint responsibility in case the Union or the Member State assent to be co-respondent(s) (Article 3(5)). This mechanism being voluntary, cannot prescribe a derivative responsibility rule that could fill the above gap.⁵⁵ Ultimately, the only leeway left to the Court according to the 2013 DAA in order to hold responsible the correct respondent can be found in the last sentence of Article 3(7) – provided the co-respondent mechanism is activated.

In any case, whether one follows a more positive assessment on the attribution rules encompassed in the 2013 DAA Article or a more critical one, there is no doubt that the ECtHR will be called to examine the degree of control exercised by the Union upon its Member States and whether the latter implement strict Union obligations. Yet, according to the CJEU's reasoning in *Opinion 2/13*, such assessment is likely to impinge upon the division of competences between the Union and its Member States.

⁵³ See, implicitly, A Delgado Casteleiro, 'United We Stand: The EU and its Member States in the Strasbourg Court' in V Kosta, N Skoutaris and V Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford, Hart Publishing, 2014) 105, 112.

⁵⁴ PJ Kuijper, 'Attribution-Responsibility-Remedy: Some Comments on the EU in Different International Regimes' (2013) 46 *Revue Belge de Droit International* 57, 72. For further examples that might remain unregulated by the 2013 DAA, see J d'Aspremont, 'A European Law of International Responsibility? The Articles on the Responsibility of International Organisations and the EU' in Kosta, Skoutaris and Tzevelekos, *ibid.*, 75, 77; E Cannizzaro, 'Beyond the Either/Or: Dual Attribution to the European Union and to the Member State for Breach of the ECHR' in Evans and Koutrakos (n 29) 295, 306–07; GI Hernández, 'Beyond the Control Paradigm? International Responsibility and the European Union' (2013) 15 *Cambridge Yearbook of European Legal Studies* 648, 651.

⁵⁵ T Lock, 'End of an Epic? The Draft Agreement on the EU' Accession to the ECHR' (2012) 31 *Yearbook of European Law* 162, 173. See, however, the Union's Draft Declaration annexed in the 2013 DAA (n 7) Appendix II, where it promises that it will request to become a co-respondent if the conditions are met. Even so, it is submitted that the clause of Art 3(5) remains a self-judging one.

In that perspective, it is clearly preferable that the CJEU rules on the division of competences before the ECtHR proceeds to its assessment, since the formal division of competences is relevant for the factual assessments that the ECtHR makes. That is why the 2013 DAA supplements the rules on attribution in Article 1 with the co-respondent mechanism so as to fully take into account the requirement of Protocol 8 to the Lisbon Treaty, according to which any application to the ECtHR after accession must be addressed to the correct respondent. Put differently, the co-respondent mechanism aims at taking into account the complex reality of the Union legal order as exemplified above.

Article 3(2) 2013 DAA allows the EU to become a co-respondent in proceedings before the ECtHR when applications addressed only towards the Member States raise issues of compatibility of an EU law provision with the ECHR, 'notably where that violation could have been avoided only by disregarding an obligation under EU law'. Moreover, Article 3(3) allows the Member States to become co-respondents in proceedings against the EU before the ECtHR when a provision of EU primary law seems to be the one producing the violation of the ECHR.⁵⁶ If the co-respondent mechanism is employed and a violation of the ECHR is established, the respondent and the co-respondent will be jointly responsible unless the Court decides otherwise (Article 3(7)). Ultimately, the co-respondent mechanism seeks to ensure that joint responsibility is the rule of thumb in cases involving both the Union and (one or more) Member States.⁵⁷

Under the 2013 DAA, the ECtHR would have the final say on whether it is 'plausible' that the conditions in Articles 3(2) and 3(3) are met. The CJEU strongly objected to this in Opinion 2/13, asserting that the ECtHR would thus 'be required to assess the rules of EU law governing the division of powers between the EU and its Member States'.⁵⁸ This would be 'liable to interfere with the division of powers' and was, therefore, found incompatible with the principle of autonomy.⁵⁹ It follows that, as the CJEU views it, the allocation of responsibility is inextricably linked to an assessment of the division of competences within the European Union. While this is not entirely correct, as we demonstrate above, it is true that one cannot fully separate the division of competences from the allocation of responsibility.

Some examples may further illustrate the Court's position while addressing some common counter-arguments.

First, it has been argued that Article 3 2013 DAA cannot impinge upon the autonomy of the Union legal order because responsibility allocation by the ECtHR will not require an assessment of the competence division between the EU and its Member

⁵⁶ The rationale being that the Member States are responsible for the contents of the EU Treaties since they have 'freely entered into' them; see *Matthews v UK* [GC], no 24833/94 (1999) para 33.

⁵⁷ Opinion 2/13, Opinion of AG Kokott, para 216: 'Put simply, the respondent in each case will therefore be the party to which the impugned act, measure or omission is to be attributed, whereas the role of the co-respondent falls to the party which has the power, if necessary, to bring about an amendment of the provisions of EU law relating to that act, measure or omission.'

⁵⁸ Opinion 2/13, para 224.

⁵⁹ Opinion 2/13, para 225. For a critique of the Court's reasoning on this point, in the sense that the plausibility review would not be binding upon the EU and its Member States, see P Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR' (2015) *European Yearbook on Human Rights* 27, 43. Yet, as has been pertinently observed, if during the plausibility assessment the ECtHR rejected the request for co-respondentship, this would constitute a de facto determination of the competence distribution; see Benoit-Rohmer (n 36) 597.

States but only an interpretation of EU law. As Piet Eeckhout observes, '[a]t most, it would need to determine whether the Member State was compelled by EU law ... to adopt these measures.'⁶⁰ In practice, though, the existence of a margin of discretion is one of the factors that determine and enrich the division of competences, particularly the aspect of how those competences are exercised.⁶¹ For instance, reviewing the margin of discretion in a *Bosphorus*-type case would necessarily involve a determination of whether the respondent Member State is implementing strict obligations under Union law, that is, whether it still retains a competence in the relevant field of activity by virtue of Union law.⁶²

A second complication on avoiding competence assessment while apportioning responsibility relates to the question of attribution of omissions. The ECHR contains a large array of positive obligations that may give rise to responsibility for failure to legislate.⁶³ Such a failure is attributable to the entity that holds the legislative competence in the framework of the Union legal order – thus making it impossible to determine the responsibility question without assessing competences.⁶⁴ Additionally, as already alluded to, the expansion of Union competences will often render it difficult to disentangle whether the EU or its Member States have the competence to legislate in order to remedy violations of such positive human rights obligations.⁶⁵ Consequently, in this case too, who is competent and capable of remedying the violation must be determined with reference to competence allocation.⁶⁶ For instance, focusing on the entity that can remedy a breach through the modification of relevant legislation falls within this type of assessment.

These examples illustrate the impossible task of completely separating the responsibility question from a review of the division of competences between the EU and its Member States.⁶⁷ Apportioning responsibility and determining what measures should be taken in order to remedy the violation and by whom is part of the ECtHR's judicial function. Yet, those very functions risk undermining the autonomy of the Union legal order since they presuppose the Court's power to assess competence allocation.⁶⁸ Indeed, the joint participation of the Union and its Member States in a mixed agreement with judicial dispute settlement procedures will inevitably affect the autonomy of the Union legal order.

Having those parameters in mind, the negotiators drafted Article 3 2013 DAA so as to prevent as far as possible the ECtHR from impinging upon the autonomy of the EU legal order. Accordingly, the ECtHR was given the power to invite (but not order)

⁶⁰ Eeckhout (n 23) 983.

⁶¹ Contartese (n 32) 374–76.

⁶² JM Cortés-Martín, 'Sur l'adhésion à la CEDH et la sauvegarde de l'autonomie de l'ordre juridique de l'Union dans l'identification du défendeur pertinent: le mécanisme du codéfendeur' (2011) *Revue du Droit de l'Union Européenne* 615, 628.

⁶³ For an introduction, see J Gerards, *General Principles of the European Convention on Human Rights* (CUP 2019) 108–35.

⁶⁴ Lock, 'Accession of the EU' (n 33) 131–33.

⁶⁵ Cortés-Martín (n 62) 639.

⁶⁶ É Dubout, 'Une question de confiance: nature juridique de l'Union européenne et adhésion à la Convention européenne des Droits de l'Homme' (2015) 51 *Cahiers de Droit Européen* 73, 88–89.

⁶⁷ Opinion 2/13, Opinion of AG Kokott, paras 231–32, where she admits that allowing the ECtHR to decide on who should be responsible undermines the principle of autonomy.

⁶⁸ Cortés-Martín (n 62) 652–53.

a High Contracting Party to become co-respondent or decide upon the latter's request after assessing in this case whether the conditions of paragraphs 2 or 3 of the said Article were fulfilled (Article 3(5)). Moreover, if a violation were established while employing the co-respondent mechanism, the respondent and the co-respondent would be jointly responsible 'unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible' (Article 3(7)).

All in all, the co-respondent mechanism, in opting for a general rule of joint responsibility, was explicitly construed with the intention to ensure that the ECtHR would only rarely and to a limited extent rule on competence allocation between the Union and its Member States.⁶⁹ However, this was not sufficient to please the CJEU. That an exception to joint responsibility existed and it was up to the ECtHR to consider whether the conditions were met led the CJEU to find the co-respondent mechanism in the 2013 DAA incompatible with the principle of autonomy.⁷⁰ In doing so, the CJEU has placed the DAA negotiators in no man's land.

In the end, despite being rather simplistic and introducing a logic of automaticity (especially with regard to the joint responsibility clause in case of co-respondentship), the 2013 DAA scheme was found incompatible with the principle of autonomy by the CJEU. It is worth noting that the provisions in the agreement that granted certain flexibility to the ECtHR were most criticised by the Court.

IV. Further Simplifying and Internalising the Responsibility Question as a Way Forward?

The CJEU's negative opinion has led the negotiating parties back to the drawing board. Some scholars have argued for merely minimal changes in the co-respondent mechanism and the collateral attribution scheme, claiming that it is feasible for the ECtHR to limit itself to a determination that an act, measure or omission that is 'generally determined by EU law' violates the ECHR and to an automatic application of the joint attribution rule, without offering detailed reasoning on responsibility allocation, thus respecting the principle of autonomy.⁷¹ Yet, as is readily admitted, the lack of responsibility allocation by the ECtHR increases the risk that the ruling will be implemented inadequately.⁷²

⁶⁹ Final Report of the CDDH, App V, para 62; X Groussot, T Lock and L Pech, 'EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011' (Foundation Robert Schumann Policy Paper, European Issues 218, 2011) 10 and 13.

⁷⁰ Opinion 2/13, paras 229–34. For a positive review of the Court's opinion on this particular point, see Łazowski and Wessel (n 4) 198. For a proposal that follows the CJEU's line of reasoning towards effacing the exception from Art 3 para 7 DAA, thus retaining only the rule of automatic joint responsibility, see X Groussot and E Stavefeldt, 'Accession of the EU to the ECHR: A Legally Complex Situation' in Nergelius and Kristoffersson (n 37) 7, 23; JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *CML Rev* 995, 1015.

⁷¹ P Tacik, 'The Contribution of the EU Accession to the ECHR to Shared Responsibility in International Law' (ESIL Annual Conference, Riga, 7–9 September 2016) 24–25, https://euglobal.files.wordpress.com/2016/09/tacik_the_contribution_of_the_eu_accession_to_the_european_convention_on_human_rights_to_shared_responsibility_in_international_law.pdf, last accessed 4 September 2021.

⁷² *Ibid.*

There are also two further obstacles. First, even this limited assessment over EU law might be considered incompatible with the principle of autonomy by the CJEU, as we have already highlighted. Second, it is doubtful if the CJEU will find acceptable a mechanism that relies on the ECtHR's good faith to limit itself when reviewing applications concerning EU law.

Consequently, an increasing number of scholars and actors involved in the negotiation have turned towards a different solution. More particularly, the further simplification and automaticity of the responsibility provisions through the further circumscription of Article 3(5) ECtHR's determination and the deletion of Article 3(7) 2013 DAA exception has been proposed.⁷³ This appears to be the only option for the negotiators after the CJEU's rejection of the 2013 DAA. However, such a strategy unavoidably translates into a more elaborate set of internal EU law rules on responsibility allocation, including arrangements determining who should implement ECtHR judgments.⁷⁴

The need for EU internal rules to complement the co-respondent mechanism was highlighted by the EU during the previous round of negotiations,⁷⁵ and various scholars have paid considerable attention thereto.⁷⁶ Such rules are viewed as an additional safeguard (beyond the co-respondent mechanism) for preventing the ECtHR from undermining the autonomy of the Union legal order. Accordingly, they would supposedly resolve questions about how the Union reaches a decision on the activation and the implementation of the co-respondent mechanism.⁷⁷ Moreover, they would facilitate any inquiries about 'the origin of the violation and the precise share of responsibility' between the EU and its Member States on the basis of the internal allocation of competences,⁷⁸ clarifying who should be obliged to pay just satisfaction, as awarded by the ECtHR, or how much of it is incumbent upon each party, as well as who should adopt any normative measures ordered by the Court.⁷⁹ An additional internal mechanism to settle disputes between the Union and its Member States regarding the above elements might be necessary.⁸⁰ Such a mechanism could even provide for a special fund

⁷³ See CDDH 47+1 Ad Hoc Negotiation Group, 'Report of the Sixth Negotiation Meeting' (22 October 2020), §§13–14; Seventh Negotiation Meeting (n 18) §9.

⁷⁴ Common Statement of the Informal Group of Non-European Union Member States, Sixth Negotiation Meeting, *ibid*, Appendix III, §3; Seventh Negotiation Meeting, *ibid*, §6.

⁷⁵ Council of EU, 'Council Decision Authorising the Commission to Negotiate the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)' (8 June 2010) EU Council Doc 10817/10 (declassified on 10 June 2015) Annex III.

⁷⁶ See, indicatively, K Raba, 'Closing the Gaps in the Protection of Fundamental Rights in Europe: Accession of the EU to the ECHR' in S Morano-Foadi and L Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Oxford, Hart Publishing, 2015) 21, 40–41.

⁷⁷ P Gragl, 'A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Rights' (2014) 51 *CML Rev* 13, 39.

⁷⁸ S Lambrecht, 'The Sting is in the Tail: CJEU Opinion 2/13 Objects to Draft Agreement on accession of the EU to the European Convention on Human Rights' (2015) 1 *European Human Rights Law Review* 185, 192.

⁷⁹ 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) 1 *Europe des Droits & Libertés* 27, 35; LH Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' (2015) 15 *Human Rights Law Review* 485, 501.

⁸⁰ T Lock, 'The EU Before the European Court of Human Rights after Accession' in S Douglas-Scott and N. Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Cheltenham, Edward Elgar Publishing, 2017) 226, 238.

under the control of the Commission that will ensure the prompt and effective compensation of the applicant.⁸¹

If the ECtHR's role is further limited to an automatic declaration of joint responsibility (ie if the last sentence of Article 3(7) is deleted), internal rules will become even more crucial, determining, for instance, the scope of obligations undertaken by each contracting party on the basis of the ECHR or to whom the wrongful conduct should be attributed in the first place.⁸² Thus, the black box of the Union's composite nature will become completely inaccessible for the ECtHR and, reflectively, for the applicant.

In our view, such a strategy of shifting the details of responsibility to the EU internal rules is fraught with serious risks for the effective protection of human rights (section IV.B). Before delving into this issue, the nature of those rules according to general international law ought to be examined (section IV.A).

A. The Legal Nature of EU Internal Rules: Are they an Admissible *Lex Specialis*?

Internal arrangements are not automatically binding upon third states that are High Contracting Parties to the ECHR by virtue of the law of treaties.⁸³ The same conclusion can be reached through the application of the *lex specialis* principle, which requires that the special rule have the same status as the general rule and be applicable between the same parties.⁸⁴ This is not the case with the internal rules of an organisation, which are not concluded between an organisation and its Member States on the one side and third parties on the other side.⁸⁵

Nevertheless, the wording of Article 64 DARIO on *lex specialis* seems to cover purely internal rules of the organisation.⁸⁶ This conclusion is, however, mitigated by the commentary to Article 64, which explicitly states⁸⁷ that it is modelled on Article 55 ASR, the latter insisting that the special rule is only applicable between the parties to the agreement that contains that rule.⁸⁸ More fundamentally, Christiane Ahlborn has argued that internal rules of an international organisation should not be treated as

⁸¹ M den Heijer and A Nollkaemper, 'A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights' (SHARES Briefing Paper, Amsterdam Centre of International Law 2014) 17, www.sharesproject.nl/wp-content/uploads/2014/01/Binder11.pdf, last accessed 4 September 2021.

⁸² *Ibid.*, 9; Tacik (n 71) 22.

⁸³ 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art 34; see also, regarding EU internal arrangements, I Govaere, "Facultative" and "Functional" Mixity Consonant with the Principle of Partial and Imperfect Conferral' in Chamon and Govaere (n 5) 21, 25; Talmon (n 30) 416.

⁸⁴ P Bodeau-Livinec, 'Les faux semblants de la *lex specialis*: l'exemple de la Résolution 52/247 de l'Assemblée générale des Nations unies sur les limitations temporelles et financières de la responsabilité de l'ONU' (2013) 46 *Revue Belge de Droit International* 117, 122–23.

⁸⁵ JM Cortés-Martin, 'European Exceptionalism in International Law? The European Union and the System of International Responsibility' in M Ragazzi (ed), *Responsibility of International Organizations* (n 28) 189, 197–98.

⁸⁶ 'Such special rules of international law may be contained in the rules of the organization applicable to the relations between an IO and its members.'

⁸⁷ DARIO, Commentary to Art 64, para 7. See also, *ibid.*, Commentary to Art 5, para 3.

⁸⁸ 'Draft Articles on Responsibility of States for Internationally Wrongful Acts [2001] ILCYb, vol II/2; Commentary to Art 55, paras 1–2. See also Hernández (n 54) 653–54.

lex specialis because they are not rules of the same legal order as those of general international law. Any other conclusion, she pertinently observes, ‘may convey the false impression that Member States and international organizations could avoid compliance with their international obligations towards third parties by means of special internal “rules of the organization”’.⁸⁹

The question, thus, is how such rules could become compulsory for third states. It has been argued, for instance, that third parties’ consent to conclude a mixed agreement with the EU and/or its Member States (or to transform a pre-existing treaty into a mixed agreement) to some extent mutates those internal rules into international ones.⁹⁰ In our view, such an outcome would be possible only if the relevant EU internal rules are reproduced, or incorporated by reference, in the mixed agreement.⁹¹ Yet, this option risks subjecting EU internal rules to the review powers of the competent international dispute settlement body, namely the ECtHR, in the case at hand.⁹²

Moreover, even if the above arrangements make those rules an admissible *lex specialis* (ie internationalise them), its scope of application cannot be automatically extended to individual applicants, whether they are nationals of a High Contracting party to the ECHR or of a third state. States can indeed bestow rights on individuals and subject them to obligations without their consent.⁹³ But human rights treaties grant individuals procedural and substantive rights directly, and any restrictions beyond those provided by the treaty itself should not impinge upon the very essence of those rights.⁹⁴ Consequently, any internal rules regulating the responsibility question in the case of the EU accession to the ECHR should not adversely affect the essence of the applicant’s procedural rights under the Convention. This perspective has been highlighted by the CJEU in *Opinion 1/17*, where it confirmed that international dispute settlement mechanisms contained in mixed agreements must respect the Charter of Fundamental Rights and, more specifically, the *very essence* of Article 47 CFR.⁹⁵ However, any incorporation in the DAA of provisions that relegate specific steps of the judicial process to EU internal rules might violate the procedural rights to a fair trial and an effective remedy enjoyed by the applicant before the ECtHR, as we will explain in the following section.

⁸⁹ C Ahlborn, ‘The Rules of International Organizations and the Law of International Responsibility’ (2011) 8 *International Organizations Law Review* 397, 437–38.

⁹⁰ See the eloquent analysis by J Odermatt, ‘Facultative Mixity in the International Legal Order: Tolerating European Exceptionalism?’ in Chamon and Govaere (n 5) 291, 295.

⁹¹ S Vezzani, ‘The International Responsibility of the European Union and of Its Member States for Breaches of Obligations Arising from Investment Agreements: *Lex Specialis* or European Exceptionalism?’ in M Andenas et al (eds), *EU External Action in International Economic Law: Recent Trends and Developments* (The Hague, TMC Asser Press, 2020) 281, 312–13.

⁹² Besides, incorporation by reference has the further drawback of depriving third states of any leverage if the rules are modified internally, their initial consent covering equally those amendments; see V Pergantis, *The Paradigm of State Consent in the Law of Treaties* (Cheltenham, Elgar, 2017) 139–41.

⁹³ M Waibel, ‘The Principle of Privity’ in M Bowman and D Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge, CUP, 2018) 201, 208.

⁹⁴ For the term, see S van Drooghenbroeck and C Rizcallah, ‘The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk’ (2019) 20 *German Law Journal* 904.

⁹⁵ *Opinion 1/17*, paras 167, 190 and 201. See also *Waite and Kennedy Germany* [GC], no 26083/94 (1999) paras 59 and 73.

B. How May the Shift to EU Internal Rules Undermine the Effectiveness of the ECHR and the Procedural Rights of the Applicant?

Depriving the ECtHR of the opportunity to interpret Union law, allocate responsibility, and determine remedies for the execution of its judgments undermines the external control that it is meant to exercise. It thus challenges ‘the very idea of the Strasbourg system’,⁹⁶ by transforming the concept of external control into an empty shell.⁹⁷ Additionally, any conditioning of the ECtHR’s judicial function on EU internal rules – such as in the case at hand, where the CJEU subsequent to an ECtHR judgment would exclusively determine who is ultimately responsible – undermines the very premise of the ECtHR’s judicial independence.⁹⁸ By awarding to the EU and its internal rules such a prominent role, the CJEU becomes the sole interpreter of such internal arrangements, thus overriding the authority of the ECtHR and predetermining the outcome of the case and its execution.⁹⁹

More worryingly, internalising the issue of responsibility allocation might also work at the expense of the applicant.¹⁰⁰ For instance, if the ECtHR distributes responsibility, the applicant will be better informed about where to address a claim of redress in the form of ‘just satisfaction’ or adoption of individual and general measures.¹⁰¹ If the allocation of responsibility is instead left in the hands of the Union, the applicant might, at the subsequent stage of internal EU arrangements, remain uncertain about which entity should undertake remedial action.¹⁰² Moreover, any internalisation of the responsibility allocation and execution processes might force the applicant ‘to bring further actions (and possibly being sent from pillar to post)’ for its injury to be properly remedied, thus putting him/her in a disadvantageous position in relation to applicants in other cases.¹⁰³

To be fair, it is possible to mitigate some of these consequences. There are at least two possibilities. First, responsibility allocation could be conditioned on the consent of the applicant.¹⁰⁴ This solution, however, leaves the applicant vulnerable to pressures from a powerful respondent, notably the EU. Second, the applicant could be automatically

⁹⁶ Łazowski and Wessel (n 4) 199.

⁹⁷ Gaja (n 35) para 6; C Hillion and RA Wessel, ‘The European Union and International Dispute Settlement: Mapping Principles and Conditions’ in M Cremona, A Thies and RA Wessel (eds), *The European Union and International Dispute Settlement* (Oxford, Hart Publishing, 2017) 7, 18.

⁹⁸ Cortés-Martín, ‘Sur l’adhésion à la CEDH’ (n 62) 653.

⁹⁹ Lambrecht (n 78) 191–92. See also Seventh Negotiation Meeting (n 18) §10.

¹⁰⁰ See, generally, C Tomuschat, ‘The International Responsibility of the European Union’ in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (The Hague, Kluwer, 2002) 177, 183. *Contra* T Lock, ‘The Future of the European Union’s Accession to the European Convention on Human Rights after Opinion 2/13: Is it Still Possible and is it Still Desirable?’ (2015) 11 *European Constitutional Law Review* 239, 269, who argues that in any case, the principle of joint responsibility translates into increased protection for the applicant.

¹⁰¹ C Krenn, ‘Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13’ (2015) 16 *German Law Journal* 147, 152.

¹⁰² Lock, ‘The Future’ (n 100) 249.

¹⁰³ Den Heijer and Nollkaemper (n 81) 17.

¹⁰⁴ See *mutatis mutandis* D Halbestram, ‘“It’s the Autonomy, Stupid!”: A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’ (2015) 16 *German Law Journal* 105, 137, who proposes that such allocation be done by the ECtHR.

awarded compensation by an EU fund, leaving the question of responsibility apportionment between the Union and its Member States to be decided *inter se* at a later stage.¹⁰⁵ While attractive in its simplicity, this proposal does not consider Convention violations that can only be remedied through positive action, such as failures to legislate or restitution. In such cases, it will be impossible to execute the judgment automatically, and any later responsibility allocation between the EU and its Member State might delay (or create further roadblocks to) the cessation of the wrongful act and the adoption of the proper remedy.

Whereas some mitigation is thus possible, it remains that a shift to EU internal arrangements might disproportionately restrict the right to an effective remedy enjoyed by applicants before the ECtHR and create insurmountable obstacles for ensuring the Court's judicial independence and the enforcement of its judgments. It might also open up an opportunity for abuse if the Union and/or its Member States engage in a 'blame game'. Consequently, the Union and its Member States would no longer be on an equal footing with the other High Contracting Parties to the ECHR – which contradicts one of the most fundamental principles of the accession negotiations.¹⁰⁶

V. Conclusion

Ultimately, any attempt to accommodate EU autonomy and the ECtHR's prerogative to allocate responsibility finds itself between a rock and a hard place. If the negotiators attempt to establish a mechanism for addressing the applications to the correct respondent, as the 2013 DAA attempts, the ECtHR will inescapably be called to assess the distribution of competences in order to allocate responsibility between respondents (the Union and/or its Member States). This is contrary to the Union's autonomy, as demonstrated by the CJEU's reaction to the current draft.

Conversely, if the new draft opts for a light touch with regard to responsibility allocation, for example, by establishing a (near-)automatic rule of shared responsibility in cases involving the Union, the effectiveness of the ECHR system is threatened. That is because solutions along these lines will invariably entail shifting the issue of determining who should implement ECtHR judgments to the EU internal sphere. Such a shift will also raise difficult issues with regard to whether these rules can be opposable to applicants before the ECtHR, especially if they are nationals of states that are not members of the CoE.

There is no obvious compromise position between these two extremes. Indeed, the 2013 DAA was an attempt at such a compromise, which went quite far in the direction of preserving the CJEU's precious principle of autonomy, but was rejected. We, therefore, do not envy the negotiators currently tasked with working out this part of the DAA after the resumption of the negotiations. Unless the CJEU changes course, we could thus be headed in the direction of another impasse, either because the parties

¹⁰⁵ Den Heijer and Nollkaemper (n 81) 17. But this does not resolve the problem of who will execute an individual or general measure ordered by the ECtHR as a remedy.

¹⁰⁶ Draft Explanatory Report (n 18) para 7.

simply will not agree, or the CJEU will again reject an attempt at compromise, or because the ECtHR will rebuff a simplified system shifting responsibility allocation to the EU internal sphere.¹⁰⁷

In any event, these difficulties are not particular to the ECHR. In the case of joint participation of the Union alongside its Member States in a mixed agreement with dispute settlement procedures, the autonomy of the Union legal will invariably be threatened. Often, the threat to autonomy can be mitigated, for example, by simplifying and internalising the responsibility question. As demonstrated, that solution is unsatisfactory for treaties like the ECHR, which bestow individuals with substantive rights and access to judicial dispute resolution. In these cases, the principle of autonomy constitutes a serious hindrance to joint participation – and thus a hindrance to ensuring the Union’s external human rights accountability.

¹⁰⁷ The latter risk is clearly present this time around, as the negotiators are considering asking the ECtHR for an opinion on the DAA once it is (re)negotiated; see ‘Report of the sixth meeting of the CDDH ad hoc negotiation Group (“47+1”) on the Accession of the European Union to the European Convention on Human Rights’ (22 October 2020) CoE Doc 47+1(2020)R6, para 43.