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EU´s Accession to the ECHR: Challenging the Relationship between the ECtHR and the CJEU

Linn Schyberg

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Examiner: Vadym Tsymbal and Jeanette Andersson.
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Abstract

The European Union´s [EU] accession to the European Convention on Human Rights ['ECHR' or 'the Convention'] represents the process whereby the EU will become equally responsible as the Contracting Parties for upholding European human rights. The purpose of the accession is to create a coherent system and to make it possible for individuals to apply to the European Court of Human Rights [ECtHR] for a review of the acts of the EU institutions. The accession is required under the Treaty of Lisbon and is destined to be a landmark in European legal history regarding the protection of human rights.

The European Court of Justice [CJEU] rejected the Accession Draft Agreement [the Draft] in Opinion 2/13, which left a significant setback for the future protection of human rights. The CJEU held numerous aspects of the Draft incompatible with the EU Treaties. This paper analyses the reasoning of Opinion 2/13. It examines the effect of the accession on the autonomy of the EU and the relationship between the two courts, the ECtHR and the CJEU. The aim is to clarify what might change due to the EU´s accession to the European Convention on Human Rights and the protection of human rights in Europe today, specifically the right to non-discrimination against same-sex marriages.

The jurisdiction and hierarchy of the two courts, the CJEU and the ECtHR, are further analysed, and the relationship is treated as horizontal since the EU-law and the Convention do not build on each other but rather as two independent sources that protect human rights individually. The paper concludes that the relationship between the courts will stay horizontal as the CJEU will not accept any Draft that will grant the ECtHR jurisdictions over issues where the CJEU now has exclusive jurisdiction. Therefore, the hierarchy between the two courts will remain unchanged unless the CJEU changes its opinion. Hence the paper completes that the special characteristics of the EU and the respect for the legal order of the EU in today's conditions have put a stop to the accession, and the protection of human rights was not prioritised.

The paper treats an incredibly complex subject, and therefore, where possible, a simple and accessible language will be used without sacrificing legal accuracy.

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1 Introduction

1.1 Background

The European Union ['EU' or 'the Union'] and the European Convention on Human Rights ['ECHR' or 'the Convention'][1] system have been developed separately since the Second World War but have over the last decades become more and more intertwined and are now relying on each other. The fact that the EU, even though it is an institution, has not, like all its Member States, acceded to the ECHR has created a source of uncertainty and incoherence in the legal structure. The purpose of the accession is to create a coherent system that can protect human rights throughout Europe and to make it possible for individuals to apply to the European Court of Human Rights [ECtHR] for a review of the acts of the EU institutions, which is of great importance.[2]

The *Stauder* case is one of the founding cases that ensure that human rights are preserved in the general principles of the EU and shall be protected by the European Court of Justice [CJEU].[3] To strengthen the protection of human rights, there is a growing need for the EU to ratify the ECHR. This is now not just a mere wish; it has become a legal obligation under Article 6(2) of the Treaty of Lisbon, which clearly states, 'The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competencies as defined in the Treaties'[4] and the addition of Protocol 14 to the European Convention, which came on 1 June 2010, which amended Article 59(2) of the ECHR so that it now reads: 'The [EU] may accede to [the ECHR]' make it possible for an accession.[5]

The most recent attempt to finalise the accession of the EU to the ECHR was on the 5th of April 2013. Accession Draft Agreement [the Draft] was made between the 47 Member States of the Council of Europe (now 46 members due to the Russian Federation's exclusion from the Council of Europe on 16 March 2022) and the EU and was referred by the Commission to the CJEU for an opinion on if the Draft was compatible with EU-law. The Draft was rejected, and the CJEU found several issues concerning the preservation of the specific characteristics of the EU and EU-law, as well as the disruption of the balance in the EU and the autonomy of EU-law. The CJEU is reasoning in the Opinion that the accession shall not intrude nor change the powers of the Union as stipulated in the treaties, according to Protocol No 8 relating to Article 6(2) of the Treaty on European Union [TEU].[6] The condition of keeping the balance of the Union's power makes it interesting to look at the different opinions in the ruling to analyse how the accession might change the norm hierarchy of the EU. The accession can also affect the relationship between the CJEU and the ECtHR.

One aim of the EU´s accession to the ECHR is to ensure that the external supervision of upholding human rights is similar for both the Union and the Member States of the EU. The accession will create a coherent system for protecting human rights and make the EU subject to supervision. The accession represents the creation of a shared conception of human rights in Europe, which results

[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.
[2] Johan Callewaert, 'Accession of the European Union to the European Convention on Human Rights' (2013), p. 13.
[3] Case 26/69, *Stauder*, ECLI:EU:C:1969:57.
[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) Official Journal C 306, 13 December, pp 1 – 271.
[5] Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention [2004] OJ 1 194/7.
[6] Opinion 2/13, Opinion pursuant to Article 218(11) TFEU [2014] OJ 2014:2454/194.

in all Europeans and individuals within the jurisdiction of the Treaty members having the same possibilities to access the minimum human rights. The EU´s accession to the Convention can be seen as a compliment to the Member States' catalogues of human rights to ensure a minimum level of protection. The paper specifically focuses on the right to non-discrimination against same-sex marriage in the EU. The two courts in Europe are different from the National Courts since it is the only courts that can lay down a standard of protection on a European scale.[7] Therefore, the CJEU and the ECtHR have a particular responsibility in this area, and the accession will set the pace for harmonised protection against the non-discrimination of same-sex marriage.

1.2 Purpose

The paper's purpose is to go through some of the reasons for the EU's accession to the ECHR, such as the need for external supervision and minimal protection of human rights within the EU. The purpose is also to analyse Opinion 2/13 to see what the reasoning of the CJEU was as it resulted in the failure of the EU to accede to the ECHR. The paper will also examine what effect an accession might have on protecting against discrimination against same-sex marriages in Europe. Additionally, the relationship between the two European Courts, the CJEU and the ECtHR, will be examined to see if the accession will influence the norm hierarchy.

To reach the purpose of this paper, the following questions will be answered:

- Would the EU's ratification of the ECHR change the norm hierarchy between the ECtHR and the CJEU?
- What legal impact, if any, would the EU´s accession to the ECHR have on the law relating to non-discrimination and same-sex marriage in the EU?

1.3 Method and Material

This section will describe and justify the method used in this paper. A clear description of legal methodology in international law is often disputed and has yet to be a generally accepted definition.[8] Even though there is no common perception of the term legal methodology, this paper will refer to the legal dogmatic method to identify the applicable law by interpreting and systematising the legal sources. It has been claimed that legal dogmatics is neither rational nor a real science, but using the legal dogmatic method, the legal order can be seen as a coherent network of main rules and exceptions. The rules and exceptions can be interpreted to find *de lege lata* when it comes to how the norm hierarchy between the two courts might play out if the accession was completed today and to determine *de lege lata* of the effect that the accession has on the treatment of the protection of non-discrimination of same-sex marriages in the EU.[9] The sources used to interpret will be legislation, case-law, a handbook from the European Union, and legal doctrine such as legal research.[10] To be able to limit and look at how it actually is*, de lege lata* when it

[7] See, Callewaert, (n 2), p.11-14.
[8] Christian Dominicé, Methodology of International Law In: L'ordre juridique international entre tradition et innovation. Genève: Graduate Institute Publications, 1997 < https://books.openedition.org/iheid/1334#text > accessed 13 April 2023, section 1-4.
[9] Aleksander Peczenik, 'Juridikens Allmänna Läror' [2005] SvJT 249, 249–152.
[10] Maria Nääv, et al. ´Juridisk metod lära´. [2019], Studentlitteratur, 21.

comes to the norm hierarchy and the protection of non-discrimination of same-sex marriages, there will be a comparison of Article 14 in the Convention in the ECHR[11] and Article 21 in the Charter of Fundamental Rights of the European Union [the Charter].[12] This is to test through the legal dogmatic method - what principles are undeniably true – and if there needs to be any change due to the EU's accession to the ECHR. The paper will examine if the EU, in relation to the norm hierarchy, does not need to change anything, if they are forced to choose a more precise interpretation of their legal acts in the light of the ECHR, or if they need to accept the ECHR as a predominant norm. Since the goal of the accession is to be able to bring human rights claims against the EU, they might have to change.

The reason to use the legal dogmatic method in this paper is to identify what type of norm hierarchy there is today between the ECtHR and the CJEU and what changes to the hierarchy a possible ratification could lead to. Since the ratification of the ECHR has not happened yet, arguments of *de lege ferenda* nature will be used as there will be reasoning as to 'the law as it ought to be' for accession to be possible. Subsequently, to only look at legal reasoning – the formal legal analysis of positive legal norms - can be limiting, and therefore *de lege ferenda* arguments are used.[13]

The relation between EU-law and the ECHR will be treated as a horizontal relationship as the EU-law and the Convention do not build on each other but rather as two independent sources that protect human rights individually. The general rules of international law control the EU in accordance with case law from the CJEU, which is a fundamental element of the Union's legal order.[14] Through this, the basic human rights have acquired the status of customary international law, which has been incorporated in the founding treaties such as Article 2 TEU 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[15]

A counterargument that the relation between the EU and the ECHR is vertical can be made on the basis that the TEU needs to respect the human rights established in the ECHR according to Article 6(3) TEU, but the established case-law can prove otherwise. Looking at the *Stauder* case where the question of dignity was raised and whether the directive in place was compatible with the general principles of Community law in force. The ruling was in favour of the applicant, which shows that human rights are embedded in the principles of the EU and do not need to be controlled by the ECHR.[16] Therefore, the conclusion is that human rights values exist within the EU even without the ECHR.

The paper will treat the notion of a hierarchy of norms that refers to a vertical order of the legal acts in a legal system. The legal acts in the lower levels of the hierarchy are subordinate to those at a higher level in the hierarchy. The existence of an EU legal order can be traced to the Lisbon Treaty, where the legal order was kept as proposed by the Unratified Constitutional Treaty. The

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[11] See, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (n 1) Article 14.

[12] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 21.

[13] P Minkkinen, De Lege Ferenda: What Is the 'Socio' of Legal Reasoning? in D Feenan (ed), Exploring the 'Socio' of Socio-Legal Studies (*Palgrave Macmillan Socio-Legal Studies* 2013) p. 85-86.

[14] Christian Tomuschat, '7 Right Holders and Duty Bearers' (*Oxford Public International Law,* 01 September 2014) <https://opil.ouplaw.com/display/10.1093/law/9780199683734.001.0001/law-9780199683734-chapter-7?rskey=Gcjnup&result=1&prd=OPIL> accessed 14 April 2023.

[15] European Union, Consolidated version of the Treaty on European Union [2007] OJ 1 115/01, Article 2.

[16] See, *Stauder* case, (n 3).

hierarchy consists, in falling order beginning with the top, of primary law, international agreements, secondary law, and soft law.[17] EU's accession to the ECHR might affect the hierarchy order, which the paper argues now is horisontal. The term hierarchy, and the fact that there is a hierarchy within the EU, will be used to explain the effect on the relation between the ECtHR and the CJEU.

Due to the scope of the EU in relation to the accession, many questions, such as the EU´s supremacy and the relation to the Member States, can be raised in the field of human rights, therefor the paper will focus on the relationship between the two European courts, the CJEU and the ECtHR and to not just have a hypothetical analysis of what the effects of the accession might have on the norm hierarchy, an analysis will be made of Article 14 in the Convention in the ECHR and Article 21 in the Charter. The analysis will be used to illustrate parallels to the relations between the EU and the ECHR to arrive at a probable conclusion for what impact the ratification will have on the hierarchy of norms and human rights in Europe. The reason for choosing the right of non-discrimination and, in particular, the protection against discrimination of same-sex marriage and partnerships is that the case-law from the two courts is somewhat similar and, therefore, can be used to show the divergence between the EU and the ECHR systems. Both courts must deal with different views on this issue between and within the Member States.

1.4 Disposition

This paper proposes to analyse the reasons and the aims for the EU's accession to the ECHR in Section 2 and then to clarify how the current protection of the right to non-discrimination against same-sex marriages works (Section 3) and with a particular focus on the prohibition of discrimination of same-sex marriage (Section 3.1.1; 3.1.2) and the judgements on that said topic (Section 3.1.3; 3.1.4); as to show what might change to the right of non-discrimination of same-sex marriages (Section 3.2). Section 4 analyse Opinion 2/13 to see the reasons for the failure of the EU to accede to the ECHR and then to show the complexity of the relationship between the two European Courts, the CJEU and the ECtHR. A finishing analysis of the need to change due to the EU's accession to the ECHR and how the assession affects the legal order of the EU is found in section 5. Section 6 concludes.

[17] Publications Office of the European Union, 'EU hierarchy of norms' (*EUR-Lex*, 09 February 2023) <https://eur-lex.europa.eu/EN/legal-content/glossary/eu-hierarchy-of-norms.html> accessed 14 April 2023.

2 Reasons for the Accession

This section will go through the main reasons for the EU´s accession to the ECHR and highlight the need for external supervision of the European Union's actions and the protection of the minimum protection of human rights. In the light of the conferred powers concerning, for example, legislative matters to the EU from the Member States, the issue of the EU escaping the scrutiny of the ECtHR will be discussed. Additionally, the accession coherence and strengthening of the relation between the European Union's words and deeds relating to human rights will also be addressed.

2.1 The Need for External Supervision

One of the aims of the EU´s accession to the ECHR is to ensure that the upholding of human rights is equal for both the Union and the Member States of the EU. External supervision of the EU will make it possible to claim individual remedies under ECHR against actions conducted by Union, similar to the measures already in place against Member States' actions. External supervision is needed to ensure that human rights are protected.

The main argument for the need for external supervision is that all the power that the EU exercising has been conferred from the Member States in the treaties. The principle of conferral, powers which initially lay with the Member States that have transferred to the EU, come from Article 5(2) TEU, which states:

> 'The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'[18]

The situation was slightly different before the principle of conferral had entered into force, and all the power was with the Member States. Since the Member States were bound to the ECHR when they were exercising their power, they were obliged to comply with the Convention and the monitoring of the ECtHR. When the Member States confer the powers, which include their obligations under the Convention and the scrutiny of the Court, to the EU, it creates a problem concerning the protection of human rights. The problem comes from the fact that the Convention does not bind the EU and, therefore, can its actions not be externally reviewed by ECtHR. Actions that might violate human rights protected under ECHR are not under the scrutiny of the court. In other words, the conferred power of the EU is also a way of removing the exercise of the powers in question from the Court's scrutiny. Only the competences that have not been conferred to the Union from the Treaties will remain with the Member States and under the scrutiny of ECtHR. The EU has such a broad competence that it is hard to accept that they should be the only legal entity in Europe which is not subjected to monitoring by the ECtHR in the same way as the Member States.[19] Therefore, the EU actions will continue to escape the scrutiny of the Court, and citizens will be unable to challenge any of them before the Court unless the EU accede to the Convention.[20]

[18] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, Article 5(2).
[19] See, Callewaert, (n 2), p.14-15.
[20] *Matthews v United Kingdom*, App no 24833/94 (ECtHR, 18 February 1999), para 32.

Hence, the accession will make a coherent system where both the European legal systems are going to be subject to the same supervision when it comes to the protection of human rights.[21]

The conferred powers to the Union are essential as they are extensive. The Treaty of Maastricht is an example of the extent of the conferred powers. The Union established the Treaty to create a common foreign and security policy, an economic and monetary union, and cooperation on legal and internal affairs.[22] These changes also affected the institution, which gave the European Parliament increased influence in many legislative matters. Through the Treaty, the Member States transferred their power to the Union, which resulted in removing the exercise of the Court's scrutiny. So, even though the powers of the EU and the Member States come from the same nature, due to the fact that all the power initially comes from the Member States, they are not equal before the ECtHR. This constitutes a weakening in the protection of human rights and will continue to be so until the Union has acceded to the ECHR.[23]

A supporting argument for the importance of the accession is to ensure that no legal entity is above the law regarding human rights. Since the Member States have conferred power to the EU, it can be argued that the credibility of the EU can be questioned if they do not ratify the Convention. Since the Member States need to ratify the ECHR as it is a precondition for becoming an EU member, it is somewhat hypocritical that the EU itself is not a member of the Convention. Therefore, not acceding does affect credibility.[24] Through the accession, the EU can finally be on the same side as the Member States and apply the same rules as it requires the current and prospective Member States to accept and oblige.[25]

In today's conditions, whereas the accession has not occurred yet, the applicants of complaints of human rights violations against the EU as an institution need to either: make a complaint before the national courts since they can refer the issue to the CJEU through the preliminary reference procedure; or the applicant can complain to the ECtHR about the EU, indirectly while also bringing action against a Member State.[26] The accession to the ECHR will change this, so one can challenge the EU directly and therefore send a strong signal of coherence between the Union and the Council of Europe's human rights system.

2.2 Creating a Minimum Protection

When the EU was created, the founding treaties were created for economic reasons, and there was no place to incorporate human rights. This changed during the 60's when the scope of the EU grew, creating a need for human rights protection. The first attempt for the EU's accession to the ECHR was in 1996, but that was under very different circumstances than now since only States could

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[21] Council of Europe, 'Accession by the European Union to the European Convention on Human Rights Answers to frequently asked questions' (*ECHR*, 1 June 2010) <https://www.echr.coe.int/documents/ue_faq_eng.pdf> accessed 17 April 2023.

[22] European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

[23] See, Callewaert, (n 2), p.14-15.

[24] See, Frequently asked questions, (n 2121).

[25] View of Advocate General Kokott, (13 June 2014), ECLI: EU: C:2014:2475,< https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CP0002> accessed 12 April 2023, paragraph 1.

[26] European Union Agency for fundamental rights and Council of Europe, Handbook on European non-discrimination law (Publications Office of the European Union 2018) p.17.

accede to the ECHR. This condition changed when Protocol 14 to the ECHR entered into force in 2010, making it possible for the EU to accede.[27]

Initially, the basis for the accession was to ensure a minimum level of protection of human rights in EU-law that was not existing at the time, and the goal was to fill a gap in the legislation. Since the Member States had their constitutions and statutes already in place to protect human rights as well as being Contracting Parties to the Convention, the accession was intended to be a complement also to secure human rights within the EU. Today, there is a multitude of different protections for human rights, such as the Charter but accession to the Convention remains on the agenda since Article 6, paragraph 2, of the TEU, as amended by the Treaty of Lisbon, requires the EU to accede.[28]

It is stated in Article 52(3) of the Charter that the rights that are represented in the Charter need to correspond with the rights in the Convention and that these two statutes shall define similar rights. This means ensuring that the human rights application in Europe is the same; however, if the EU has yet to accede to the ECHR, the CJEU will mainly apply the rights described in the Charter. Although this might cause incoherence since they are 'based on, but not identical to, those of the ECHR'.[29] The issue of how the CJEU and the ECtHR can ensure alignment in the case-law coming from the two courts and ensure minimum protection of human rights in Europe if the EU does not accede to the ECHR.

The ECHR only contains the minimum standards of protection, therefore, can all parties to the Convention still provide more extensive human rights protection. The ECtHR judgments are declaratory, meaning that the court only defines and outlines the rights and obligations of each party and condemns damages. The ECtHR cannot annul nor amend a national decision as it is up to each State. In case of accession, the EU will, like any other member of the ECHR, decide how best to comply with judgments coming from the ECtHR.[30]

Even though the EU must accede to the Convention and other treaties and functions in place today, the accession still works to create greater coherence between the European Union's words and deeds relating to human rights. The accession will represent a common conception of human rights in Europe. All Europeans and those within the jurisdiction of one of the treaty members have the same possibilities to access the same minimum human rights. If the EU is unable to ratify the ECHR, the rights in question will become increasingly relative and, therefore, less and less fundamental.[31]

3 The Current Protection

To start, a general explanation will be made to make clear what the scope of the protection of human rights in Europe looks like today and what the jurisdiction of the two courts, the CJEU and the ECtHR are and then to exemplify the right to non-discrimination of same-sex marriages will

[27] Joakim Nergelius, 'The accession of the EU to the European Convention on Human Rights: A critical analysis of the Opinion of the European Court of Justice [2015] SIEPS 2015(3) Swedish Institute for European Policy Studies, p. 11-12.
[28] See, Callewaert (n 2), p. 14.
[29] See, Frequently asked questions, (n 21).
[30] ibid.
[31] See, Callewaert (n 2), p. 12.

be used to show the application of the right in the two courts in today's conditions and what might change due to EU´s accession to the ECHR.

The parties that the ECHR binds are all 46 Member States of the Council of Europe, including the UK.[32] Contrary to the Charter, which applies to the 27 Member States (also bound by the ECHR), this means that the ECHR has more ratifications and therefore has a broader impact as it has more contracting parties. As mentioned earlier in the text, ECHR and the Charter must align with each other. However, the scope of application of the ECHR is much broader as the Charter is only addressable to the institutions and bodies of the EU in all their actions and to the national authorities when implementing EU-law. At the same time, the ECHR is directly applicable to all parties to the Convention.[33] Since the Charter is not applicable in all situations, just in cases concerning EU-law, there is a limitation on the extent of the Charter´s rights. There is no equivalent limitation compared to the ECHR, as the rights in the ECHR shall be guaranteed for everyone within the Contracting Parties' jurisdiction, regardless of which area of law.[34]

When dealing with questions concerning the relationship between the CJEU and the ECtHR, is it reasonable to establish the basic differences between the two courts. The CJEU was established in Luxemburg in 1952 and ensured that the law is followed, and that justice is done when interpreting and applying the EU-law. This task means that the CJEU checks the legality of the legal acts adopted by the institutions, ensures that the Member States have observed their obligations under Union law, and interprets Union law at the request of the national courts. This is to make sure and maintain cooperation with the Member States' courts so that EU-law is applied and interpreted homogeneously. Human rights in the EU have been mainly specified in the Charter since December 2000 and came into full effect when the Treaty of Lisbon entered into force on December 1, 2009. Article 6 of the consolidated text of the TEU, which also declares that the EU needs to accede to the ECHR, states that the Union needs to recognise the rights, freedoms, and principles set out in the Charter.[35]

The ECtHR is an international court of the Council of Europe and has been in Strasbourg since its establishment in 1959. The purpose of the court is to monitor the party's respect for human rights under the ECHR. The court deals with applications from individuals, other parties, or states alleging violations of the civil and political rights set out in the ECHR.[36]

3.1 Non-discrimination

The two courts, the CJEU and the ECtHR, co-exist on the same level and substantially impact the Member States; therefore, it is beneficial to compare them to determine the protection of a specific right. It is also helpful to look at the relationship between the two courts in their judgments to see

[32] Equality and Human Rights Commission, 'What is the European Convention on Human Rights?' (*Equality and Human Rights Commission*, 19 April 2017) <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> accessed 20 April 2023.
[33] See, Frequently asked questions, (n 2121).
[34]See, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (n 1), Article. 1.
[35]Directorate-general for communication, 'EU Institution: Court of Justice of the European Union (CJEU)' (*European Union*) <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en> accessed 24 April 2023.
[36] The International Justice Resource Centre (IJRC), 'European Court of Human Rights' (*International Justice Resource Center*) <https://ijrcenter.org/european-court-of-human-rights/> accessed 24 April 2023.

what effect the accession of the EU to the ECHR might have on the protection of human rights in Europe, in this case, the right to non-discrimination of same-sex marriage. As discussed above, one of the aims is to ensure that the EU has a coherent system for protecting human rights and a harmonised case-law. Although the EU and the ECHR systems have had similar objectives from the beginning, for instance, ensuring peaceful co-existence between Member States and trying to generate a stronger bond in the Union based on economic cooperation and respect for human rights, one can say that the traditions differ; nevertheless, the EU has attempted to achieve these aims through economic cooperation, while the system of the ECHR's main purpose is to guarantee a minimum level of protection of human rights in Europe.[37]

Non-discrimination is enshrined in Article 14 of the ECHR and Article 21 of the Charter; the wording is similar in both Articles, and the scope of the prohibition of discrimination is so broad that a limitation will be on same-sex marriage and partnerships. The reason for choosing non-discrimination against same-sex marriage and partnerships is that the case-law from the two courts is similar and, therefore, can be used to show the differences between the EU and the ECHR systems. Both courts must deal with different views between and within the Member States on this issue.

3.1.1 Article 14 ECHR

The right to protection against discrimination is, according to ECtHR case-law, of a fundamental nature and shall always be considered an underlying value of the Convention. Non-discrimination law ensures that all individuals have fair and equal opportunities when exercising their other rights stipulated in the Convention.[38] Article 14 of the Convention constitutes the prohibition against discrimination and reads as follows:

> 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'[39]

This is a codification of the protection against discrimination when enjoying the other rights established in the Convention. The prohibition of discrimination is supported by Article 1 of Protocol No. 12 to the Convention, which expands the protection and makes it more general so the right can be enjoyed by any right, including rights under national law. This means that when looking at the case-law of the right to non-discrimination, the Article is combined with other rights in the Convention.[40] One can see in Article 14 that it is not an exhausting list of discrimination grounds as "other status" opens the Article for application in cases that might not be mentioned. The ECtHR used to hold that the ECHR could not be interpreted as including the right to recognition for same-sex partners. Still, in recent years, the ECtHR has understood that there is a

[37] T Giegerich (ed.), The European Union as Protector and Promoter of Equality, European Union and its Neighbours in a Globalized World 1, https://doi.org/10.1007/978-3-030-43764-0_7 p. intro
[38] Council of Europe, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No 12 to the Convention: Prohibition of discrimination (Council of Europe/European Court of Human Rights 2022) p. 6.
[39] See, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, (n 1), Article 14.
[40] See, Guide on Article 14 (n 38), p. 6.

need for protection against discrimination against same-sex partners so that they can be treated the same as different-sex partners.[41]

Article 14 does not provide a clear definition of what direct discrimination is, but it can be identified by the different treatment of persons in equivalent or relevantly similar situations. Discrimination is usually based on an identifiable characteristic or status. Less favourable treatment can be established by comparing to someone in a similar situation.[42]

What reflects indirect discrimination is, for example, some form of the disproportional harmful effect of a general policy or measure that, even though the policy or measure is expressed in neutral terms, has a discriminatory impact on a particular group. The aim might not be specifically aimed at or directed at a specific group, but it can still indirectly discriminate against that group.[43]

3.1.2 Article 21 Charter

The EU anti-discrimination law was initially limited to a provision prohibiting discrimination based on gender in employment, but in 2000, the EU Charter of Fundamental Rights was adopted. First, it was a nonbinding declaration, but when the Treaty of Lisbon entered into force in 2009, it altered the status of the Charter to make it a legally binding document with the same legal value as the other EU treaties.[44] The main article in the Charter for Non-discrimination is Article 21, which states:

> '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'[45]

As stated earlier, this means that individuals can complain about EU legislation or national legislation that implements EU-law if they feel the right to non-discrimination has not been respected. Unlike Article 14 ECHR, the prohibition of discrimination in the Charter is a freestanding right that applies to situations that do not need to be covered by any other Charter provision. The Charter has other non-discrimination articles; nonetheless, according to the CJEU, the principle of equal treatment is a general principle of EU-law. The principle of non-discrimination is enshrined in Article 20 of the Charter, but it concludes that Article 21 (1) of the Charter contains the expressions of the right.[46]

Even if Article 21 of the Charter is broader, the personal scope of the protection is quite limited. Third-country nationals, citizens of a state not a member of the EU, are not protected against unfavourable treatment. This differs from the Convention, which protects all those within the jurisdiction of a member state, whether they are citizens or not. The protection even extends beyond

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[41] *Oliari and Others v Italy,* App no. 18766/11 and 36030/11, (ECtHR 21 July 2015), where the ECtHR held that Italy had not met its obligations under the Convention by not providing for any sound framework to recognize and protect same-sex unions. paras. 165–185.
[42] See, Guide on Article 14, (n 3838), para 28.
[43] ibid 32.
[44] See, Handbook on European non-discrimination law (n 26), p. 21.
[45] See, the Charter (n 12), Article 21.
[46] See, Handbook on European non-discrimination law (n 26), p. 35.

the national territory to those areas under the effective control of the state, such as individuals in occupied territories.[47]

3.1.3 Judgements from the ECtHR on Discrimination of Same-Sex Marriages

Since the acceptance of same-sex partnerships is to be treated the same way as different-sex partnerships, there is a case-law on the subject that can clarify how the ECtHR looks at the grounds of discrimination against same-sex couples.

To start with, there is a case where a violation of Article 14 in conjunction with Article 8 was found in *Vallianatos and Others v Greece*.[48] It concerned a challenge to Greek law that introduced the possibility for different-sex couples to register as a civil union. The concept of civil union is more flexible and less formal than marriage, but the issue was that Greek law excluded same-sex couples from its scope.[49] In its reasoning, the ECtHR looked at the European consensus and noted that 19 of 47 Council of Europe Member States had authorised registered partnerships and that 17 of those 19 States had recognised both different-sex and same-sex couples. Therefore, the court concluded that there were neither grounds nor convincing reasons for excluding same-sex couples from entering a civil union. So, when a Member State introduces some form of registered partnership, it must be accessible to all couples regardless of their sexual orientation, or there will be discrimination under Article 14 in conjunction with Article 8.[50] In other words, the ECtHR recognised that Article 8 contains protection against discrimination against same-sex couples. If a state has made a civil union available, then all couples should have access to such a union. Hence, the state needs to ensure that the same opportunities are available for same-sex couples as for different-sex couples.

The case of *Taddeucci and McCall v Italy* is one of the founding cases on discrimination against same-sex partners on the grounds of sexual orientation (Article 14 ECHR combined with Article 8 ECHR, *right to family life*).[51] The case is from 2016 and concerns two applicants, Taddeucci and McCall, Italian and New Zealand nationals who are unmarried. The applicants moved to Italy, and McCall applied for a residence permit on family grounds. The Italian authorities dismissed his application on the basis that Italian law on the subject only recognised different-sex spouses as qualified for a residence permit for 'family members'. Due to the restrictive Italian rules that did not consider the applicants' personal situation, the ECtHR found a breach of the right to non-discrimination against sexual orientation.[52]

One of the interesting approaches in *Taddeucci and McCall v Italy* is that the court truly examined the conditions for discrimination that might consist of a failure to treat differently persons whose situations are significantly different. The Court recognised that the applicants are not treated differently from unmarried different-sex couples when looking at the criteria for granting residence permits on family grounds. Neither of the groups qualifies for such a residence permit under the applicable Italian law since neither is married. However, the Court takes its reasoning a step further;

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[47] ibid 27.
[48] *Vallianatos and Others v Greece* [GC], App no. 29381/09 and 32684/09, (ECtHR 7 November 2013).
[49] ibid 3.
[50] ibid 91-92.
[51] *Taddeucci and McCall v Italy,* App no. 51362/09, (ECtHR 30 June 2016).
[52] ibid 98.

instead of discarding the situation, the ECtHR found it problematic. The court acknowledged that steady same-sex partners do not enjoy the same rights as different-sex spouses and that same-sex couples do not have access to marriage under the relevant domestic law. The court also criticised the restrictive understanding of "family member" under Italian immigration law, which consequently became an undefeatable obstacle to obtaining a residence permit as a partner in a same-sex couple. Therefore, the ECtHR found that because the prerequisite for obtaining a residence permit is to get married, which is not available for same-sex couples under national law, it constituted a violation of Article 14 together with Article 8 of the ECHR.[53]

A similar case *Oliari and Others v Italy*[54] concerns three same-sex couples who 2015 claimed that their rights stipulated in Article 14 in conjunction with Article 8 ECHR had been breached since they could not get married nor register any other type of civil union under Italian law. The case-law of the ECtHR acknowledged that the trends in Europe and internationally do legally recognise same-sex couples and the fact that the Italian Constitutional Court had recurrently called for legal recognition of the rights of homosexual unions. Hence, the ECtHR concluded, within the circumstances of the case, that Italy needed to ensure effective respect for the applicant's private and family lives by officially accepting same-sex unions. The court held that the legal framework for recognising same-sex couples must at least provide for the 'core rights relevant to a couple in a stable and committed relationship'.[55] So, by failing to perform this type of legislation, the ECtHR resolved that Italy had overstepped its margin of appreciation and failed to fulfil its positive obligation, constituting a breach of Article 14 and the right to family life in Article 8 ECHR.[56] This case-law shows that the ECtHR has increased its protection and strives for equal treatment of same-sex marriages.

3.1.4 Judgements from the CJEU on Discrimination of Same-Sex Marriages

The case-law of the CJEU has gone through a similar development of the right of non-discrimination concerning same-sex marriage as the ECtHR. Still, the development seems to have been slightly slower, and the focus is more related to other rights, such as the free movement of persons, as shown below. The CJEU has, like the ECtHR, been a bit reluctant to deal with these types of issues and instead relied on the legislation and interpretation of the national courts.

The case of *Maruko*[57] shows a good example of when the CJEU was reluctant to take a stand on the issue of the non-discrimination principle in relation to same-sex marriage. The question was if the principle implied that the same survivor's benefits should follow from a 'life partnership' between same-sex partners as to what is recognised for married spouses of different sex. The CJEU left it to the national court to determine whether life partners and spouses are in a comparable situation. The court concluded, however, that if the national courts decide that those civil statuses are in a comparable situation, the applicable legislation, in the case, is direct discrimination on the grounds of sexual orientation within the meaning of the EU-law.[58] Hence, the CJEU did not directly approach the issue in 2008. The court did not give guidance on whether the non-discrimination

[53] ibid 92–97.
[54] See, *Oliari and Others v Italy*, (n 41).
[55] ibid 174.
[56] ibid 184-187.
[57] Case 267/06, *Maruko v Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757.
[58] ibid 72.

principle did imply that same-sex partners should have the same legal rights as different-sex partners.

Another case shows the unwillingness of the CJEU to involve itself with the issues of discrimination against same-sex partnerships. The case is called *Parris v Trinity College Dublin and others*[59] which deals with the right to the benefits of a same-sex partner's pension scheme for a survivor. The decision in this case recognises a limitation of EU-law in this area. The applicant in the case is a lecturer in French that worked at Trinity College Dublin between 1972 and 2010. He was in a stable relationship with a same-sex partner for over 30 years and had dual Irish and British nationality. While working, he was a member of a pension scheme which provides a survivor's pension payment to a member's spouse or civil partner. This, however, is only granted if the member was married or had entered a civil partnership before reaching the age of 60.[60]

At the time, there was no provision to recognise his civil partnership under Irish law, but it was possible to enter a civil partnership in the United Kingdom which he did at the age of 63. When the applicant turned 65, he had the possibility of early retirement and requested that his partner receive a survivor's pension on his death, but it was rejected.[61] After several attempts in different courts, he came to the Labour Court in Ireland, which referred to the question: Does it constitute discrimination on the grounds of sexual orientation if the pension survivors scheme is limited by a requirement that the member and his surviving civil partner entered their civil partnership prior to the member's 60th birthday in circumstances where they were not permitted by national law to do so? to the CJEU for a preliminary ruling.[62]

It is an interesting case because it is like the *Maruko* case since the CJEU is reluctant to take a stand on the issue of the non-discrimination principle in relation to same-sex marriage. What sticks out is that the court went against the Advocate General's opinion and ruled that, in the circumstances of this case, the actions of the respondent were not discriminatory. Advocate General Kokott delivered an opinion that said it was indirect discrimination because the applicant could not legally do anything to change the situation because same-sex marriage or a civil partnership was not available to him before his 60th birthday.[63] The reasoning of the CJEU in 2016 was that there is no category of discrimination resulting from the combination of more than one of the grounds, such as sexual orientation and age, and that exclusively on one of the grounds taken in isolation, discrimination has not been fulfilled. It is also within the competence of every individual Member State to determine survivors' benefits under pension schemes.[64]

The view of the CJEU has gradually changed, and in 2018 the CJEU gave an important ruling in the *Coman* case.[65] The case concerned, in some ways, a similar issue as the ECtHR ruled on in *Taddeucci and McCall*, the problems related to the right to marry for same-sex partners. The applicants in the case are a Romanian and an American that lives as a same-sex couple. The couple used to work in Brussels, where they also got lawfully married. When they wanted to move to Romania, they were told that their marriage would not be recognised as a marriage. The issue

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[59] Case C-443/15, *David L Parris v Trinity College Dublin and others* [2016], OJ C 30.
[60] ibid 15-17.
[61] ibid 18-26.
[62] ibid 27–28.
[63] Opinion of Advocate General Kokott [30 June 2016] ECLI:EU: 2016:493, p.164.
[64] See, *David L Parris v Trinity College Dublin and others*, (n 59), para 83.
[65] Case C-673/16, *Coman v Inspectoratul General pentru Imigrări* [2018], ECLI:EU:C: 2018:385.

brought before the court was that, since Romanian law did not recognise same-sex spouses, they could not exercise their residence rights in the same way as different-sex spouses could. This is a complicated problem, and the court did recognise that marriages are something that falls within the competence of the Member States, and it is up to each Member State to decide if same-sex marriage is allowed.[66] A the same time, the CJEU referred to the importance of the free movement principle and that all EU citizens shall have excess to the same rights throughout the EU. Therefore, the court concluded that a Member State could not use its domestic law or national identity to justify the refusal to recognise a same-sex marriage that has been concluded in a different Member State.[67]

In these cases, ruled by the CJEU, one can say that depending on the object of the discrimination, such as cases where the free movement of persons is at stake or survivor's benefits, the CJEU showed itself to be willing to protect against this type of discrimination. The development since the *Maruko case* in 2008 shows that the CJEU has, as shown in the case *Coman,* taken its responsibility to protect same-sex partners and same-sex marriages against discrimination.

3.2 Human Rights Protection after the EU Accedes to the ECHR

Before looking at the prospects of what might change when or if the EU acceded to the ECHR, it must be acknowledged that it is hard to compare the two courts. Firstly, the courts have procedural differences, such as the CJEU ´s possibility to give a preliminary ruling, which is not possible in the ECtHR, where one must have exhausted all available remedies.[68] Secondly, it has not always been possible for the two Courts to decide on similar cases. For instance, the ECtHR has now developed a significant portion of case-law regarding discriminatory violence, a topic that is not likely to be raised before the CJEU.[69] Lastly, the objective of the two courts is different in nature, which is the focus here. The ECHR contains a list of rights that is primarily characterised as securing basic rights for anyone within a Member States jurisdiction, including their citizens and people of other nationalities,[70] and the Charter 'civil, political, social and economic rights'[71] the nature of the judgements differs in the way that the ECtHR expressly referred to the core of the values in the Convention, and considered the individual circumstances and allowed it to play a significant role in its reasoning, while the CJEU's focus was on the freedom of free movement. These types of differences could maybe explain some part behind the variation of the judgements between the ECtHR and the CJEU.

[66] ibid 37.

[67] ibid 43-47.

[68] See, Convention of Human Rights, (n 1), Article 35 (*admissibility criteria*) - Exhausted all remedies - To use (or at least to have attempted to use) the legal avenues available.

[69] Janneke Gerards, 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights: Who Takes the Lead?' in Thomas Giegerich (ed), *The European Union as Protector and Promoter of Equality*, vol 1 (Springer International Publishing 2020) <https://link.springer.com/10.1007/978-3-030-43764-0_7> accessed 17 April 2023, p. 157.

[70] See, Equality and Human Rights Commission, (n 32).

[71] Patricia Brander, Laure de Witte, Nazila Ghanea, Rui Gomes, Ellie Keen, Nastasia Nikitina, Justina Pinkeviciute, COMPASS: Manual for human rights education with young people (2nd ed, Council of Europe 2020), p. 390.

3.2.1 The Objectives of the Two Courts

Both courts, the ECtHR and the CJEU, have gradually developed the case-law on discrimination of same-sex marriages, and it can be concluded that the ECtHR seems to have taken the lead in this particular field. Even though both courts hold that there is no right to marry same-sex partners, it is still up to each Member State, but same-sex marriages that have been concluded abroad should be legally recognised in other states.

Interestingly, even if they agree with each other, the subject is approached differently, and the legal reasoning is motivated in different ways. Looking at the ECtHR's judgment in *Taddeucci and McCall v Italy*, the court considered the European consensus and the applicants' personal situation, which played an important role and not focusing on the move or the free movement. The ECtHR criticised the restrictive understanding of 'family member' since it was an obstacle to obtaining a residence permit as a same-sex couple, as marriage was not available for same-sex couples under national law. The case focused on the personal situation that steady same-sex partners do not enjoy the same rights as different-sex spouses. While in the CJEU's *Coman* case, the judgment is primarily based on the right of free movement and citizenship. The reasoning of the CJEU was based on the fact that they could not exercise their residence rights in the same way as different-sex spouses could. Therefore, one can conclude the different objectives of the courts, and the fact that they do differ makes somewhat of a contrast to each other when treating the right of non-discrimination of same-sex couples. Even though both courts, the ECtHR and the CJEU, find that there is discrimination against same-sex couples compared to different-sex couples, there is a difference in the objective of a judgement. One of the reasons behind the different objectives could be that the CJEU need to consider the primacy of EU law; in this case, the free movement of persons and national rules cannot endanger the primacy of EU-law. In this way, the CJEU can be seen as a constitutional court for all of the EU and sets the standard, while the ECtHR sets out minimum standards. This means that the CJEU cannot take as broad an approach as the ECtHR.[72]

The judgements are not coherent in the fact that the CJEU does not consider the personal situation of the applicant and the fact that the applicant in *Maruko* could not do anything to be granted the pension scheme. If the EU had acceded to the ECHR, the judgement in *Maruko* might have been different. The CJEU would have been more bound to the reasoning in *Vallianatos and Others v Greece*. The protection of non-discrimination of same-sex couples would be coherent and more robust since the EU would also be bound to follow the minimum protection set out by the ECtHR. The development of the prohibition of discrimination against same-sex partners would probably go faster if the CJEU had not been reluctant to recognise the same-sex partnerships' legal status in 2008 when the ECtHR already had done so.

What is interesting is the ruling in the similar case *Parris v Trinity College Dublin and others,* the CJEU did not take a stand in the development of the right of non-discrimination concerning same-sex marriage, even though Advocate General Kokott did conclude that it was indirect discrimination because the applicant could legally do something to be granted the pension scheme. After all, same-sex marriage nor a registered civil partnership was not available to him at the right

[72] Martin Kuijer, 'The ECHR and EU Accession The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession' [2018] 24 (Issue 7: The Relationship Between the European Convention on Human Rights and Wider International Law) The International Journal of Human Rights 998-1010.

time. This judgement came in 2016, and if the CJEU would have been bound by the *Vallianatos and Others v Greece* judgement, it might have been another outcome. That the CJEU was still behind the development of non-discrimination protection is problematic and shows the incoherence between the courts and that there is no common conception of human rights in Europe. As one of the aims of the accession is to create greater coherence between the ECtHR and the CJEU when it comes to human rights and, in this case, the right of non-discrimination in relation to same-sex partnerships, something needs to be done, and the accession might be a solution.

The argumentation above shows that the principles and values represented in the interpretation of the statutes can have a crucial impact on the two court's reasoning and even on the outcomes of the judgments. This is problematic. The divergence in the characteristics of non-discrimination and the different objectives of the two systems is reflected in their case-law. As it is now, it is hard to predict future developments, making it difficult for the Member States and the individuals that must deal with the divergences. It makes it hard to know whose party to follow and whose objectives to agree with. Since the EU's accession to the European Convention has not happened, the different rationales of the ECtHR and the CJEU will continue to play a role in the Member States' case-law as they are contracting parties to both the ECHR and the Charter.[73]

3.2.2 Harmonisation of the Protection of Non-Discrimination

As shown by the case-law development in the two courts, one can see the divergence and the need for harmonisation. Looking at the *Vallianatos and Others v Greece* case and the *David L Parris v Trinity College Dublin and others* cases were judged in 2013 and 2016 but with two very different outcomes. The facts of the cases are slightly different, but both do, in some ways, concern the acknowledgement of same-sex partnerships' legal status. In *the Vallianatos and Others v Greece case, the ECtHR recognised that exclusion against same-sex couples entering a civil union should* not be allowed. In the *David L Parris v Trinity College Dublin and others* case the CJEU ruled that the actions of the respondent were not discriminatory even though there was no possibility under national law for the applicant to registrar nor marry his partner to be able to grant same-sex partner's pension scheme for the survivor. This shows that if the CJEU had been bound or forced by the accession to recognise the decision of the ECtHR and the decisions would be formally binding on the Union. If this incoherence had happened after accession, it could, in an extreme case, result in non-compliance. In other words, if the CJEU rejects an interpretation of the ECtHR of internal matters of EU-law - the Convention would be a part of EU-law - it could be a non-compliance of EU requirements.

Another issue of the harmonisation between the two courts concerns the protection against discrimination of same-sex partnerships, as it is not entirely clear what status the CJEU will give the rulings of the ECtHR after the accession. That the CJEU could, when dealing with an EU-law matter, follow an argument that protects the EU legal order but might clash with the protection of non-discrimination of same-sex couples given by the case-law from the ECtHR. As shown in the argumentation above, the development in the ECtHR has gone faster and grants a more extensive scope of protection against discrimination against same-sex couples since the court does consider the personal situation of the applicant instead of the right of free movement. The ECtHR grants

[73] See, Geralds (n 69), p. 158.

broader protection against discrimination, while the CJEU might protect the legal order of EU-law or the autonomy of EU-law instead of non-discrimination of same-sex couples.

Whenever the EU accession to the Convention happens, it is going to constitute a considerable challenge in terms of coherence between the two courts. The moral and legal credibility of the EU is at stake since, as it is now, there is divergence, fragmentation, and division. One could argue that the legal landscape of human rights is threatened. EU´s accession to the ECHR allows Europe to be coherent with itself and its ethical and legal traditions.[74] While waiting for a new attempt to accede to the Convention, the only way forward is for the ECtHR and the CJEU to join forces and try to find a mutual understanding of what the underlying values of non-discrimination are and what non-discrimination law entails. This will ensure that the two courts show that they are protectors and promoters of non-discrimination. To grant the national courts a harmonised understanding of doctrine that is easily applied.[75]

4 Opinion 2/13

This section is meant to provide a brief overview of what the Draft agreement contains and what the reasons behind Opinion 2/13 are, whilst blocks 4.1 and 4.2 will go into more detail about what is essential for this paper, the effect of the accession on the autonomy of EU and the relation between the two courts, the ECtHR and the CJEU. The goal is to show the different views of the CJEU and Advocate General Kokott will be used to indicate a contrasting opinion and reasoning of the outcome of the Opinion and how the accession could be conducted. In section 5, the influence of the accession will be analysed based on the previous sections.

Opinion 2/13 is based on the request from the European Commission for an opinion from the CJEU on the Draft that reads as follows:

> 'Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950 ("the ECHR"),] compatible with the Treaties?'[76]

The Draft contains the provisions that are considered necessary to make sure that the EU can accede to the ECHR. The first section of the provisions in the Draft contains the procedural mechanisms that need to be in place before an accession for it to be effective. The second section of the provisions is purely technical to deal with the fact that the ECHR was meant to only apply to the Member States of the Council of Europe. Since the EU is not a State nor a Member of the Council of Europe, there need to be amendments to the ECHR. When the provisions are made clear, the Draft concludes with how entry into force and the accession shall be completed.[77]

4.1 The Effect on the Autonomy of the EU

One of the key issues that were discussed, and the reason for the rejection of the Draft on accession, was the problem of maintaining the autonomy of the legal order in the EU, particularly preserving

[74] See, Callewaert, (n 2), p.90-91.
[75] See, Geralds, (n 69) p. 158.
[76] See, Opinion 2/13, (n 6), para 1.
[77] ibid 12.

the specific characteristics of EU-law.[78] To be able to protect the specific characteristics and the autonomy of the EU legal order, the Treaties have established a judicial system.[79] The Treaties are binding agreements between the EU Member States, which set out the objectives, rules for the EU institutions, how decisions are made, and the relationship between the EU and its Member States. Every action taken by the EU is founded on the Treaties. This is to ensure consistency and uniformity when interpreting EU-law.[80]

The special autonomy of EU-law needs to be respected according to Article 1 of Protocol no. 8 as 'for preserving the specific characteristics of the Union and Union law' with a fundamental desire 'to preserve the specific features of Union law'.[81] This differs from the autonomy of national law and state sovereignty, but to describe and explain precisely the whole meaning of the specific characteristics of the Union, would be an entire paper and is not the focus here. Still, the general idea is EU is a multi-level system where EU-law is characterised by the fact that it comes from an independent source of law and the Treaties have primacy over the laws in the Member States. The direct effect of provisions that apply to nationals and the Member States themselves also constitutes an important characteristic that is unique to the Union.[82] The effect of the special characteristics of the Union and Union law has emerged a structured network of principles, rules, and mutually supporting relations between the EU and its Member States, which can be seen as the nature of EU-law.[83]

The protection of the special autonomy of the EU legal order has been one of the cornerstones of the case-law of the Court of Justice for more than 50 years, which now benefits from universal recognition. This autonomy needs not only to be respected by EU-law and the relation to the laws of the Member States. Still, it must also be respected in the same way by third countries and international organisations. Whenever the EU enters into an international agreement, steps need to be taken to maintain the autonomy of the EU legal order and to make sure it is not affected.[84]

Opinion 2/13 rejects the Draft due to the incompliance with the special autonomy on the basis that the Draft agreement fails to have regard to the specific characteristics of EU-law. That the Draft delegates the judicial review of acts, actions, or omissions exclusively to a non-EU body in Common Foreign and Security Policy [CFSP] matters.[85] CFSP is a program meant to contribute to the EU's objectives of preserving peace, strengthening security, promoting cooperation, and developing democracy, the rule of law, and respect for human rights.[86]

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[78] Recognised in Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ 1 326/01, relating to Article 6(2) TEU on the Accession of the EU to ECHR.
[79] See, Opinion 2/13, (n 6), para 174.
[80] See, Callewaert, (n 2), p. 84.
[81] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2012] OJ 1 326/01.
[82] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, EU: C:1963:1, p. 12, and Opinion 1/09, Opinion pursuant to Article 300(6) EC, EU: C:2011:123, para 65.
[83] See, Opinion 2/13 (n 6), para. 167.
[84] See, View of Advocate General Kokott, (n 25), para. 159.
[85] See, Opinion 2/13 (n 6), para. 258.
[86]Directorate-general for communication, 'Common Foreign and Security Policy' (*European Commission*) <https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/common-foreign-and-security-policy_en> accessed 19 April 2023.

The Draft does also not lay down correct arrangements for how the co-respondent mechanism and the procedure for how the involvement of the CJEU shall be conducted so that the specific characteristics of the EU and EU-law can be preserved.[87] Article 3 of the Draft agreement has a co-respondent mechanism that makes it possible for several Member States and/or the EU to be co-respondents in a violation of the ECHR. This could result in the ECtHR checking internal responsibilities in the EU of both respondent and co-respondent. By using the co-respondent mechanism, the Union or an EU Member State can become full parties to proceedings. The ECtHR would examine a provision of EU-law regarding its compatibility with the ECHR. This is the case where a violation would only have been avoided using a violation of EU-law.[88]

The problem here, according to the CJEU, is the distribution of responsibility which needs to be supervised and investigated by the CJEU through the relevant rules of EU-law. This is because only the CJEU has exclusive jurisdiction to ensure that any agreement between the co-respondent and respondent respects EU-law. If the CJEU would permit the ECtHR to decide whether an agreement exists between the EU and its Member States on sharing responsibility, it would be the same as recognising that the ECtHR can settle a question that falls outside its jurisdiction. So, the co-respondent mechanism as it is described in the Draft agreement cannot be recognised, as it does not ensure the preservation of the specific characteristics of the EU and EU-law.[89]

What can be argued when looking at the Opinion and the reasons for the rejection, one can conclude that the CJEU is afraid to lose control of the ruling of EU-law. It can be argued that it wants to protect its position as the only judge and interpreter of all EU-law, notwithstanding occasional cooperation with the national courts in the Member States. In the case of the EU´s accession to the ECHR, one could understand the CJEU's fear that the autonomy and the specific characteristics of EU-law would change in case of accession is relatively easy to understand.[90]

Advocate General Kokott does not entirely agree with the CJEU. Kokott argues that even though it is necessary to ensure that its accession to the ECHR does not restrict the competences of the EU, the Draft agreement does not affect the competences of the EU.[91] The Draft agreement might impose restrictions on the EU when exercising its competences as the ECHR will be binding on the EU institutions after the accession, which the Advocate General claims to be like any rules guaranteeing fundamental rights. The function of fundamental rights is to set out boundaries for the actions conducted by national and international institutions so the individual can be protected. The accession would lose its meaning if the EU cannot accept the restrictions arising from the ECHR when it comes to exercising its competencies.[92]

The Advocate General states that the EU applies the human rights standards codified in the ECHR even without the EU acceding to the ECHR. In other words, what the EU is already following in Article 6(3) TEU: the rights granted in the Convention need to constitute general principles of the Union's law, shows that the EU already in substance needs to comply with the result of an

[87] See, Opinion 2/13 (n 6), para. 258.
[88] ibid 55-57.
[89] ibid 235.
[90] See, Nergelius, (n 27), p. 28.
[91] See, View of Advocate General Kokott, (n 25), para. 38–39.
[92] ibid 40–41.

accession.[93] This means that the reasoning of the CJEU in Opinion 2/13 could be superstition and that they are actually just afraid to lose control of the ruling of EU-law.[94]

The issue of the distribution of responsibility that the CJEU has exclusive jurisdiction over will not, according to Kokott, be a problem since the first part of Art. 3 (7) in the Draft provides that the respondent and the co-respondent are jointly responsible for a violation of the ECHR. This provision should prevent the ECtHR from deciding who is responsible for a particular violation based on EU-law.[95] The reasoning from the CJEU can therefore be questioned if one agrees with the Advocate General and the Draft agreement does not permit the ECtHR to decide whether an agreement exists between the EU and its Member States on the sharing of responsibility and, therefore, will not the ECtHR settle questions that fall outside its jurisdiction.

The CJEU also rejected the Draft on another basis, that the accession will affect the specific characteristics and the autonomy of EU-law since the Draft does not ensure a coordination between Article 53 of the ECHR and Article 53 of the Charter. This would risk undermining the principle of Member States' mutual trust under EU-law. The relationship between mutual trust and the preliminary ruling procedure would also be affected.[96] The rejection of the Draft based on this argument will not be further discussed as it would constitute another paper or book; the limitation is also made to be able to say within the boundaries of the topic of this paper.

The complexity of how to deal with questions concerning the hierarchy of norms in EU-law concerning the ECHR will now be briefly discussed, and what the effect on the legal order in the EU might be. One cannot clearly state the Convention's precise position in the EU hierarchy without writing a book, but an effort to outline the general function will be made. The hierarchical position of the Convention in the domestic legal order of a Member State does not matter when looking at the provisions of the Convention. Therefore it is up to each Contracting Party.[97] However, it still needs to comply with Article 1 ECHR, which is called upon to show compliance with the rights represented in the treaty,[98] and the case-law from the ECtHR[99].This means each acceded Contracting Party, including the EU when they have acceded to the Convention, is free to give the Convention the status in the hierarchy that seems most appropriate to ensure its effectiveness.[100]

4.2 The relation between the CJEU and the ECtHR

In Opinion 2/13, the CJEU set out two main concerns for the relationship between the courts, the CJEU and the ECtHR. Firstly, the issue discussed in the previous section concerning the co-respondent mechanism that might interfere with the distribution of responsibility, which the CJEU believe will lead to the ECtHR settling a question that falls outside its jurisdiction and deciding on matters that the CJEU has the exclusive jurisdiction on. Secondly, the issue of maintaining the jurisdiction of the Courts of the EU in the sense that the CJEU objects against that the Member

[93] ibid 42.
[94] See, Nergelius, (n 27), p. 28.
[95] See, View of Advocate General Kokott, (n 25), para. 176.
[96] See, Opinion 2/13 (n 6), para. 258.
[97] See, Calleweart, (n 2), p. 83.
[98] See, ECHR (n 1), Article 1.
[99] See, for example, *Fabris v France*, App no. 16574/08, (ECtHR, 7 February 2013).
[100] See, Calleweart, (n 2), p. 84-85.

States may bring cases against each other concerning the '*ratione materiae* of EU-law'[101] before the ECtHR. This means that there is an issue, according to the Opinion, with the provisions that allow for Member States to complain to the relevant treaty body about alleged violations of the treaty by another Member State and that the accession can disturb the underlying balance of the EU and undermine the autonomy of EU-law. It shall be noted that this type of case does not frequently occur in any of the two courts and has rarely been a significant cause of concern.[102]

According to Opinion 2/13, the problem is not the already existing option for the EU Member States to bring cases against each other before the ECtHR according to Article 33 ECHR, but rather the risk that they may initiate proceedings against the EU. The CJEU sees a possible complication related to the fact that the EU wishes not to be considered a state or equal to a state, which might be the result of the accession. This is because the Draft agreement treats the EU as a State and gives it a role identical to any other Contracting Party. The CJEU argues that the agreement disregards the nature of the EU and continues to say that since the Member States have conferred the powers to the EU shows that the Member States have accepted the way relations between them work.[103]

In Opinion 2/13, the CJEU says that the already existing function for an EU Member State to bring an action against another one to the ECtHR is contrary to EU-law. What shall be pointed out is that this type of case within EU-laws, "*ratione materiae*", can already be brought to the CJEU under Articles 258 and 259 TFEU, even if in a slightly different legal circumstance.[104] So, one can argue that the CJEU here seems to warn for a problem that does not exist, and if one looks at Advocate General Kokott's reasoning, it might be a problem but not as tremendous as the CJEU seems to think. Kokott points out that there is tension between the obligation of the EU Member States to bring disputes concerning EU-law before the CJEU according to Article 344 TFEU. The parallel obligation can be found in Article 55 ECHR, that Member States need to settle disputes relating to the ECHR before the ECtHR, in other words using the inter-state procedure in Article 33 ECHR. She continues to argue that since the ECHR will, after the accession, be a fundamental part of the EU legal order and EU-law, the disputes concerning the interpretation and application of the ECHR between the EU Member States or between the EU and its Members might well arise.[105]

To avoid situations where the EU Member States do not respect the exclusive jurisdiction of the CJEU under any circumstances when settling disputes concerning the ECHR relation to EU-law, the proposed Draft agreement needs to contain a rule where Article 344 TFEU would take precedence over Article 33 ECHR. This type of additional provision would be relatively easy to arrange if it is necessary. Still, the Advocate General notes that the need to implement such a provision shows that other international agreements the EU has signed in the past contain a defect

[101] The ratione materiae requirement refers to the features and characteristics of the subject-matter of a dispute falling under the arbitral tribunal's jurisdiction to determine its jurisdiction, an arbitral tribunal must have recourse to the applicable rules on its jurisdiction ratione materiae. Simon Weber, Charis Tan, 'Jurisdiction Ratione Materiae' (Jus Mundi, 27 December 2022) <https://jusmundi.com/en/document/publication/en-jurisdiction-ratione-materiae> accessed 19 April 2023.
[102] See, Opinion 2/13 (n 6), para. 194.
[103] ibid 193.
[104] See, Treaty on the Functioning of the European Union (n 18), Article 258 TFEU gives the Commission the power to take legal action against a Member State that is not respecting its obligations under EU-law and Article 259 TFEU states that a Member State that believes another Member State has failed to fulfil an obligation under the Treaties can bring the issue before the CJEU.
[105] See, View of Advocate General Kokott, (n 25), para. 100–108.

since no such clauses have previously been included in them.[106] The Advocate General concludes that if the CJEU has a problem with this, which they had, it is possible to make a declaration signed by the EU and its Member States together with the other Contracting Parties of the ECHR at the time of the EU's accession. The declaration would contain an agreement, which is binding under international law, that their intention is not to initiate proceedings against each other regarding alleged violations of the ECHR before the ECtHR in the subject-matter of the dispute falls within the scope of EU-law.[107] One can therefore see that there is a solution to the issue of the EU Member States respecting the exclusive jurisdiction of the CJEU when settling disputes concerning the ECHR relation to EU-law if an accession would take place. Accepting the reluctance and constructive attitude of the CJEU is complex and should be suggestive of what position the CJEU stands in.

So far, the CJEU has yet to be clear on how they would like the relationship between the two courts to look. It appears as one of the biggest struggles since they already are compelled to observe the case-law coming from the ECtHR according to Article 6(3) TEU as discussed earlier, but the fact to accede to the ECHR can challenge the tasks or authority conducted by the EU Courts, or the courts of the Member States when exercising a function under EU-law since the EU court will be under the influence of external judicial review.[108]

When the EU accede to the ECHR, situations might arise where the ECtHR could determine who is the respondent in any given case, and the ECtHR might divide or assign responsibility to the EU and its Member States. This would interfere with the Court of Justice's judicial autonomy to interpret EU-law. However, the ECtHR could not just disregard the power division that already exists between the EU and its Member States, both in law and in practice.[109]

One of the aims of the accession is to have external supervision of human rights compliance and the possibility of external judicial review of EU decisions. So, after the accession, the EU and the Member States will be bound by the rulings from the ECtHR. This could become an obstacle, and as shown in the Opinion, the worry of disruption in the legal order might be valid. If a situation arises when the ECtHR must deal with an issue that needs an interpretation of substantive EU-law that will be binding on the EU, it could impact its judicial authority. The discussion concerning the problems of the EU's autonomy is huge, but one could ask: are the EU, the national legal orders, and judicial systems ready to face an external review from the ECtHR? The external review by a well-respected judicial authority might confirm that the EU breaches human rights.[110]

The Draft agreement does not expressly say that the EU will be subject to the jurisdiction of the ECtHR, but like all the other Contracting Parties, they will have to recognise the jurisdiction of the ECtHR. External judicial control is a recognition of compliance with basic human rights standards. It will transform the present legal position and represent real value. The recognition of the jurisdiction of the ECtHR by the EU is an opportunity to reinforce the ongoing dialogue on human rights issues between the CJEU and the ECtHR. As stated earlier, the EU can only recognise the jurisdiction of the ECtHR if the arrangements in the accession agreement ensure that the specific

[106] ibid 115.
[107] ibid 120.
[108] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' [2013] 76(2) The Modern Law Review <https://ael.eui.eu/wp-content/uploads/sites/18/2015/04/Eckes-08-Eckes.pdf> Accessed 3 May 2023, p. 259.
[109] ibid p. 265.
[110] ibid p. 266.

characteristics of the EU and EU-law can be preserved. In a perfect world, cooperation will strengthen human rights protection in Europe and the values on which the EU is founded. [111]The formal recognition of ECtHR jurisdiction should not lead to practical difficulties in most cases. Still, it will make a difference to wide-ranging convergence between the decisions of the ECtHR and those of the CJEU concerning human rights. It needs to be highlighted, however, that the EU must show a willingness also to recognise decisions of the ECtHR where EU-law is incompatible with the ECHR or that the EU has violated the ECHR in a specific case.[112] In other words, there needs to be cooperation between the two courts to make the accession possible.

5 Analysis: The Accessions Influence on the Norm Hierarchy

As it is now, the relationship between EU-law and the ECHR is horizontal, but the question remains: will this change due to the accession? It seems like that is what the CJEU fears if one looks at the reasoning of Opinion 2/13. The reluctance from the CJEU to continue the negotiations and find solutions and show optimism for the accession to the ECHR. EU's accession to the ECHR is essential since it takes a stand to improve the human rights protection of individuals in the EU, although it does add complexity. The accession will enhance the possibilities of individuals to access justice for violations conducted by the EU institutions since those actions will no longer fall outside the scope of the ECtHR´s jurisdiction.

The rulings of the ECtHR do play an essential role in the EU legal order already. Still, after the accession, the EU will be legally bound and must submit itself to the authority of the ECtHR for external supervision, which will ensure the legal effects of the Convention. The divergence between the two courts and the 'pick and choose application' that the CJEU has now will have to change. The accession to the ECHR will require the CJEU to take a stand on the hierarchical status of the ECHR within the EU legal order.[113] As the CJEU will have to recognise the jurisdiction of the ECtHR and the ECHR will become a part of EU-law, the question that continues to arise is: will the CJEU recognise the case-law from the ECtHR and regard the ECHR as fully part of the EU constitutional law?

The accession will affect the relationship between the two courts, such as the CJEU´s full recognition of case-law emerging from the ECtHR. As argued previously in this paper, the coherence between the two courts will most likely be improved. The EU will not have to be subject to the jurisdiction of the ECtHR, but it will have to recognise it. There might not need to be a formal stand on the hierarchical status of the ECtHR, instead keeping a pluralist legal landscape in Europe.[114] The accession can contribute to a dialogue between the legal orders and continue a horizontal relationship instead of a hierarchy. The issue with this reasoning is the CJEU´s view on the strict exclusive jurisdiction on ruling EU-law matters, even when it might concern human rights conformity. There is a great fear that the ECtHR might rule on issues relating to EU-law when judging a human rights case which could change the hierarchy between the two courts.

Protecting the special characteristics of EU-law and the EU's legal order is more important to the CJEU than strengthening human rights protection in Europe. This might be a sign that the EU

[111] See, View of Advocate General Kokott, (n 25), para. 164.
[112] ibid 167.
[113] See, Eckers (n 108), p. 284.
[114] Turkuler Isiksel, European Exceptionalism and the EU's Accession to the ECHR, *European Journal of International Law*, Volume 27, Issue 3, August 2016, Pages 565–589.

believes that the legal order or norm hierarchy is in danger if the accession to the ECHR happens. The ECHR could become a predominant norm, and the ECtHR might be granted jurisdiction that is exclusive to the CJEU. This concern has been argued throughout the Opinion. It is one of the main reasons for the rejection - the Draft agreement does not respect and protect the specific characteristics and the autonomy of the EU legal order. These are legitimate concerns that the CJEU should raise, but what could be pointed out is the feeling of unwillingness to succeed in the accession. When looking at the different approaches of Advocate General Kokott and the CJEU, for example, Kokott shows a more optimistic view. Kokott expressed when arguing the different sides of the co-respondent mechanism in the following way:

> '…appear to me to be appropriate to declare the draft agreement, *in its current form*, incompatible with the Treaties. Rather, the Court of Justice should, […] declare that the draft agreement is compatible with the Treaties, provided that the modifications, additions, and clarifications to which I have alluded are made.'[115]

This shows there might be a solution to the issues, but the CJEU rejected the Draft without considering other options. The accession requires a great adaption of the Convention to ensure it respects the special characteristics so that the EU can accede, which shows the EU's significant influence on international legal regimes. The adoption of the Convention has been recognised and accepted by all parties in the negotiation of the Draft agreement, which includes both the EU Member States and the Parties of the ECHR, which confirms the importance of the accession.

As illustrated in the section concerning the protection against discrimination against same-sex marriages, there is a difference between the ECtHR and the CJEU. Both courts do offer protection, but they are different in nature and objectives. To create coherence, there must be a change in the mindset. Human rights standards should not be considered an instrument to achieve other goals, such as the free movement of persons in the EU; the priority must be protecting the human right. Protecting human rights should not be a hindrance to another legal doctrine like the primacy of EU-law or legal order of the EU, which one could argue that Opinion 2/13 suggests. Instead, the primacy of EU-law should be used as an instrument to achieve the values of the EU and ensure the respect of human rights. EU´s accession to the Convention should be seen as a symbol and a legal arrangement between the two European courts.

EU´s accession to the ECHR will increase the likelihood that the protection against discrimination of same-sex partners becomes an underlying value in the EU's institution and strengthen the protection of human rights in Europe. This is due to the accession as the EU will be under the scrutiny of the ECtHR and be bound by both the case-law of the CJEU as well as the ECtHR. The EU will become a 'state-like' party to the ECHR and therefore be on the same level as the other Contracting Parties, which are States. This could be said to change the hierarchy to a vertical since the EU will be under the scrutiny of the ECtHR. The ECtHR could be interpreted on a higher level than the CJEU since the CJEU "only" interpret the European treaties while the ECtHR is the external supervisor of the EU. Simultaneously, the EU and the CJEU have been given a higher position within the system of the Convention since the 'accession of the Union shall not affect the competencies of the Union or the powers of its institutions.[116] The EU will have the same duties as the other Contracting Parties while still having more rights and influence before the ECtHR. This

[115] See, View of Advocate General Kokott, (n 25), para. 279.

[116] See, Protocol 8 (n 81), Article 2; like what has been expressed in Article 6(2) TEU 'Such accession shall not affect the Union's competencies as defined in the Treaties'.

could be seen as a recognition of the EU´s special characteristics and showing that the relationship between the two courts will stay horizontal.

6 Conclusion

The legal obligation of the EU to accede to the ECHR still stands, but the CJEU´s Opinion left a significant setback on the future protection of human rights. As it has already been said, in the section on non-discrimination of same-sex marriages, EU accession to the Convention will ensure greater collaboration between the two courts, and the analyse demonstrate the need for coherence and external supervision of EU actions to secure the equal protection of human rights all through Europe. The President of the Court of Human Rights has also expressed concerns regarding the protection of human rights by saying:

> '…the principal victims will be those citizens whom this opinion (no. 2/13) deprives of the right to have acts of the European Union subjected to the same external scrutiny as regards respect for human rights as that which applies to each member State.'[117]

What will happen with the hierarchy order between the two courts in case of accession will most likely remain unanswered as the CJEU rejected the Draft agreement. Nonetheless, it is up to the EU to give the Convention the status in the hierarchy order that seems most appropriate to ensure its effectiveness. The hierarchy between the two courts will stay horizontal as the CJEU will not accept any draft that will grant the ECtHR jurisdictions currently exclusive to the CJEU, even if the jurisdiction of the ECtHR is recognised. Therefore, the hierarchy between the two courts will remain unchanged unless the CJEU changes its opinion. The fact that the special characteristics of the EU and the respect for the legal order of the EU in today's conditions have put a stop to the accession is concerning and that the protection of human rights is not prioritised. While new negotiations are on the table and a new attempt for accession will be made, the EU can still accede to the ECHR. As well as the legal obligation to do so, the question is, however: is the EU prepared to join the ECHR and become equal to the other Contracting Parties, or will there be grave internal tensions from the external supervision of the ECtHR?

[117] European Court of Human Rights, Annual Report (2014) p. 6.

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