

**Mélanges en l'honneur de / Essays in honour of  
Dean Spielmann**

***Liber amicorum* Dean Spielmann**

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autorités nationales avaient simplement relevé un risque de compromission d'activités passées ou futures, la Cour conclut à la non-violation de l'article 8. La Cour a accompli un pas important en ce sens dans l'affaire *Youth Initiative for Human Rights c. Serbie*<sup>38</sup>, mais seulement en tant que le refus illégal des autorités internes violait l'article 10. Il nous semble qu'en la matière, il serait plus judicieux de suivre la démarche adoptée dans les affaires relatives à l'obligation de notification *a posteriori*. Ainsi, l'accès au dossier faisant partie d'un redressement de la violation, celui-ci devrait être accordé par principe, sauf circonstances tout à fait particulières.

Conclusion

Ce bref rappel de la jurisprudence de la Cour témoigne du défi toujours renouvelé de conjuguer la marge nationale d'appréciation dont bénéficient les États dans un domaine particulièrement sensible et la nécessité d'une garantie effective du droit au respect de la vie privée. Si la Cour reste à notre avis trop hésitante sur certains points, il nous semble que le cadre jurisprudentiel posé devrait tout à fait lui permettre de parvenir à des solutions adaptées au contexte actuel de surveillance de masse. Consciente du défi imposant qui pèse sur les États, la Cour ne saurait en tout cas se défaire en s'inclinant devant la raison d'État.

Protocol No. 16 and EU Law

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On 2 October 2013, the Committee of Ministers of the Council of Europe opened for signature Protocol No. 16 to the European Convention on Human Rights<sup>2</sup>. This new Protocol, which will allow the highest courts of the Contracting States to the Convention to request an advisory opinion from the European Court of Human Rights ("ECtHR") on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto", is very dear to President Spielmann in whose honour this essay has been submitted. He has called it "the Protocol of the dialogue", stressing that it indeed has the potential of opening up an area of intensified dialogue between the ECtHR and the national courts of the Contracting States<sup>3</sup>.

Recently, however, in its Opinion 2/13<sup>4</sup>, the Court of Justice of the European Union (CJEU) expressed reservations in respect of Protocol No. 16 in the following terms:

" it must be pointed out that Protocol No. 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU

<sup>38</sup> Cour EDH 25 juin 2013, *Youth Initiative for Human Rights c. Serbie*, req. n° 48135/06, § 25. « The exercise of freedom of expression may be subject to restrictions, but any such restrictions ought to be in accordance with domestic law. The Court finds that the restrictions imposed by the intelligence agency in the present case did not meet that criterion. The domestic body set up precisely to ensure the observance of the Freedom of Information Act 2004 examined the case and decided that the information sought had to be provided to the applicant. It is true that the intelligence agency eventually responded that it did not hold that information, but that response is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response ».

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<sup>2</sup> CETS No. 214. On this Protocol see, *inter alia*, David Milner, "Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road", *Zeitschrift für europarechtliche Studien*, 2014, p. 19; Linos-Alexandre Sicilianos, "L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – A propos du Protocole n° 16 à la Convention européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme* 2014, p. 9.  
<sup>3</sup> See, *inter alia*, the speech given by President Spielmann on 30 January 2015 at the solemn hearing for the opening of the judicial year of the Court ([http://echr.coe.int/Documents/Speech\\_20150130\\_Solemn\\_Hearing\\_2015\\_ENG.pdf](http://echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf)).  
<sup>4</sup> CJEU 18/12/2014, Opinion on the compatibility of the draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms with the EU and FEU Treaties 2/13. On this opinion, see *inter alia*, Leonard F.M. Besselink, "Acceding to the ECHR notwithstanding – the Court of Justice Opinion 2/13", <http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213>; Sionaidh Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice", <http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice>; Jean-Paul Jacque, "Non à l'adhésion à la Convention européenne des droits de l'homme ?", <http://www.droit-union-europeenne.be/412337458>; Tobias Lock, "Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR", [http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emr-beitritt-der-eu/#VJ\\_phDWB4](http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emr-beitritt-der-eu/#VJ_phDWB4); Steve Peers, "The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection", [http://eulawanalysis.blogspot.fr/2014/12/the-cjeu-and-eus-accession-to-echr.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed+EuLawAnalysis+\(EU+Law+Analysis\)](http://eulawanalysis.blogspot.fr/2014/12/the-cjeu-and-eus-accession-to-echr.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed+EuLawAnalysis+(EU+Law+Analysis)); Denys Simon, "Deuxième (ou second et dernier ?) coup d'arrêt à l'adhésion de l'Union à la CEDH: étrange avis 2/13", *Revue Europe*, février 2015, p. 4.

It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the [Convention] would form an integral part of EU law, the mechanism established by that protocol could – notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR – affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.

In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure<sup>5</sup>.

These considerations call for a few observations, on the scope of the problem thus raised by the CJEU (1) and on the possible solutions to it (2).

### 1. Scope of the problem

According to the CJEU, the preliminary ruling procedure provided for in Article 267 TFEU might be “circumvented” as a consequence of requests made under Protocol No. 16. The risk thus identified is in fact a twofold one, for it means a) that by making a request for an advisory opinion under Protocol No. 16, a court of an EU Member State could indeed act in breach of Article 267 TFEU, but also b) that the ECtHR could accept to deal with such a request. It is worth asking how realistic those scenarios are and what their consequences would be.

#### a. Could Article 267 TFEU be “circumvented” by a court of an EU Member State making a request under Protocol No. 16?

First of all, one should bear in mind that whilst, in light of some of its characteristics, the advisory opinion provided for by Protocol No. 16 resembles the preliminary ruling given by the CJEU under Article 267 TFEU, there are important differences. As part of these differences only “the highest courts and tribunals” of the Contracting States will be entitled to request such an opinion; it will be optional for them to do so and not in any way obligatory; the ECtHR will have discretionary power to accept or reject such requests, the only obligation being to give reasons for its decision; last but not least, the advisory opinions will not be binding<sup>6</sup>. Thus, in contrast with the mechanism provided for under Article 267 TFEU, the one put in place by Protocol No. 16 involves a considerable amount of discretion both for the national courts and for the ECtHR: it creates a possibility and in no way imposes obligations.

Hence, there is no question of conflicting legal obligations between the Convention and EU law here.

This only reinforces the fact that the problem raised by the CJEU fundamentally is an internal EU law problem, the issue being whether or not, by filing a request for an advisory opinion by the ECtHR, the supreme courts of the Member States could or would act in breach of Article 267 TFEU and, if so, how to avoid that. As pointed out by several authors, it is rather surprising to see the highest EU Court expect an external legal instrument such as the agreement on EU-accession – which moreover is not primarily intended to apply to the EU member States but rather to the EU as such –, to ensure such compliance<sup>7</sup>.

Be that as it may, it is certainly worth taking a closer look at what could be meant by the “circumvention” of the preliminary ruling procedure in this context. This terminology indeed suggests that there is an overlap between the material scope of the preliminary rulings under Article 267 TFEU and of the advisory opinions under Protocol No. 16. However, the reality is that while there is an overlap as regards the *provisions* to be interpreted under both Article 267 and Protocol No. 16 (i), the *question to be answered* by each European Court in this connection is by definition a different one (ii).

#### (i) An overlap as regards the provisions to be interpreted

It is a well-known fact that the great majority of the civil and political rights contained in the EU-Charter of Fundamental Rights (“the Charter”) are derived from the Convention or the ECtHR’s case law. Since, as a result, many of the rights of the Convention capable of being interpreted under Protocol No. 16 also find themselves – with an identical or similar content – in the Charter, and since the interpretation of the Charter falls within the competence of the CJEU under Article 267 TFEU, there is a clear overlap between those two sets of rights and, thus, also in terms of the material scope of the interpretative jurisdiction of the two European Courts. That, however, is not in itself sufficient to speak of a “circumvention” because the questions to be answered by each Court in this context are different.

#### (ii) No overlap as regards the questions to be answered

Whereas, in line with the principle of subsidiarity, the ECtHR determines a *minimum* level of protection which can be raised by each of the Contracting Parties<sup>8</sup>, the CJEU establishes a *uniform* level of protection which in principle cannot be modified by the EU member States when they apply EU law<sup>9</sup>.

At the same time, the minimum protection level determined by the ECtHR in respect of those rights which the Convention and the Charter have in common is also binding under EU law, to the effect that EU law can raise it but not reduce it. This is the result of Article 52 § 3 of the Charter which reads:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said

<sup>5</sup> §§ 196-199.

<sup>6</sup> See the Explanatory report to Protocol No. 16, §§ 7-8, 14 and 25-27.

<sup>7</sup> In this sense, see Lock and Jacqué (footnote 4 above).

<sup>8</sup> Article 53 of the Convention.

<sup>9</sup> CJEU 26.2.2013, *Melloni*, C-399/11.

Convention. This provision shall not prevent Union law providing more extensive protection.<sup>10</sup>

Consequently, with the Charter referring to the Convention as the minimum level of protection applicable under EU law in respect of those Convention rights, EU law itself agrees not to interpret them in a completely autonomous way but rather relies indirectly on the Strasbourg case-law. In other words, by virtue of Article 52 § 3 the ECtHR has an (indirect) say on what should be the minimum protection level under EU law as regards the EU rights taken from the Convention.

So in the hypothetical instances where the ECtHR would be asked to give an advisory opinion by a domestic court not complying with Article 267 TFEU, and in the very unlikely event that the ECtHR would nonetheless accept to give it<sup>11</sup>, not much harm could be done to EU law autonomy anyway, limited as it is in this field. By definition, the ECtHR's opinion would only determine the *minimum* Convention requirements which EU law itself accepts as binding and which, one way or another, the CJEU needs to know itself in order to comply with Article 52 § 3 of the Charter. At the same time, EU law would remain free to go beyond them and, pursuant to Article 53 of the Convention, EU Member States would remain free to apply those common higher requirements in the areas of domestic law regulated by EU law. Domestic courts would therefore still have to ask the CJEU about the specific *uniform* level of protection to be applied under EU law in light of the Strasbourg binding minimum.

In short: a) it is for the ECtHR *only* to determine the minimum level of protection applicable under the Convention, by virtue of Article 52 § 3 of the Charter this level applies under EU law in respect of "rights which correspond to rights guaranteed by the Convention"; b) it is for the CJEU *only* to determine, having regard to Article 52 § 3 of the Charter, the level of protection of those rights under EU law.

This would remain the same if, as anticipated by Opinion 2/13, the Convention became an integral part of EU law as a consequence of EU accession, for several reasons. Firstly, the fact that through accession the Convention would become part of EU law would not give the EU any greater autonomy in determining the minimum level of protection which is binding under Article 52 § 3 of the Charter. EU accession would indeed only reinforce the binding nature of that minimum level, as it would be made subject to external supervision by the ECtHR. Neither would EU accession give the ECtHR any competence to determine the level of protection which should be applied under EU law, this determination remaining the exclusive privilege of the CJEU. If, on the other hand, the CJEU were to be seized first under Article 267 TFEU about the interpretation of a Convention right applicable under EU law, it could only determine the level of protection applicable under EU law, without prejudice to the competence of the ECtHR to rule, in the context of an application under Article 34 of the Convention or of a request for an advisory opinion, on whether the interpretation given by the CJEU is compatible with the Convention.

Thus, what is decisive here is not so much *which* of the two European Courts speaks first but *what* it says, i.e. whether it remains within the limits of its own competence. If this is the case, it becomes rather irrelevant whether Luxembourg or Strasbourg is being interrogated first by a domestic supreme court, as within its own area, each European court would always be the

<sup>10</sup> On this provision, see Johan Callewaert "The Accession of the European Union to the European Convention on Human Rights", Council of Europe Publishing, Strasbourg, 2014, at p. 37.

<sup>11</sup> On this see point 1 b) below.

only one and therefore the first to speak, with no risk for the autonomy of the other. Under these circumstances it seems more than doubtful that there can be any real "circumvention" of Article 267 TFEU by a domestic court consulting the ECtHR under Protocol No. 16.

### **b. Would the ECtHR deal with a request for an advisory opinion "circumventing" the preliminary ruling procedure?**

This being said, the question arises as to how realistic it is in the first place to expect the ECtHR to deal with a request for an advisory opinion "circumventing" the preliminary ruling procedure.

First of all, as noted above, there will be no obligation for the ECtHR to deal with any request filed under Protocol No. 16, as it will have discretionary power to accept or reject such requests. Secondly, the ECtHR has always been very anxious to respect the autonomy of EU law and to avoid every decision capable of encroaching on it. This is illustrated not only by its case-law<sup>12</sup> but also by its constant efforts to secure the participation of the EU institutions, and notably the European Commission, as a third party in proceedings where EU law is involved<sup>13</sup>, for the obvious reason that the ECtHR has no interest whatsoever in interfering with the autonomy of EU law. It is neither its task nor within its competence to do so.

Under these circumstances, one may ask how realistic it is to assume that the ECtHR would not decline altogether to touch on any EU law issue being raised in the context of a request for an advisory opinion, whilst – as far as still possible – addressing the others. Moreover, and just for the sake of argument, even if – by mistake – the ECtHR ruled on an EU law issue among other issues not related to EU law, its opinion – which, by definition, is not binding – would be even less binding in respect of the EU law issue involved for lack of competence. Nothing would then prevent a supreme court from going before the ECJ as regards the EU law issues involved in the case as, legally speaking, they would not yet have been addressed by the sole competent authority to do so, the CJEU. To incite them to do so, the ECtHR could even indicate, where appropriate, in its opinions regarding EU Member States, that they are given without prejudice to any EU law issues falling within the scope of the CJEU's competence under 267 TFEU.

### **2. Solutions**

This being said, it is clear that it has never been the intention of the drafters of Protocol No. 16, including those from the EU Member States, to allow the use of the Protocol to interfere with EU law autonomy. Concerns in this respect, as those expressed by the CJEU in Opinion 2/13, should therefore be taken seriously and dispelled as a matter of urgency for the sake of facilitating ratification of the Protocol by the EU Member States, regardless of whether the EU accedes or not.

<sup>12</sup> "The Court emphasises that under the terms of Article 19 and Article 32 § 1 of the Convention it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law: the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention" (*Jeunesse v. The Netherlands* [GC] no. 12738/10 § 110, 3 October 2014).

<sup>13</sup> See as one of the most recent examples the case of *Avotins v. Latvia* no. 17502/07, 25 February 2014, where the European Commission intervened both in the written and oral proceedings before a Grand Chamber of the ECtHR.

Opinion 2/13 suggests that the draft accession agreement should make a "provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU" This approach, however, might not be entirely adequate, as the said agreement is primarily intended to govern the relationship of the EU with the Convention, whereas it is the use made of Protocol No 16 by the courts of the Member States which is the cause of the CJEU's concerns In addition, in the event of Protocol No 16 entering into force in respect of EU member States prior to the entry into force of the accession agreement, the former would have to operate without the benefit of the provisions laid down in the latter

Other, additional means might therefore need to be considered In this context, one could think of inviting the EU Member States, when ratifying Protocol No 16, to make a declaration to the effect that they interpret a) Article 1 of Protocol No 16 as being without prejudice to the obligations of their national courts to comply with Article 267 TFEU, Protocol No 16 thus being no alternative to compliance with the obligations flowing from this provision, and b) the words "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" in Article 1 as precluding any EU law issue

In addition, a provision could be inserted in the Rules of Court of the ECtHR relating to the procedure to be followed under Protocol No 16 according to which any (part of a) request involving interpretation of any legal instrument other than the Convention and its Protocols shall be declared inadmissible The draft accession agreement and/or the explanatory report to it could refer to this rule, if deemed appropriate Even though such a provision would reflect nothing but standard case-law<sup>14</sup>, it could be justified by the fact that the situation created by Protocol No 16 is a particular one contrary to the situation arising out of an application under Articles 33 and 34 of the Convention, which is focused on the application of the Convention to a set of facts, the Court's task under Protocol No 16 is more abstract, confined as it is to questions of interpretation It could therefore make sense explicitly to rule out the possibility that such an interpretation could cover any legal source other than the Convention and its Protocols Over and beyond the concerns relating to the autonomy of EU law, this may also facilitate the use of Protocol No 16 by domestic courts which might otherwise fear interferences by the ECtHR in the interpretation of their own national law

Finally, the possibility of a third-party intervention in the context of a request for an advisory opinion<sup>15</sup> could also be used by the EU institutions for the purpose of advising the ECtHR on whether the said request involves any EU law issue which would warrant a reference for a preliminary ruling under Article 267 TFEU Under the CILFIT doctrine<sup>16</sup>, some might indeed not do so

### 3. Conclusion

As a result of Opinion 2/13 it will take some more time for any EU accession agreement to enter into force By contrast, it could take much less time for Protocol No 16 to enter into force, as only 10 ratifications are needed for this to happen The aim of both the EU Member States and the ECtHR should therefore be to let Protocol No 16 enter into force as soon as possible and to make it work in such a way as to soothe any concerns, including those expressed by the CJEU, regarding respect for the exclusive competence of supreme courts to interpret their own domestic law The proof of the pudding is in the eating

<sup>14</sup> 'The Court would recall that it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation.

This also applies where domestic law refers to rules of general international law or international agreements. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention' (ECtHR 18 2 1999, *Waite and Kennedy v Germany*, 29083/94 § 54)

<sup>15</sup> Article 3 of Protocol No 16

<sup>16</sup> ECJ 6 10 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 283/81