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Atlas shrugged: an analysis of the ECtHR case law involving issues of EU law since Opinion 2/13

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Articles

The Revised Draft Agreement
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Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law Since *Opinion 2/13*

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Abstract: How did the European Court of Human Rights respond to *Opinion 2/13*? Or, more precisely, how did its "post-2/13" jurisprudence evolve in cases that raised issues of EU law? In answering this question, various aspects of the Strasbourg case law are analysed: cases where the Court dealt with complaints about acts of the EU institutions themselves; complaints about the conduct of EU Member States when implementing EU law or about situations where they cooperated with one another in the context of EU law; cases where an interpretation of EU law is required, and finally cases where an interesting substantive synergy between the ECtHR and the CJEU can be detected. One conclusion is that the *Bosphorus* doctrine, which was developed by the ECtHR in 2005, is still alive and kicking. It has been applied in a growing number of scenarios, and has been refined over the years. A second conclusion is that clashes between the two European Courts have been avoided. Thirdly, the Strasbourg Court has continued to support the EU and its legal order. Thus, it has recognised that the need to comply with obligations under EU law is "a legitimate general-interest objective of considerable weight" that may justify restrictions on, for instance, property rights; found that the refusal to execute a European Arrest Warrant (EAW) was insufficiently justified; qualified a criminal conviction in breach of EU law as a manifest error of law; and continued to support the judicial dialogue between domestic courts and the CJEU.

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I. Introduction: "The disappointment that we felt"

How did the European Court of Human Rights respond to *Opinion 2/13*? Or, more precisely, how did its "post-2/13" jurisprudence evolve in cases that raised issues of EU law?

It seems safe to assume that the *njet* from Kirchberg, on that fateful day in December 2014, took the Strasbourg Court by surprise. An outside observer might be forgiven for thinking that the Court must have been dismayed; dismayed by the contents as much as by the tone of *Opinion 2/13* … the endless list of objections against the proposed accession agreement, the repeated emphasis on the autonomy of the EU legal order (17 hits), the insistence on the need to preserve the exclusive jurisdiction of the Court of Justice (5 hits) – and indeed, the *distrust* towards the Court in Strasbourg that permeated the Opinion.[1] Is it strange to assume that the Strasbourg judges were taken aback by what was said by their colleagues in Luxembourg? Not only did the Opinion derail the Union's accession for the foreseeable future, but the CJEU also behaved as, well, an unreliable partner. It had been involved in the accession negotiations behind the scenes, and sometimes in broad daylight as well – and at no point did it signal its opposition to the draft agreement.[2] Talking about mutual trust (4 hits), Strasbourg must have felt betrayed.

Indeed: Dean Spielmann, at the time the President of the European Court of Human Rights, did not hide his discontent. At the solemn hearing for the opening of the judicial year 2015, just a few weeks after *Opinion 2/13* had been issued, he stated: "Let us be clear: the disappointment that we felt on reading this negative opinion mirrored the hopes that we had placed in it – hopes shared widely throughout Europe".[3]

Still, the idea of accession could not, and should not, be abandoned:

> "In deciding that the Union would accede to the European Convention on Human Rights, the drafters of the Lisbon Treaty clearly sought to complete the European legal area of human rights; their wish was that the acts of EU institutions would become subject to the same external scrutiny by the Strasbourg Court as the acts of the States. They wanted above all to ensure that a single and homogenous interpretation of human rights would prevail over the entire European continent, thereby securing a common minimum level of protection. The opinion of the Court of Justice does not render that plan obsolete; it does not deprive it of its pertinence. The Union's accession to the Convention is above all a

[1] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 paras 20 ff.

[2] See *e.g.* ECHR, *Joint communication from presidents Costa and Skouris* www.echr.coe.int as mentioned by A Drzemczewski, 'The EU Accession to the ECHR: The Negotiation Process' in V Kosta, N Skoutaris and VP Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 20. See also the observations in CWA Timmermans, 'A View From the CJEU' in V Kosta, N Skoutaris and VP Tzevelekos (eds), *The EU Accession to the ECHR* cit. 336.

[3] See ECHR, Opening address, www.echr.coe.int.

political project and it will be for the European Union and its member States, in due course, to provide the response that is called for by the Court of Justice's opinion".[4]

But that was clearly a long-term project. What about the short term? How, if at all, should "this negative opinion" translate into the Court's case law? President Spielmann ventured a few thoughts on that matter:

> "For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution.
>
> Our Court will thus continue to assess whether State acts, whatever their origin, are compliant with the Convention, while the States are and will remain responsible for fulfilling their Convention obligations.
>
> The essential thing, in the end, is not to have a hierarchical conception of systems that would be in conflict with each other. No, the key is to ensure that the guarantee of fundamental rights is coherent throughout Europe.
>
> For, let us not forget, if there were to be no external scrutiny, the victims would first and foremost be the citizens of the Union".[5]

How did this play out in actual practice? Did the Court, to use a hyperbole, "seek revenge" for the "betrayal" of *Opinion 2/13*? Or did it continue business as usual?
A quick reply: *Opinion 2/13* itself is mentioned only once in the Court's case law, and only in a rather matter-of-fact way.[6] But we do not give up so easily. There must be other ways to find out if the Court has changed the way in which it deals with cases that raise issues of EU law.

The obvious starting point for our exploration, the *ex ante* point of reference, is the well-known *Bosphorus* case.[7] In this case – decided in 2005, *i.e*. well before *Opinion 2/13* – the Court developed its general approach *vis-à-vis* international organisations. It then applied this approach to the EU (or, to be more precise, to the Community, as the case was decided before the Lisbon Treaty entered into force). In doing so, it tried to strike a balance between two potentially conflicting interests: on the one hand, the need to protect human rights and to preserve the integrity of the system set up under the European Con-

[4] *Ibid*.

[5] *Ibid*.

[6] ECtHR *Avotiņš v Latvia* App n. 17502/07 [23 May 2016] para. 114; see section IV of this *Article*. To complicate matters, a search in the HUDOC search engine (on the Court's website, www.echr.coe.int) using "Opinion 2/13" yields no hits. The term "EU accession" does give some results, but these lead to cases where mention is made of a State acceding to the EU, *e.g*., "Hungary's EU accession" (ECtHR *Somorjai v Hungary* App n. 60934/13 [28 August 2018] para. 6). All cases referred to in this article are judgments, unless specified differently. All cases can be found through HUDOC.

[7] ECtHR *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App n. 45036/98 [30 June 2005] paras 152–157.

vention of Human Rights (ECHR); on the other hand, the need to create space for international cooperation and, more in particular, the process of European integration with its unique dynamics.

It is convenient briefly to recall the Court's *Bosphorus* doctrine, because it will be a recurring theme in this overview. The starting point is that the ECHR does not prohibit the Contracting Parties from establishing international organisations, from transferring sovereign power to these organisations, or indeed from performing actions in compliance with legal obligations flowing from their membership of these organisations. In essence this is not much different from the situation where a State Party to the Convention is requested to extradite an individual pursuant to an extradition treaty with a third state: the obligation to comply with that treaty continues to exist. Yet, as the example illustrates, the States Parties remain responsible under art. 1 ECHR for all acts and omissions of their own organs – and so the decision to extradite may lead to the State's responsibility under the Convention.[8]

It is at this point that *Bosphorus* adds a new dimension. If an international organisation protects fundamental rights at a level which is at least equivalent – that is, not identical but "comparable" – to the Convention standards, a presumption arises that the State has not departed from the requirements of the Convention when carrying out its obligations as a Member State. This presumption can be rebutted if, in the circumstances of a particular case, the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation will be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[9]

As regards the Community in particular, the Court found in *Bosphorus* that the protection of fundamental rights by Community law could be considered to be "equivalent" to that of the Convention system, both as regards the substantive guarantees of fundamental rights and the mechanisms of control in place to ensure their observance.[10] It will be noted that the Court arrived at this conclusion at a point in time that the EU Charter of Fundamental Rights had merely declaratory status; it would only acquire force of law four years later, with the entry into force of the Lisbon Treaty. It was the kind of benevolence towards the EU that the Strasbourg Court had also displayed before. In the earlier case of *Pafitis* it held that the time spent on a preliminary ruling procedure (two years, seven months and nine days!) should not be taken into account when determining if court proceedings had been completed "within a reasonable time": "even though it may at first sight appear relatively long, to take it into account would adversely affect the system instituted by Article 177 of the EEC Treaty and work against the aim pursued in substance in that Article".[11]

[8] ECtHR *Soering v UK* App n. 14038/88 [7 July 1989] para. 91. Conversely, the decision not to extradite may lead to the State's responsibility under the extradition treaty.

[9] See also ECtHR *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands* App n. 13645/05 [20 January 2009], admissibility decision.

[10] *Bosphorus* cit. paras 159–165.

[11] ECtHR *Pafitis v Greece* App n. 20323/92 [26 February 1998] para. 95.

The question is to what extent the Court maintained this *courtoisie* towards the EU after *Opinion 2/13* was issued. In an attempt to answer this question, we will explore the "post-2/13" Strasbourg case law. About a dozen cases stand out and will be subjected to closer scrutiny. The following roadmap will be used. We will start, in section II, with a series of cases where the Court dealt with complaints about acts of the EU institutions themselves. In section III the focus shifts to complaints about the conduct of EU Member States when implementing EU law, for instance when transposing a directive or complying with a judgment of the CJEU. A special group of cases features in section IV: situations where EU Member States cooperate with one another in the context of EU law, for instance by surrendering a suspect on the basis of a European arrest warrant. This section will take most of our time. We will end the tour with two short stops. In section V we will see how the Strasbourg Court tackles cases where an interpretation of EU law is required, for instance to know if an interference with a particular right was "in accordance with the law", or if proceedings were unfair because a domestic court declined to refer preliminary questions to the CJEU. The focus of section VI will be on the Strasbourg Court's involvement in the Polish rule of law crisis, which was also the subject of a series of judgments from the CJEU. The parallel involvement of the two European Courts has led to an interesting synergy, which can also be detected in other areas. Finally, some conclusions will be drawn in section VII.

II. *Connolly* continued: complaints about acts of the EU institutions

Prior to *Opinion 2/13*, the Court dealt with several complaints about acts of the EU institutions. Labour disputes, for instance between officials and the European Commission, acting as their employer, were a clear example. The EU not being a contracting party to the ECHR, complaints that were addressed against the EU – or the Communities before them – have always been rejected *ratione personae*.[12] Unsurprisingly, this did not change after *Opinion 2/13*.[13]

[12] See *e.g.* European Commission of Human Rights, *CFDT v the European Communities, alternatively: their Member States, a) jointly and b) severally* App n. 8030/77 [10 July 1978], and European Commission of Human Rights, *Dufay contre les Communautés européennes, subsidiairement, la collectivité de leurs Etats membres et leurs Etats membres pris individuellement* App n. 13539/88 [9 January 1989]. This seemingly obvious outcome was questioned in the literature (*e.g.* EA Alkema, 'The EC and the European Convention on Human Rights – Immunity and Impunity for the Community?' (1979) CMLRev 501–508; P Pescatore, 'La Cour de justice des Communautés européennes et la Convention européenne des Droits de l'Homme' in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension* (Cambridge University Press 1988) 441–455. Yet, the approach was confirmed by the Court in *Bosphorus* cit. para. 152: "[...] even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party".

[13] See *e.g.*, ECtHR *Andreasen v the United Kingdom and 26 other member States of the European Union* App n. 28827/11 [31 March 2015], admissibility decision, para. 62 (quoting *Bosphorus* cit. para. 152).

Applicants have tried to work their way around this obstacle by bringing complaints against the EU Member States collectively.[14] Prior to *Opinion 2/13*, these attempts remained unsuccessful. In the case of *Senator Lines*, a company complained that it did not enjoy an effective right of access to court when trying to challenge a fine imposed by the European Commission. The case was pending before the Grand Chamber of the Strasbourg Court; a principled decision seemed to be in the making. But an anti-climax occurred: the EU Court of First Instance quashed the impugned fine and then Strasbourg was quick to reject the case.[15] Complaints concerning labour disputes, such as the relatively well-known case of Mr Connolly, were unsuccessful, too.[16] Cases that involved other international organisations – such as Eurocontrol and NATO, or indeed the Council of Europe itself – met with a similar fate.[17]

The adoption of *Opinion 2/13* did not bring about a change in the Court's hands-off approach. The case of *Andreasen*, which was based on a remarkable course of events, provides an example.[18] In 2002, Ms Andreasen was appointed by the European Commission to the posts of Director for Execution of Budget and Chief Accountant. She quickly identified a number of weaknesses and incoherencies in the European Union's accounting system. However, her proposals to change the system were rejected by her superior, the Director-General, who did not contest that there were shortcomings, but wanted "to proceed in a more orderly way to improve the current system than that proposed by the applicant".[19] Within weeks the situation escalated completely. Bypassing her DG, Ms Andreasen wrote directly to the Commissioner for Finances and Budget to share her concerns. When criticised for this, she addressed all of the Directors General in the Commission, and subsequently the President and the two Vice-Presidents of the Commission, the President of the European Court of Auditors and several MEPs. Within four months of her appointment, she was "released from her duties" and transferred to the DG Personnel and Administration to assume the somewhat undefined post of Adviser. Undeterred, she started to talk to the press, despite instructions not to do so. Disciplinary procedures

[14] An avenue explored at length, with minimal impact on the Court's case law, in RA Lawson, *Het EVRM en de Europese Gemeenschappen* (PhD Leiden 1999).

[15] ECtHR *Senator Lines GmbH v Austria a.o.* App n. 45036/98 [10 March 2004], admissibility decision.

[16] See *e.g.*, ECtHR *Connolly v 15 Member States of the European Union* App n. 73274/01 [9 December 2008), admissibility decision. Mr Connolly, an official of the Commission working on monetary policies, was dismissed after publishing the book The Rotten Heart of Europe. The Dirty War for Europe's Money. He may have found some consolation in the warm praise that his book received from a Brussels-based journalist named Boris Johnson.

[17] See ECtHR *Boivin v 34 Member States of the Council of Europe* App n. 73250/01 [9 September 2008], admissibility decision; ECtHR *Gasparini v Italy and Belgium* App n. 10750/03 [12 May 2009], admissibility decision; ECtHR *Beygo v 46 Member States of the Council of Europe* App n. 36099/06 [16 June 2009], admissibility decision. More recently, this line of case law was reconfirmed: ECtHR *Dalvy contre les 47 États membres* App n. 61548/21 [23 May 2023], admissibility decision.

[18] *Andreasen v the United Kingdom and 26 other member States of the European Union* cit.

[19] *Ibid*. para. 9.

followed, during which it emerged that she had failed to disclose that she had been suspended by her former employer, OECD, when she applied for the position at the Commission. In the end she was dismissed. She challenged her dismissal at the EU Civil Service Tribunal, lost her case, appealed to the General Court and lost again. At this point she lodged an application to the European Court of Human Rights, addressed against the EU Member States. She claimed that she was denied an effective remedy.

The Court rejected her complaint as inadmissible *ratione personae*. It quoted its earlier *Bosphorus* judgment at length and recalled that it had observed in that case "that the protection of fundamental rights afforded by Community law was, *at the relevant time*, 'equivalent' to that of the Convention system".[20] It left it at that, and made no explicit attempt to examine the *current* level of EU protection. Yet, the Court was prepared to find, by implication, that the EU continued to meet the *Bosphorus* test:

> "In the present case the Court does not consider that the applicant has 'complained in a substantiated manner either that there were manifest deficiencies in the internal appeal proceedings' of the European Union or that in transferring their powers to that organisation the Member States failed to fulfil their obligations under the Convention by not providing an 'equivalent' system of fundamental rights protection. As such, the present case can be distinguished from both Gasparini and Perez, in which the applicants made detailed submissions about the failings of the internal appeal procedures and explicitly argued that these amounted to manifest deficiencies which the Member States ought to have been aware of at the time they transferred powers to the organisation.
>
> Indeed, [...] the applicant in the present case has not identified any specific act or omission on the part of the Member States or their authorities which would be capable of engaging their responsibility under the Convention (see Beygo, cited above). On the contrary, her complaints were essentially directed at the decision of the Disciplinary Board and the proportionality of the disciplinary measures taken against her (see Connolly, cited above). As this decision emanated from an international tribunal outside the jurisdiction of the respondent States, no act or omission could be attributed to them so as to engage their responsibility under the Convention".[21]

All in all the *Andreasen* saga allows us to conclude that, by 2015, the Strasbourg Court has continued the line of case law that pre-dates *Opinion 2/13*: the EU Member States will not be held accountable for issues that "lay entirely within the internal legal order" of the EU. The EU was still considered to pass the *Bosphorus* test as an organisation that offers an "equivalent protection" of human rights.

[20] *Ibid*. para. 63, emphasis added.

[21] *Ibid*. paras 70–71. Three of the cases to which reference is made are *Boivin v 34 Member States of the Council of Europe* cit. *Gasparini v Italy and Belgium* cit. *Beygo v 46 Member States of the Council of Europe* cit. The fourth is ECtHR *Perez v Germany* App n. 15521/08 [29 January 2015], admissibility decision, concerning the UN. For a similar approach, as regards the European Patent Office (EPO), see ECtHR *Klausecker v Germany* App n. 415/07 [6 January 2015], admissibility decision.

At the same time, a keen observer will have noted that *Bosphorus* was actually used "out of context". At the time, in 2005, the *Bosphorus* test was developed in a situation where a Member State implemented a binding measure: Ireland seized an aircraft pursuant to sanctions that had been imposed "by Brussels". The Court found that Ireland could safely do so. But in *Andreasen* the situation was quite different: no Member State was involved at all. Still the Court used the *Bosphorus* test – one could say: by analogy. A complaint about a procedure before the CJEU was "translated" into the question whether the Member States, in creating that court and in transferring powers to it, failed to provide an "equivalent" system of fundamental rights protection. It seems safe to assume that the Court will be slow to accept that, back in the 1950s, the founding fathers failed to anticipate how the Communities, and much later the Union, would develop over the decades to come.

Be that as it may, the fact that *Andreasen* was decided by a Committee of three judges suggests that the decision was not seen as particularly complex. This is confirmed in a relatively recent Norwegian case, where a complaint was made about the fairness of a procedure before the EFTA Court. In rejecting this complaint, the European Court of Human Rights first distinguished between EU and EEA law:

> "the Court emphasises that the basis for the presumption established by *Bosphorus* is in principle lacking when it comes to the implementation of EEA law at domestic level within the framework of the EEA Agreement, due to the specificities of the governing treaties, compared to those of the European Union. For the purpose of the present analysis, two distinct features need to be specifically highlighted. Firstly, and in contrast to EU law, there is within the framework of the EEA Agreement itself no direct effect and no supremacy (contrast *Bosphorus* [...] § 164). Secondly, and although the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights" in order to enhance coherency between EEA law and EU law (see, *inter alia*, the EFTA Court's judgment in its case E-28/15 *Yankuba Jabbi* [2016] par. 81), the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention".[22]

This observation might signal that the Court will take a more critical approach to international organisations other than the EU; similar remarks were not made in earlier cases involving Eurocontrol and so on. Meanwhile, the role that EU law plays in the Court's comparison with EEA law can only mean that the EU is still seen as meeting the *Bosphorus* test.

Yet, in the Norwegian case at hand no breach of the Convention was found. The Strasbourg Court continued to assess whether the "organisational and procedural regime of the EFTA Court" is "manifestly deficient" when compared with the Convention requirements. In reaching a negative answer (that is, no deficiency) the Court used a remarkable line of reasoning:

[22] ECtHR *Konkurrenten.no AS v Norway* App n. 47341/15 [5 November 2019] para. 43. This analysis was later nuanced in ECtHR *LO & NTF v Norway* App n. 45487/17 [10 June 2023] para. 107.

> "Taking into account the fact that the EFTA Court was set up to operate as a judicial body *similar to the CJEU, and* that the essential procedural principles governing the operation of the EFTA Court were *inspired by those of the CJEU*, *the only starting point can be that there are no such manifest deficiencies.* This is indeed confirmed by specific provisions in the EEA and ESA/Court Agreements, the EFTA Court's Rules of Procedure and its case law as the parties and the ESA have presented it. In this connection, the Court notes in particular that the EFTA Court is a body of independent and impartial judges who deliver reasoned decisions based on proceedings that are public and adversarial".[23]

In conclusion, the Strasbourg Court still finds that the EU passes the *Bosphorus* test as an organisation that offers an "equivalent protection" of human rights. Indeed, almost 20 years have passed since *Bosphorus* – but the Strasbourg Court did not even find it necessary to check if its finding that the Community legal order offered an "equivalent protection" still holds water today. The Norwegian case suggests that, without further ado, the EU is seen as *the* benchmark in this field. No trace of any hard feelings towards Luxembourg – it is as if *Opinion 2/13* never happened!

III. Back to real *Bosphorus*: complaints about EU Member States implementing EU law

In the present section we will explore how the Strasbourg Court deals with complaints about the way in which EU Member States implement EU law – the scenario in which the original *Bosphorus* test was first developed.

First the point of reference. In December 2012, two years before the CJEU delivered its *Opinion 2/13*, the Strasbourg Court gave the EU a nice present, wrapped in a judgment: the case of *Michaud*.[24] The case concerned a newly introduced obligation for lawyers to report suspected money laundering by their clients. Mr Michaud argued that this jeopardised legal professional privilege and the confidentiality of exchanges between lawyer and client, in breach of art. 8 ECHR. France replied that it was merely implementing EU law – in this case EU Directive 2005/60 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Invoking the *Bosphorus* presumption, France maintained that the Strasbourg Court should not review the French implementation measures. On this occasion the Court recalled its *Bosphorus* judgment, in which it found that the protection of fundamental rights afforded by the EU was in principle equivalent to that of the Convention system, and added (in a sentence that does not seem entirely correct): "*A fortiori* since 1 December 2009, the date of entry into force of Article 6 (amended) of the Treaty on European Union, which gave the Charter of Fundamental Rights of the European Union the force of law and made fundamental rights,

[23] *Konkurrenten.no AS v Norway* cit. para. 45, emphasis added.
[24] ECtHR *Michaud v France* App n. 12323/11 [6 December 2012].

as guaranteed by the Convention and as they resulted from the constitutional traditions common to the member States, general principles of European Union law".[25]

Yet the Court found that France could not rely on the *Bosphorus* presumption. Distinguishing the present case from *Bosphorus*, the Court noted, somewhat cautiously, that the directive left discretion to France.[26] In addition, "and above all", the Court noted that the French courts had never bothered to ask preliminary questions to the CJEU:

> "The Court is therefore obliged to note that because of the decision of the *Conseil d'Etat* not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the *Conseil d'Etat* ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply".[27]

The Strasbourg Court then filled the gap that had remained in the EU system of fundamental rights protection and proceeded to determine whether the interference was necessary for the purposes of art. 8 ECHR. A nice present for the EU: the Strasbourg Court provided an obvious incentive for domestic courts to refer matters to the CJEU for a preliminary ruling, enabling *that* court to review EU law for compliance with fundamental rights. The fact that the Strasbourg Court subsequently concluded – unanimously – that no violation had occurred in the case of Mr Michaud makes the ruling all the more interesting: the Court really went out of its way to strengthen the position of their good colleagues in Luxembourg. Little did they know.

Two years later they found out. How would the *Bosphorus*/*Michaud* line develop "post 2/13"?

A temporary prohibition on commercial mussel-seed fishing gave an opportunity to find out. An Irish company, O'Sullivan McCarthy Mussel Development, was engaged in the cultivation of mussels in Castlemaine harbour, on the west coast of Ireland. In 2007 the CJEU found that Ireland had failed to fulfil its obligations under two EU environmental directives.[28] In view of the judgment, the authorities considered that it was not legally possible to permit commercial activity in Castlemaine harbour until some necessary assessments had been completed. Mussel-seed fishing was therefore prohibited from June 2008. In October 2008, following successful negotiations between the Government and

[25] *Ibid*. para. 106.

[26] *Ibid*. para. 113: "the question whether France, in complying with its obligations resulting from its membership of the European Union, had a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection is not without relevance". See also *M.S.S. v Belgium and Greece* cit. para. 338.

[27] *Michaud v France* cit. para. 115.

[28] Case C-418/04 *Commission v Ireland* ECLI:EU:C:2007:780.

the European Commission, mussel-seed fishing could resume. By that time, however, natural predators had already decimated the mussel seed. Since mussels need two years to grow to maturity, Messrs. O'Sullivan and McCarthy had no mature mussels to sell in 2010, causing a loss of profit. The company instituted unsuccessful compensation proceedings against the State, then lodged a complaint in Strasbourg.[29]

Like the French government in *Michaud*, the Irish government argued that the *Bosphorus* case law should apply. But the Court was not persuaded. Adopting a more straightforward formulation than in *Michaud*, it observed that the application of *Bosphorus* presumption is subject to two conditions:

> "The first is that the impugned interference must have been a matter of strict international legal obligation for the respondent State, to the exclusion of any margin of manoeuvre on the part of the domestic authorities. The second condition is the deployment of the full potential of the supervisory mechanism provided for by EU law, which the Court has recognised as affording equivalent protection to that provided by the Convention [...]".[30]

As to the first condition, the Court noted that Ireland "was not wholly deprived of a margin of manoeuvre": while it was clear that Ireland had to comply with the directive and, with immediacy, the CJEU judgment, both required results to be achieved. Neither mandated how compliance was to be effected. The Strasbourg Court made sure to avoid categorical statements about EU law: "[t]he Court leaves open the question whether a CJEU judgment under Article 258 TFEU could in other circumstances be regarded as leaving no margin of manoeuvre to the Member State in question, but finds in the circumstances of the present case in relation to the need to comply with the relevant EU directive that the *Bosphorus* presumption did not apply".[31]

At first sight, then, it appeared that the Court was making life more difficult for EU Member States which seek to comply with their obligations under EU law. But the opposite is true. The Court considered that, in addition to the need to protect the environment, the Irish authorities had acted to comply with Ireland's obligations under EU law – which it readily recognised as "a legitimate general-interest objective of considerable weight".[32] In its assessment of the Irish measures, the Court did take into account the need to achieve compliance on a nation-wide scale, and within an acceptable timeframe, with the State's obligations under EU environmental law.[33] No violation of the Convention was found.

This overview confirms the conclusion of section II. The Court is willing to grant considerable leeway to domestic authorities that seek to comply with their obligations under EU law ("a legitimate general-interest objective of considerable weight"). The *Bosphorus* test is still alive and kicking, even if the Court introduced a somewhat stricter formulation

[29] ECtHR *O'Sullivan McCarthy Mussel Development Ltd v Ireland* App n. 44460/16 [7 June 2018].
[30] *Ibid*. para. 110. Reference to the *Avotiņš* case, to be discussed in section IV of this *Article*, omitted.
[31] *Ibid*. para. 112.
[32] *Ibid*. para. 109.
[33] *Ibid*. paras 115–129.

of the requirements that have to be fulfilled before a Member State can rely on the presumption of "equivalent protection".

IV. No blind trust: complaints about cooperation between EU Member States

Within the wider group of cases where Member States seek to comply with their obligations under EU law, cases involving judicial cooperation between EU Member States take a special position. Here one may think of the surrender of individuals based on a European Arrest Warrant (EAW), the recognition of foreign judgments, or the removal of an asylum-seeker family to another Member State under the Dublin II Regulation. In order to facilitate and accelerate these forms of cooperation, various instruments *require* the Member States to cooperate when requested. The core principle on which these systems are based is mutual recognition, which in turn depends on mutual trust between the EU Member States. Of course this may lead to tensions in practice, as has become clear in the case law of the CJEU as well, for instance if one Member State adopts a higher level of protection than another,[34] or if the mutual trust between Member States erodes, as happened when the rule of law and judicial independence in Poland were undermined in the period 2015–2023.[35]

This area has given rise to some interesting Strasbourg cases. In our review we will focus on two issues: the Court's overall approach, where – once again – the *Bosphorus* doctrine will play an important role (section IV.1), and the specific issue of whether the mutual recognition mechanisms are compatible with the ECHR (section IV.2).

IV.1. *Avotinš: Bosphorus* in a horizontal setting, too

The potential clash between the principle of mutual trust and the realities on the ground emerged in the Strasbourg case law, too, well before *Opinion 2/13* was adopted. The case of *M.S.S. v Belgium and Greece* concerned an asylum-seeker from Afghanistan who had entered the European Union through Greece and then moved on to Belgium. Using the so-called Dublin II system, Belgium returned the person to Greece, the port of first entry, where the asylum claim should be processed. At that time, however, the asylum system in Greece was severely overburdened. In its judgment the Strasbourg Court held that the Belgian authorities should not have removed the asylum-seeker to Greece on the simple assumption that he would be treated in conformity with Convention standards. The Belgian authorities – who "knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities" – should have

[34] Case C-399/11 *Melloni* ECLI:EU:C:2013:107 paras 55–64.

[35] See, among many cases, case C-216/18 *Ministry of Justice and Equality v LM* ECLI:EU:C:2018:58 and joined cases C-354/20 and C-412/20 *L and P* ECLI:EU:C:2020:1033.

verified how the Greek authorities applied their asylum legislation in practice. Instead they had simply, and systematically, relied on the possibilities of the Dublin II system.[36]

Although this was not a case of an EU Member State transposing a directive in domestic law (as in *Michaud*) or complying with a CJEU judgment (as in *O'Sullivan McCarthy Mussel Development*), the *Bosphorus* presumption popped up. Intervening in the *M.S.S.* case, the government of the Netherlands argued that it had to be assumed that Greece would honour its international obligations and that transferees would be able to appeal to the Greek courts and subsequently, if necessary, to the Court: "[t]o reason otherwise would be tantamount to denying the principle of inter-State confidence on which the Dublin system was based, blocking the application of the Dublin Regulation by interim measures, and questioning the balanced, nuanced approach the Court had adopted, for example in its judgment in *Bosphorus* [...], in assessing the responsibility of the States when they applied Community law".[37]

This did not convince the Court. Like in *Michaud*, the Court found that the *Bosphorus* presumption did not apply. The Dublin II system simply did not oblige the Belgian authorities to transfer the asylum-seeker to Greece.[38] It merely obliged Greece to accept asylum-seekers if the conditions for transfer in the Dublin II Regulation were fulfilled.

But ever since *M.S.S.*, the *Bosphorus* presumption continues to play a role in cases that feature some form of judicial cooperation between EU Member States. The most prominent example is the case of *Avotiņš*, in which the applicant argued that the Latvian courts should have refrained from enforcing a Cypriot judgment. The latter judgment had been delivered in Mr Avotiņš's absence; in his view, it was clearly defective as it had been delivered in breach of his defence rights. However, the Latvian courts felt that the so-called Brussels I Regulation, as interpreted by the CJEU, did not allow them to refuse the enforcement of the Cypriot judgment.[39]

The European Court of Human Rights agreed with the Latvian courts. It found in essence that the *Bosphorus* presumption of equivalent protection applied, as the Latvian courts had done no more than implement Latvia's legal obligations arising out of its membership of the European Union. In a generous mood the Court accepted that the Latvian courts had not requested a preliminary ruling from the CJEU: "this second condition should be applied without excessive formalism".[40]

[36] ECtHR *M.S.S. v Belgium and Greece* App n. 30696/09 [21 January 2011] paras 344–359. The "response" from Luxembourg came later that year: joined cases C-411/10 and C-493/10 *N.S. and Others* ECLI:EU:C:2011:610 paras 88–106.

[37] *M.S.S. v Belgium and Greece* cit. para. 330.

[38] *Ibid*. paras 338–340. For a "pre-2/13" case with a different outcome, see ECtHR *Povse v Austria* App n. 3890/11 [18 June 2013], admissibility decision. The case concerned the enforcement under the Brussels IIa Regulation of an Italian court order for the return of a child who had been taken to Austria by its mother.

[39] *Avotiņš v Latvia* cit.

[40] *Ibid*. para. 109: "it would serve no useful purpose to make the implementation of the Bosphorus presumption subject to a requirement for the domestic court to request a ruling from the CJEU in all cases

In a dissenting opinion, Judge Sajó expressed unease about the application of the *Bosphorus* presumption in this "horizontal" context. But he remained a lone dissenter in a Grand Chamber of 17 judges.[41]

IV.2. *Avotiņš* II: mutual recognition not to be applied automatically and mechanically

This was not the end of the *Avotiņš* story, though. Having determined that the *Bosphorus* presumption applied, the Court proceeded to examine whether in the case at hand there had not been a "manifest deficiency". This led to an important passage: the Court reviewed the EU principle of mutual recognition from the perspective of the Convention. It started with the good news: "[t]he Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice [...] and of the mutual trust which they require. [...] it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention".[42]

But then came the twist: "the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms". It is here that the Strasbourg Court referred to *Opinion 2/13* – to my knowledge the only time that the Court did so. And it took issue with part of the CJEU's position:

> "[...] the CJEU stated recently in Opinion 2/13 that 'when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that [...], save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU' [...]. Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".[43]

For the Court the conclusion was clear. Despite the "spirit of complementarity" in which it took into account the manner in which these mechanisms operate as well as the aim of effectiveness which they pursue: "it must verify that the principle of mutual recognition is

without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law, or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights".

[41] *Ibid*. paras 58–59 of the judgment. Two other judges argued, based on the facts of the case, that it was not necessary to have recourse to the Bosphorus presumption.

[42] *Ibid*. para. 113.

[43] *Ibid*. para. 114.

not applied automatically and mechanically to the detriment of fundamental rights".[44] This implied that there was work to be done by the domestic courts of the EU Member States, too. When called upon to apply a mutual-recognition mechanism established by EU law,

> "they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law".[45]

And so, with the *Avotiņš* judgment delivered by the Grand Chamber of the Strasbourg Court, we did get a genuine "post-2/13" confrontation. The consequences for the instant case were very limited, as the Court in the end did not find a breach of the Convention. But the potential for clashes between Strasbourg and Luxembourg was clear.

IV.3. The clash that never happened

It may be a matter of well-disposed fortune, but these clashes never materialised. Just one month before *Avotiņš* was decided, the CJEU had delivered its *Aranyosi* judgment.[46] This case was triggered by the fact that the general conditions of detention of Hungary were so poor that the surrender of an individual pursuant to an EAW posed a real risk of exposing him to inhuman or degrading treatment. In its judgment the CJEU accepted that there are limitations of the principles of mutual recognition and mutual trust between Member States. "The consequence of the execution of such a warrant must not be", the CJEU ruled, "that that individual suffers inhuman or degrading treatment".[47] It then placed strict limits on the new exception, which was to operate alongside the grounds set out by the Framework Decision for mandatory and optional non-execution of an EAW, and introduced a number of steps that the domestic authorities had to take in order to try and bring about the surrender anyway. But the message was clear: the obligation to respect fundamental rights could not be sidelined by the system established by the EAW framework.[48]

[44] *Ibid*. para. 116. With the expression "automatically and mechanically" the Court refers, "mutatis mutandis", to a precedent where it used the same formula in connection to a classic international law instrument, the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (See ECtHR, *X v Latvia* App n. 27853/09 [26 November 2013] para. 98).

[45] *Avotiņš v Latvia* cit. para. 116.

[46] Joined cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[47] *Ibid*. para. 88.

[48] *Ibid*. para. 83. Confirmed in case C-220/18 *Generalstaatsanwaltschaft* ECLI:EU:C:2018:589 (Conditions of detention in Hungary), and case C-128/18 *Dorobantu* ECLI:EU:C:2019:857.

This created a space for the European Court of Human Rights to develop the reasoning of the *Avotiņš* judgment in a series of EAW cases, without engaging in a direct confrontation with the CJEU. In the case of *Pirozzi*, the Court found that the Belgian system of implementing European arrest warrants was compatible with the Convention, because the Belgian courts had examined the merits of the complaints raised under the Convention.[49] In the case of Mr Pirozzi, they had verified that the enforcement of the EAW did not give rise to a manifestly deficient protection of his rights under the Convention, and the Court agreed with that assessment.

In the case of *Romeo Castaño*, by contrast, the Belgian courts refused to execute a European arrest warrant. They based their decision on the risk that Ms N.J.E., if surrendered to Spain, would be detained in conditions contrary to art. 3 ECHR. This refusal triggered a case in Strasbourg from an unexpected corner. Ms N.J.E. was wanted in connection with the assassination, back in 1981, of an army officer by a commando unit belonging to the terrorist organisation ETA. Over the years all the members of this unit were convicted by the Spanish courts, with the exception of N.J.E., who had fled to Belgium. When the Belgian courts refused to surrender her, Mr Romeo Castaño – the son of the murdered army officer – argued that Belgium was frustrating the on-going murder investigation in Spain. This, he claimed, was in breach of art. 2 ECHR (right to life), which includes a duty to undertake an effective investigation into any unlawful killing.[50]

In these unusual circumstances, the Strasbourg Court sent a double message. On the one hand, the Belgian courts had done the right thing: they had refrained from an "automatic and mechanical" execution of a European arrest warrant. Indeed, the Court confirmed the obligation for the Belgian authorities to verify that N.J.E. would not run the risk of ill treatment if she were surrendered to Spain. Such a risk could constitute a legitimate ground, from the standpoint of the Convention, for refusing to execute the arrest warrant and thus for refusing cooperation with Spain.[51]

[49] ECtHR *Pirozzi v Belgium* App n. 21055/11 [17 April 2018] para. 67. For those who like details: the judgment (which is available only in French) reads: "la Cour estime que le contrôle effectué par les autorités belges, ainsi limité, ne pose pas de problème en soi avec la Convention *dès lors que* les juridictions belges ont examiné le bien-fondé des griefs tirés de la Convention par le requérant" (emphasis added). The Court's press release in English (ECHR 146 (2018) puts it differently: "the Court considered that the review carried out by the Belgian authorities, thus limited, did not in itself give rise to any problem in relation to the Convention, *provided that* the Belgian courts examined the merits of the complaints raised under the Convention" (emphasis added). The Court quoted extensively from the Avotiņš judgment, adding one sentence to it: "Il leur [i.e., the domestic courts] appartient dans ce cas de lire et d'appliquer les règles du droit de l'UE en conformité avec la Convention" (para. 64). This "new sentence" was later repeated in ECtHR *Bivolaru and Moldovan* App n. 40324/16 and 12623/17 [25 March 2021] para. 97, and thus "made it" to the Court's recapitulation of general principles in this area.

[50] ECtHR *Romeo Castaño v Belgium* App n. 8351/17 [9 July 2019].

[51] *Ibid*. paras 84–85 and 92.

On the other hand, such a decision should not be taken lightly. In earlier case law the Strasbourg Court had clarified that art. 2 ECHR imposes, where applicable, an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of a killing and to bring the perpetrators to justice.[52] Hence, a refusal to cooperate must be justified on a sufficient factual basis. This was not the case here. The Belgian courts had based their decisions on old information and a general reference to "Spain's contemporary political history". They had failed to conduct a detailed, updated examination of the situation, and they had not sought to identify a real and individual risk of a violation of N.J.E.'s Convention rights or any structural shortcomings with regard to conditions of detention in Spain. All in all, the scrutiny performed by the Belgian courts during the surrender proceedings had not been sufficiently thorough. Belgium had therefore failed in its obligation to cooperate under art. 2 ECHR.

It is clear that *Romeo Castaño* was decided solely on the basis of arts 2 and 3 ECHR, as interpreted by the Strasbourg Court. The Court did not venture to interpret or apply the EAW system – but the outcome of the case seems very much in line with the purpose of the EU framework. In a concurring opinion, Judge Spano referred to the "symmetry" between Convention and EU law, and he acknowledged the need "not to undermine the delicate balance of duties and obligations embedded in the EAW framework of cooperation".[53]

The last case that deserves to be mentioned here, *Bivolaru and Moldovan*, is from 2021. It provided the Court with an opportunity to recapitulate the "general principles relating to the presumption of equivalent protection in the legal order of the European Union", and the application of those principles to European arrest warrant cases.[54] The case concerns two applicants who were surrendered by France to Romanian authorities, on the basis of European arrest warrants, to serve prison sentences. In one case there was a real risk of exposure to poor detention conditions. In the other case there was no such risk, but the applicant, Mr. Bivolaru – featured in the Court's judgment as the leader of a spiritual yoga movement, the Movement for Spiritual Integration into the Absolute – had been recognised as refugee by the Swedish authorities.

[52] ECtHR *Güzelyurtlu a.o. v Turkey and Cyprus* App n. 36925/07 [29 January 2019] paras 222–238.

[53] *Romeo Castaño v Belgium* cit. para. 28 of the judgment, Concurring opinion of Judge Spano joined by Judge Pavli. It may be noted that the EAW did play a role in the Court's analysis, when examining whether the applicant, who resided in Spain, was "within the jurisdiction" of Belgium (as required by art. 1 ECHR): "In the context of the mutual undertakings given by the two States in the sphere of cooperation in criminal matters, in this instance under the European arrest warrant scheme [...], the Belgian authorities were subsequently informed of the Spanish authorities' intention to institute criminal proceedings against N.J.E., and were requested to arrest and surrender her" (para. 41). These "special features of the case" sufficed for the Court to consider that a jurisdictional link existed between the applicant and Belgium.

[54] *Bivolaru and Moldovan v France* cit. paras 96–106. On this case see J Callewaert, 'The European arrest warrant under the European Convention on Human Rights: A matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) ZEuS-Sonderband 105–114. Callewaert, Deputy Grand Chamber Registrar at the ECtHR, is a long-time observer of the ECHR–EU relationship.

The two cases have different outcomes. In the case of Mr. Moldovan the Court held that the *Bosphorus* presumption applied, since the national authorities were obliged to execute the EAW (so there was an absence of any margin of manoeuvre) and there had not been a need to refer preliminary questions to the CJEU (the law on the subject being sufficiently clear). Yet, in dealing with the case, the national authorities had not given sufficient weight to the evidence that Mr. Moldovan would be subjected to detention conditions in Romania contrary to art. 3 ECHR, and they allowed themselves to be reassured by the Romanian authorities' use of "stock language". Hence a violation was found.

In the second case, the opposite happened. The case raised new questions of interpretation, but the French courts had, once again, decided not to refer preliminary questions to the CJEU. This meant – as in the case of *Michaud*, discussed in section III– that France could not rely on the *Bosphorus* presumption. As a result, the Court reviewed "directly", without any thresholds or presumptions, if Mr. Bivolaru's surrender to Romania would expose him to a real risk of ill treatment. This was not the case, and so no violation of the Convention was found.

The judgment brings two new elements of more general interest. Firstly, as regards the establishment of a real risk to the individual, the Strasbourg Court notes that the requirements laid down by the CJEU since its ruling in *Aranyosi* "are to the same effect as those arising out of its own previous judgments".[55] So the two courts are on the same page! At least, that is what Strasbourg says.[56]

Secondly, a further nuance has been added to the *Bosphorus* test. As mentioned before, the first leg of the test is whether the Member State "does no more than implement legal obligations flowing from its membership of the organisation" (as stated in the *Bosphorus* judgment), which was later paraphrased as "the absence of any margin of manoeuvre on the part of the national authorities" (*Avotiņš*). How did this play out in the case of Mr Moldovan, where the French courts had to collect and weigh the facts in order to establish whether the surrender might pose a real risk to him? Here the Court added a new dimension:

> "this power of the judicial authority to assess the facts and circumstances and determine the legal consequences properly attaching thereto is exercised within the parameters strictly delineated by the judgments of the CJEU [...] Accordingly, the executing judicial authority, in deciding whether to grant or refuse execution of an EAW, cannot be said to enjoy *an independent* margin of manoeuvre such that the presumption of equivalent protection does not apply [...]".[57]

[55] *Bivolaru and Moldovan v France* cit. para. 114.

[56] As J Callewaert, 'The European arrest warrant under the European Convention on Human Rights' cit., rightly points out, there is still a difference, the ECtHR offering a more protective approach. For the Strasbourg Court, an overall assessment of the general situation prevailing in a country is not a pre-condition to any findings regarding the individual circumstances of the person concerned and the risks incurred in the event of their surrender.

[57] *Bivolaru and Moldovan v France* cit. para. 114, emphasis added.

What can we say at the end of this lengthy analysis? As was noted before, the *Bosphorus* doctrine is alive and kicking, it continued to evolve and in 2021 it reached a stage where the Court felt confident to recapitulate the "general principles relating to the presumption of equivalent protection in the legal order of the European Union" and the application of those principles to European arrest warrant cases.

Admittedly, a rather complex kind of jurisprudence has come into existence, which is not easy to penetrate for the uninitiated. But there is an internal logic in the system and, what is perhaps more relevant for present purposes, clashes between the two European Courts have been avoided. That was not obvious when the Strasbourg Court referred to *Opinion 2/13* in the *Avotiņš* case and expressed its reservations as regards the position of the CJEU. The Strasbourg Court put it quite firmly – and understandably so, from its point of view: the principle of mutual recognition is not to be applied automatically and mechanically to the detriment of fundamental rights. But as it happened the CJEU, confronted with real problems on the ground in Hungary (and later, as we will see in section VI, in Poland), simultaneously arrived at the same conclusion.

V. Applying EU law as a fact of life

At the end of what is becoming more than a short excursion, two issues remain that must be dealt with – briefly. The first is the apprehension of the CJEU, as expressed emphatically in *Opinion 2/13*: the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law, and the Strasbourg Court should not be allowed to encroach upon that position.[58]

In principle there is no risk that this will happen. Under art. 19 ECHR, the Court has been set up to ensure observance of the rights and freedoms guaranteed in the Convention and its Protocols. Art. 32 ECHR states that the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto. It is settled case law, therefore, that the Court does not have jurisdiction to rule on the interpretation of, or compliance with, domestic law, other international treaties or European Union law.[59] In line with this, the Court stated for instance in the case of *Jeunesse*:

> "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

[58] Opinion 2/13 cit. paras 186 and 246.

[59] See, among many authorities, ECtHR *Jersild v Denmark* App n. 15890/89 [23 September 1994] para. 30.

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".[60]

Yet, the Strasbourg Court cannot always avoid interpretations of EU law. We will briefly look at three scenarios.

The first one already became apparent in the previous paragraphs. As we have seen, EU Member States can rely on the *Bosphorus* presumption subject to two conditions, namely *i)* the absence of any margin of manoeuvre on their part and *ii)* the deployment of the full potential of the supervisory mechanism provided for by EU law. The former condition requires the Court to determine whether EU law, in a particular situation, leaves any margin of manoeuvre to the Member States (as the Court did in *O'Sullivan McCarthy Mussel Development*). As to the latter condition, the Court accepted that no preliminary rulings were asked in some cases (such as *Avotiņš* and *Moldovan*), but withheld reliance on the *Bosphorus* presumption in other cases (like *Michaud* and *Bivolaru*). Assessments like these can only be based on an evaluation of EU law: was the case at hand clear from an EU law perspective (*Moldovan*), or did it raise new questions (*Bivolaru*)?

The second scenario occurs when an applicant complains of a violation of the right to a fair trial (art. 6 ECHR), in that the domestic courts refused to refer a question to the CJEU for a preliminary ruling. Already before *Opinion 2/13* was issued, the Strasbourg Court had developed a test, according to which it will examine why the national considered it unnecessary to seek a preliminary ruling.[61] The Court has emphasised time and again that the purpose of this exercise is merely to ascertain whether the refusal constituted in itself a violation of art. 6 ECHR, and that, in so doing, it takes into account the approach already established by the case law of the CJEU. Yet, when examining the reasons advanced by the domestic courts, it cannot avoid an interpretation of EU law.

[60] ECtHR *Jeunesse v the Netherlands* App n. 12738/10 [3 October 2014] para. 110. See also *Avotiņš v Latvia* cit. para. 100: "[t]he task of interpreting and applying the provisions of the Brussels I Regulation falls firstly to the CJEU, in the context of a request for a preliminary ruling, and secondly to the domestic courts in their capacity as courts of the Union, that is to say, when they give effect to the Regulation as interpreted by the CJEU. The jurisdiction of the European Court of Human Rights is limited to reviewing compliance with the requirements of the Convention, in this case with art. 6 § 1. Consequently, in the absence of any arbitrariness which would in itself raise an issue under art. 6 § 1, it is not for the Court to make a judgment as to whether the Senate of the Latvian Supreme Court correctly applied art. 34 § 2 of the Brussels I Regulation or any other provision of European Union law".

[61] See ECtHR *Ullens de Schooten and Rezabek v Belgium* App n. 3989/07 and 38353/07 [20 September 2011] para. 62: "[t]his means that national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU. They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt". In similar vein ECtHR *Dhahbi v Italy* App n. 17120/09 [8 April 2014] para. 31.

This line of case law continued after *Opinion 2/13*. Most complaints were rejected, as the Court did not find that the domestic courts had arbitrarily refused to start a preliminary ruling procedure. Yet in 2020, in the case of *Sanofi Pasteur*, the Court did find a breach of art. 6 ECHR because the French Court of Cassation had dismissed, without providing reasons, the company's request for a preliminary reference to the CJEU.[62] That ought to be considered a positive development from the Luxembourg perspective – but again, the Strasbourg Court cannot entertain these complaints without interpreting EU law.

The third scenario ties in with a more general issue. The exercise of several rights of the Convention, such as the right to respect for private life (art. 8), can be restricted, provided that certain conditions are fulfilled. One of these is that any restriction must be in accordance with the law. Likewise, the arrest of a person has to be "lawful" (art. 5 ECHR), and art. 7 provides that there shall be no punishment without law. When analysing complaints that the legal basis for an interference was lacking, the Strasbourg Court cannot avoid a review of the domestic law in question. This is no different if the respondent State argues that EU law provided the basis for an interference.[63]

A variation to this theme occurred in the recent case of *Spasov*. A Bulgarian vessel was caught fishing inside Romania's exclusive economic zone in the Black Sea. The owner, Mr Spasov, argued that the fish in question (around twenty turbots) was part of Bulgaria's catch quota under the EU Common Fisheries Policy. However, the Romanian court held that EU law was not applicable and convicted Mr Spasov on the basis of domestic law. As it happened, the European Commission – to which the Bulgarian authorities had applied – intervened and told the Romanian authorities that the proceedings against Mr Spasov were contrary to EU law. In the light of the applicable Regulation and the "very clear" opinion of the European Commission, the Strasbourg Court held that the Romanian court had committed a manifest error of law and that the applicant had been the victim of a violation of art. 6 ECHR and art. 1 of Protocol No. 1.[64]

VI. Seeking shelter: addressing the rule of law backsliding in Poland

Much has been written about the rule of law crisis in Poland in the period 2015–2023, and how both the EU and the Council of Europe responded to that crisis. This is not the place to recount that story. But it is mentioned here because the various legal proceedings against Poland led to a series of politically charged cases before both the Luxembourg Court and its Strasbourg counterpart. This in turn triggered a strong intensification of the cross-references between the two courts. The CJEU referred extensively to the

[62] ECtHR *Sanofi Pasteur v France* App n. 25137/16 [13 February 2020].

[63] A (not so very good) example is ECtHR *Cantoni v France* App n. 17862/91 [15 November 1995] para. 30. For a more recent example, see ECtHR *Thimothawes v Belgium* App n. 39061/11 [4 April 2017] paras 68–73.

[64] ECtHR *Spasov v Romania* App n. 27122/14 [6 December 2022]. On this case: J Krommendijk, 'Straatsburg als hoeder van het EU-recht' (2023) Nederlands Juristenblad 2462–2471.

Strasbourg case law, and the European Court of Human Rights relied extensively on the Luxembourg case law. It would merit a separate examination whether the two courts were always on exactly the same page, for instance about the question when a lack of independence translates into a judge or even an entire court losing its status as a judge or court.[65] But the larger picture is that the two courts seek to harmonise their positions – arguably because they feel that together they may stand.

A nice example of these good neighbourly relations is offered by the recent Strasbourg case of *Pajak v Poland*. The case is about the Polish law that had lowered the retirement age for judges from 67 to 60 for women, and to 65 for men – a rather obvious case of discrimination, and in addition an arbitrary and unlawful interference with judicial independence. The CJEU came to that conclusion already in 2019.[66] Four years later the Strasbourg Court delivered its judgment. When describing the legal context of the case, the judgment (which is available in French only) clarifies that in Poland a distinction is made between "stan spoczynku" (which the Court translates as "l'état de repos", which in English would be something like "the state of rest") and "emerytura" (which is translated as "la retraite", retirement). This subtlety (which does not have any consequences for the case at hand) had apparently been overlooked by the CJEU. So what does the Strasbourg Court say, in a footnote that could be characterised as snobby or loyal (or both)? "Pour des raisons de cohérence par rapport aux arrêts de la CJUE, le présent rapport emploie le terme « la retraite des juges »".[67]

The pursuit of substantive coherence can also be found in very different contexts. An example is offered by two Finnish data protection cases. They were unrelated on the facts, but similar in one respect: the Supreme Administrative Court had sought a preliminary ruling from the CJEU concerning the interpretation of the Data Protection Directive 95/46/EC. In both cases the Strasbourg Court concurred with the findings of the Finnish court, the approach of which "found support in the relevant jurisprudence of the CJEU". The ECtHR quoted extensively from the preliminary rulings and added as a general consideration: "[t]he Court has regularly emphasised the importance, for the protection of fundamental rights in the EU, of the judicial dialogue conducted between the domestic courts of EU member States and the CJEU in the form of references from the former for preliminary rulings by the latter".[68]

[65] Compare for instance case C-132/20 *Getin Noble Bank* ECLI:EU:C:2023:366 with the earlier pronouncement ECtHR *Reczkowicz v Poland* App n. 43447/19 [22 July 2021] – the apparent difference was only rectified in case C-718/21 *L.G. v KRS* ECLI:EU:C:2023:1015 para. 58.

[66] Case C-192/18 *European Commission v Poland* ECLI:EU:C:2019:924 (Independence of ordinary courts).

[67] ECtHR *Pajak a.o. v Poland* App n. 25226/18 [24 October 2023] para. 2 footnote 2. This passage would translate into English as "For reasons of consistency with the CJEU rulings, this report [sic] uses the term 'retirement of judges'", author's translation.

[68] ECtHR *Jehovah's Witnesses v Finland* App n. 31172/19 [9 May 2023] para. 85. See also the earlier Grand Chamber judgment ECtHR *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App n. 931/13 [27 June 2017].

The message is clear: the Strasbourg Court values the cooperation between domestic courts and the CJEU, and will be inclined to respect its outcome. In both cases the Court found that there were "no strong reasons" to substitute its view for that of the domestic courts, suggesting that the preceding judicial dialogue entailed a wide margin of appreciation.

This comity resurfaced recently in a Belgian case about ritual animal slaughter. The case came before the ECtHR only after the Belgian courts had made a preliminary reference to the CJEU. In dealing with the case, the CJEU relied quite extensively on the Strasbourg case law and acknowledged that the ECHR offers "the minimum threshold of protection" where its provisions correspond with those of the EU Charter of Fundamental Rights.[69] Once again the Strasbourg Court accepted the outcome of the interplay between the domestic courts and the CJEU.[70] The result was, in the words of Johan Callewaert, "a welcome unisono".[71] As he rightly pointed out, the fact that the CJEU was prepared to rely on the Strasbourg case law was quite helpful when the case finally came before the ECtHR. It created enough space for the latter to rely on the principle of subsidiarity, and defer to the outcome of the "double control" which had already taken place in Brussels and Luxembourg prior to its own scrutiny.

Examples galore of the good neighbourly relations, with the Strasbourg Court citing Luxembourg jurisprudence on a wide variety of issues, ranging from the right to be forgotten[72] to "foreign agent acts"[73] to secret surveillance regimes.[74] The European Commission was welcome, too, and granted leave to intervene in several cases.[75] The one sobering thought is that, amidst all the display of warm friendship, the CJEU apparently continues to feel the need to emphasise "the autonomy of EU law *and that of the Court of Justice of the European Union*" when interpreting fundamental rights.[76] The quote admittedly derives from the official explanations relating to art. 52(3) of the EU Charter of Fundamental Rights. But the CJEU could also have chosen to put more emphasis on another part of these explanations: "[p]aragraph 3 is intended to ensure the necessary consistency between the Char-

[69] Case C-336/19 *Centraal Israëlitisch Consistorie van België a.o.* ECLI:EU:C:2020:1031 para. 56, 57, 67 and 77.

[70] ECtHR *Executief van de Moslims van België a.o. v Belgium* App n. 16760/22 [13 February 2024] paras 112–116.

[71] J Callewaert, *Successive scrutiny of the same legislation in Luxembourg and Strasbourg: judgment of the ECtHR in the case of Executief van de Moslims van België and Others v Belgium* johan-callewaert.eu.

[72] ECtHR *Hurbain v Belgium* App n. 57292/16 [3 July 2023] paras 71–87 and 195 ff.

[73] ECtHR *Ecodefence a.o. v Russia* App n. 9988/13 [14 June 2022] paras 45–47 and 166.

[74] ECtHR *Big Brother Watch v UK* App n. 58170/13 [25 May 2021] paras 209–241.

[75] See, *e.g.*, ECtHR *Xhoxhaj v Albania* App. n. 15227/19 [9 February 2021] paras 271–275, and ECtHR *S.A. Casino a.o. v France* App n. 59031/19 [7 September 2023], admissibility decision. See also the pending case of ECtHR *Italmoda Mariano Previti a.o. v the Netherlands* App n. 16395/18, communicated on 13 October 2020.

[76] Emphasis added. See *e.g.* case C-294/16 *JZ* ECLI:EU:C:2016:610 para. 50; case C-524/15 *Menci* ECLI:EU:C:2018:197 para. 23; case C-336/19 *Centraal Israëlitisch Consistorie van België a.o.* ECLI:EU:C:2020:1031 para. 56; Case C-117/20 *bpost SA* ECLI:EU:C:2022:202 para. 23.

ter and the ECHR". Apparently, ten years after *Opinion 2/13*, there is still a bit of a cold shoulder in Luxembourg. And indeed, although it falls outside the scope of this paper to analyse more in general the CJEU's stance towards the ECtHR case law, the impression does exist that the Luxembourg Court is less than faithful in following the jurisprudence of the colleagues in Strasbourg.[77] Which brings us back to our point of departure.

VII. Atlas shrugged

How did the European Court of Human Rights respond to *Opinion 2/13*? Or, more precisely, how did its "post-2/13" jurisprudence evolve in cases that raised issues of EU law? A somewhat wild hypothesis was that the Court might "seek revenge" for the "betrayal" of *Opinion 2/13*. It did not.

The recurring theme in the case law was the *Bosphorus* doctrine. Developed by the Court in 2005, it was conceived as an approach to complaints about the conduct of EU Member States when implementing EU law. It continued to be used for that purpose after *Opinion 2/13* was delivered (section III). But the field of application of the *Bosphorus* doctrine expanded. In the past years it has also been applied in cases about acts of the EU institutions themselves (section II) and in situations where EU Member States cooperate with one another in the context of EU law, for instance by surrendering a suspect on the basis of a European arrest warrant (section IV).

It is beyond the remit of this contribution to speculate about the future of the *Bosphorus* test once the EU has acceded to the ECHR. But we can say with confidence that, for the time being, the test is alive and kicking. It evolved and became more nuanced. In 2021 it reached a stage where the Court felt confident to recapitulate the "general principles relating to the presumption of equivalent protection in the legal order of the European Union" and the application of those principles to European arrest warrant cases.

Meanwhile, clashes between the two European Courts have been avoided. That was not obvious when the Strasbourg Court referred to *Opinion 2/13* in the *Avotiņš* case and expressed its reservations as regards the position of the CJEU. The Strasbourg Court put it quite firmly – and understandably so, given its position: the principle of mutual recognition is not to be applied automatically and mechanically to the detriment of fundamental rights. But, as it happened, the CJEU, confronted with real problems on the ground in Hungary and, later, in Poland, simultaneously came to the same conclusion. All's well that ends well: in 2021 the Strasbourg Court noted with apparent satisfaction that its own jurisprudence in this area aligns with the requirements laid down by the CJEU since its ruling in *Aranyosi*.

[77] To refer once more to the indefatigable Callewaert: J Callewaert, *Trends 2021-24: Taking stock of the interplay between the European Convention on Human Rights and EU Law* johan-callewaert.eu. Callewaert rightly points out that divergent case law may put the domestic courts in a difficult position, especially when the CJEU offers a lower level of protection than the ECtHR.

Another conclusion is that Strasbourg has been more than supportive of the EU. The *Bosphorus* doctrine was always an example of this (and has been praised in some quarters, and criticised in others, exactly for that reason). But there are many more examples from recent years: the recognition that the need to comply with obligations under EU law is "a legitimate general-interest objective of considerable weight" that may justify restrictions on, for instance, property rights (*O'Sullivan McCarthy Mussel Development*, 2018); the finding that the refusal to execute an EAW was insufficiently justified (*Romeo Castaño*, 2019); the willingness to find a breach of art. 6 ECHR when the domestic court did not explain why it refused to make a preliminary reference to the CJEU (*Sanofi Pasteur,* 2020); the decision to deny states the benefit of the *Bosphorus* presumption if the domestic courts failed to make a preliminary reference to the CJEU (*Michaud*, 2012, and *Bivolaru*, 2021); the qualification of a criminal conviction in breach of EU law as a manifest error of law (*Spasov*, 2022); the enduring support for the judicial dialogue between domestic courts and the CJEU (*Executief van de Moslims*, 2024). It is actually an impressive list. It would be worth exploring if the CJEU is equally supportive of the Strasbourg case law. But we have to leave that exercise to another occasion. Here we have confined ourselves to the approach of the European Court of Human Rights when confronted with issues of EU law since *Opinion 2/13*.

And so, Atlas shrugged. He continued to do what he was charged to do: to carry the sky on its shoulders, pretending not to hear all the noise that came from the surface of planet earth. As if *Opinion 2/13* never happened.

Perhaps Atlas entertains this one sobering thought. He may think about Ms. Andreasen, the bold Chief Accountant who picked a fight with all her bosses at the European Commission – we read about her fate in section II. Of all the cases discussed in this contribution, hers is arguably the only one that would have had a different outcome if *Opinion 2/13* had been positive and if EU accession had taken place. In that scenario the *Andreasen* case would not have been declared inadmissible *ratione personae* – it would have been rejected on the merits.