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## **Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms: The Second Unsuccessful Attempt**

*The article provides an overview of the impediments of the European Union accession process to the European Convention for the Protection of Human Rights and Fundamental Freedoms and assesses the prospects of completion of this process. Accession of the EU to the European Convention is the substantive issue of the European political agenda. It is going on for about 45 years. The first attempt of accession of the EU to the European Convention failed. Significant political and legal steps were taken within the frameworks of the COE and the EU for provision of accession. Notwithstanding the fact that the political decision on accession is already made, the legal systems of the European Convention and the EU are harmonized, accession cannot be completed in legal manner yet. Failure of the second attempt of accession of the EU to the European Convention is due to the European Court of Justice.*

*Keywords: European Union, European Convention, draft accession agreement, European Court of Justice*

## *Introduction*

Political and scholarly discussions concerning the accession of the European Union (hereinafter – the EU) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the European Convention) have been going on for about 45 years. The first attempt of the accession of the EU to the European Convention failed. In 1996, the European Court of Justice decided that the basic Treaties of the European Union did not grant it with explicit and implicit internal competence in the area of human rights; therefore, the EU had no authority to enter into international agreements concerning its accession to the European Convention [20, paragraph 27] [33] [1]. According to the Court, accession to the Convention meant the entry of the EU into another international legal order, on the one hand, and the integration of its rights and fundamental freedoms into the Community Law, on the other hand, which necessarily required appropriate changes to the founding treaties of the EU [21, paragraphs 34–35].

Significant political and legal steps were taken within the frameworks of the Council of Europe and the EU for provision of accession. In 2004 the Additional Protocol No.14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted, which awarded the EU with the right of accession to the European Convention and its additional protocols [24, article 17]. In 2007, the EU member states signed the “Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community” agreement in Lisbon (Portugal) (hereinafter – the Lisbon Treaty), which entered into force on December 1, 2009. The Lisbon Treaty explicitly granted the EU the competence of accession to the European Convention [31, Eighth paragraph of article 1]. In addition, the EU’s primary law defined the accession conditions. Given the fact that for provision of accession the primary law systems of the European Convention and the European Union were adapted, the negotiations were held in the bilateral cooperation format of the Council of Europe and the EU concerning drafting

the legal document – the accession agreement, which ended on April 5, 2013. By the initiative of the European Commission, the draft agreement was sent to the

European Court of Justice in order to assess its compliance with the primary law of the EU. Scholars of the International Law assumed that the prolonged process of accession had reached its final stage [8] [3]; however, according to the Opinion 2/13 of the European Court of Justice, dated December 18, 2014, the second attempt of the EU concerning the accession to the European Convention was unsuccessful. According to the opinion of the Court, the draft agreement on the accession of the EU was announced incompatible with the founding treaties and the accession process was postponed indefinitely.

Immediately after the announcement of the initiative concerning the accession of the EU to the European Convention, this issue became particularly urgent in the literature of the international law. It has been the object of research of scholars over the decades [2] [25] [14] [26] [11] [15] [4] [9] [10] [28] [27]. Unfortunately, this issue is not discussed in the Georgian legal literature. The article hereof is the first attempt to discuss this topic.

The aim of the present article is to review the Opinion 2/13 of the European Court of Justice, dated December 18, 2014, as well as the draft agreement on the accession of the EU to the European Convention in a critical section and to assess the accession prospects taking the identified problematic issues into account.

The article hereof consists of three parts. The second part deals with the second unsuccessful attempt of accession, identifies the factors impeding the accession process, proposes criticism of the draft agreement on accession and the opinion of the European Court of Justice. The conclusion summarizes the issues raised in the article, discusses them in common context and provides their systemic presentation.

*Opinion 2/13 of the European Court of Justice – the Second Unsuccessful Accession Attempt*

According to the Opinion of the European Court of Justice, dated December 18, 2014, the draft agreement on accession was announced as incompatible with the founding treaties of the EU and the accession process was delayed once again. During the discussion of the draft agreement, the Court assessed whether the draft agreement had negative effects over the specific characteristics of the EU law and how the institutional and procedural mechanisms corresponded to the terms and conditions provided for by the founding treaties of the EU [20, paragraph 178].

The Court recognized that following the accession to the European Convention, EU institutions, including the European Court of Justice would be subject to the foreign control of the European Court of Human Rights (hereinafter - ECtHR), which would exercise jurisdiction according to the first article of the European Convention [20, paragraph 181]. In addition, the Court pointed out again that signing the international agreements by the EU, which establishes a special court for the purpose of interpretation and application of such an agreement, does not contradict EU Law in principle, if the founding treaties explicitly awards the EU with the competence of signing such agreements [20, paragraph 182]. It can be said, that accession of the EU to the European Convention is not contested by the European Court of Justice, as according to the founding treaties, the EU explicitly possesses such competence. Nevertheless, the EU Supreme Court expressed such comments in its opinion concerning the draft agreement, which excludes accession on the terms of the European Convention and the current system of the EU Law. The problematic issues illustrated in the opinion of the European Court of Justice refer to:

Absence of provisions regarding the coordination between article 53 of the European Convention and article 53 of the Charter of Fundamental Rights of the European Union in the draft agreement on accession;

Absence of a rule concerning the principle of so-called “mutual trust” among the EU member states in the draft agreement on accession;

Absence of a rule concerning the mechanism stipulated by the Additional Protocol No. 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the preliminary ruling procedure;

An instrument of participation of the European Court of Justice in the proceedings of the European Convention – prior involvement procedure;

Interaction of the co-defendant mechanism and autonomy of the legal order of the European Union;

Incompliance of the article 5 of the draft agreement on accession with the article 344 of the Treaty on the Functioning of the European Union;

Jurisdiction of the ECtHR in the area of common foreign and security policy.

Consideration of the comments of the European Court of Justice is especially important for assessing the prospects of accession of the EU to the European Convention. Accession of the EU to the European Convention shall not be possible without their consideration and adoption. Above impediments shall be discussed within the chapter hereof.

### *Coordination of the European Convention and the Charter of Fundamental Rights of the European Union - criticism of the draft agreement*

The first circumstance that led to the incompatibility of the draft agreement with the law is related to the absence of a provision regarding the

coordination between the article 53 of the European Convention and the article 53 of the Charter of Fundamental Rights of the European Union (hereinafter – the Charter) in the draft agreement. The Court begins to address this issue through the discussion of the immanent features of external control. According to it, the innate characteristic of external control is that the content of interpreted provisions of the European Convention is binding for EU institutions (including the European Court of Justice), on the one hand, and the ECtHR does not have the obligation to consider the performed interpretation of the rights and freedoms protected under the European Convention by the European Court of Justice into account, on the other hand [20, paragraph 185]. According to the Court, such a rule does not apply to the interpretation of the EU Law, including the Charter by the European Court of Justice. The Court considers that the ECtHR should not have the authority to determine the scope of applicability of the basic rights provided for by the EU Law, including the Charter [20, paragraph 186]; it is obliged to take the practice of the European Court of Justice into account in this direction [20, paragraph 186]. The EU Supreme Court declared in the *Melloni case*, that application of the national standard of the basic right shall not prejudice the use of the standard of this right on the level set by the Charter, on the one hand, and the primacy, unity and effectiveness of EU law [19, paragraph 60], on the other hand. According to the Court, authority granted under the article 53 of the European Convention to the EU Members States is limited for the provision of the standards set by the Charter and the EU Law [20, paragraph 189]. There is no common position in relation to coordination of the article 53 of the Charter and the article 53 of the European Convention in the literature of the international law. Some scholars believe that there is no necessity of coordination for maintaining the harmonious relations of the above provisions. In their view, the article 53 of the European Convention authorizes the Contracting Parties to establish the higher standards than those of the European Convention for the Protection of Human Rights and shall not preclude the obligation of the EU member states before the EU Law, in particular the Charter [6, p. 11]. The scholars believe, that need for

coordination of the Charter and the European Convention is “invented” by the European Court of Justice [6, p. 11]. *Krenn* considers approach of the European Court of Justice as appropriate and believes that absence of the provision concerning coordination shall be the threat for unity, efficiency and primacy of the EU Law [13, p. 166]. According to him, after accession, the European convention will acquire the status of the source of the EU Law in line with the article 216 of the Treaty on the Functioning of the EU, correspondingly the court of the EU member state will be entitled to apply the standard (national or international) higher than the that set forth in the Charter for the Protection of Human Rights on the basis of the article 53 of the European Convention (i.e. the source of the EU Law) and not to apply the European Court of Justice within the scope of the preliminary ruling procedure [13, p. 158]. *Krenn’s* position should be shared, as the international agreement of the EU has the power of direct effect and use [18]. The draft agreement must include a provision concerning coordination of article 53 of the European convention and tarticle 53 of the Charter, which will ensure the common standards of human rights within the frameworks of the EU. In other cases, on the basis of the article 53 of the European convention, the internal court will be authorized to carry out such interpretation of the national acts (e.g. the Constitution) per case, in order to create standards higher than the EU Law on Human Rights, which will have the negative impact on the unity of the EU legal order, as well as its primacy.

### *Principle of the duty of mutual trust VS practice of the ECtHR*

According to assessment of the European Court of Justice, the second impediment for the accession of the EU to the European Convention is the absence of a so-called “mutual trust” principle between the EU member states in the draft agreement. According to this principle, in the process of implementation of a legal act related to the area of justice, freedom and security, the EU member state shall:

assume that the regime of protection of the human rights in other EU member states are in line with the standards established by the EU Law;

Not request from other EU member states the establishment of the standards higher than the human rights standards in the EU;

except for in exceptional cases, not examine whether the existing human rights standards in such States are in compliance with those of the EU system [20, paragraph 191].

The position of the European Court of Justice directly contradicts to the principle developed by the ECtHR in the *M.S.S. case*, which Belgium became liable for violation of the article 3 of the Convention. In the case, Belgium transmitted an asylum-seeker to Greece, in accordance with the Dublin Regulations. In Greece, the asylum-seeker was placed in a pre-trial detention center and was not provided with adequate subsistence conditions. In addition, the Greek legislation did not envisage appeal against the decision on the placement of a person in a pre-trial detention center. The applicant complained that Belgium was aware of the gaps existing in Greek's asylum system, including the risk of detention of asylum-seekers, nevertheless, it took the decision on transmission. The ECtHR shared the applicant's arguments and stated that Belgium should have taken the inefficiency of the Greek asylum system into account and should not have assumed that the asylum-seeker would be treated in Greece in accordance with standards established by the European Convention [17, paragraph 353]. In this decision, the Court points out that the EU member states shall be obliged to evaluate the human rights standards available in other member states.

ECtHR is focused on the creation of an effective system of human rights and the European Court of Justice is constantly trying to get the supranational cooperation concerning any other issue, including human rights. There is no doubt that the presumption of protection of human rights in line with the European Convention is in contrary with the purpose of the Convention, the



principle of equality of the Contracting Parties and the practice of the ECtHR; however, the EU cannot join the European Convention if the draft agreement does not take into account the opinion of the European Court of Justice. Therefore, it is legitimate to ask the question - which is more important – the effectiveness of the European system of human rights or the accession of the EU to the European Convention?

*Additional Protocol No. 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - the threat of the replacement of the preliminary ruling procedure?*

The Additional Protocol No. 16 of the Convention was opened for signature on October 2, 2013, according to which the supreme court or tribunal of the Contracting Parties of the European Convention will be entitled to apply the ECtHR for submission of the opinion in relation to use and interpretation of the rights and freedoms set forth in the European Convention or its protocols during the proceedings [23, article 1]. According to the current situation, the Protocol is not in force. The European Court of Justice declared in its decision that there was a real risk of limiting the preliminary ruling procedure and requested the coordination of the Additional Protocol No. 16 and this procedure [20, paragraphs 198-199]. According to the Court, given the fact that after accession the Convention will be integrated in the EU legal system, the national Supreme Court will be entitled to use the mechanism established under the Additional Protocol No. 16 for the interpretation of the EU law provision and to refuse application to the European Court of Justice, which will negatively impact the autonomy and efficiency of preliminary ruling procedure [20, paragraph 196]. It should be noted that the preliminary ruling procedure is the cornerstone of the EU justice system [12, p. 258]. Through cooperation of the courts of the EU and the member states, this mechanism will promote uniform application and interpretation of EU Law [12, p. 259]. Absence of the provision of coordination between the Additional Protocol No.

16 of the European Convention and the preliminary ruling procedure may be considered a drawback of the draft agreement. Current wording of the draft agreement does not rule out the possibility that the national Supreme Court could apply to the ECtHR, on the one hand, and the European Court of Justice, on the other hand, for interpretation of the rights declared in the Convention or its additional protocol. In this case, there is the risk of different interpretation of the European Convention, which of course will not be positively reflected on the European System for the Protection of Human Rights. In order to resolve this legal problem, it is recommended to award the European Court of Justice with the authority of preliminary participation in the process stipulated by the Additional Protocol No. 16 of the Convention and to consider the question of the national courts prior to submission of the opinion by the ECtHR.

#### *The procedure for the prior involvement of the European Court of Justice*

The decision of the European Court of Justice concerning the prior involvement procedure identifies two problematic issues. The first comment refers to availability of interpretation of the practice of the EU courts by the ECtHR. As mentioned above, the court of the member state is entitled and in some cases, is even obliged to ask the question to the European Court of Justice within the scope of the preliminary ruling procedure in relation to interpretation of sources of primary and secondary law of the EU and validity of only secondary legal acts. However, the national court has the right not to apply the preliminary ruling procedure, if such issue has been decided by the European Court of Justice, or the interpretation of the relevant provision of the EU legal act is clear [12, p. 257]. This issue is relevant in the accession process, as the national courts may consider on the basis of the aforementioned during the proceedings, that there is no need for use of the preliminary ruling mechanism and to make a decision without applying to the EU court. If a person believes that his legal interests are not complied with on

the national level and the rights stipulated by the Convention were violated, he may appeal against the EU and its member states to the ECtHR. In practice, of course, in addition to an individual application, other relevant documents, including the judgments of internal courts will be sent to the ECtHR, containing the arguments about inexpediency of use of the preliminary ruling instrument. Given the fact that the draft agreement on accession and its explanatory note does not discuss such cases, the ECtHR turns out to be in dilemma. The ECtHR will send the case for consideration within the frameworks of the prior involvement procedure to the European Court of Justice or will take the justification of the national court concerning non-use of the preliminary ruling procedure into account and will discuss the case directly. According to the EU Supreme Court, awarding such authority to the ECtHR will be equivalent to the interpretation of the practice of the European Court of Justice, which explicitly contradicts to the basic treaties of the EU [20, paragraph 239]. *Krenn* agrees with the Court's opinion and believes that granting such authority to the ECtHR "is not the best solution" [13, p. 154]. According to the European Court of Justice, the draft agreement on accession must provide full information about similar cases to the appropriate EU institutions, which will judge whether the European Court of Justice has carried out interpretation of the disputed act. He believes that only after the completion of this procedure, taking the opinion of the appropriate EU authority into account, the ECtHR will be entitled to make the decision on the initiation or refusal on the initiation of the prior involvement procedure.

The position of the European Court of Justice should be shared, as the idea of introducing the prior involvement mechanism, in addition to the fact that it means respect of the subsidiary nature of the ECtHR, aims not to grant an exclusive opportunity of the interpretation of the EU legal act to the ECtHR. Therefore, it is logical that the ECtHR should not possess the right to interpret the practices of the Court of Justice of the EU.

The European Court of Justice considers it to be disadvantageous that in the draft agreement on accession, according to the explanatory note within the frameworks of the prior involvement procedure, it holds the competence of discussion of compliance of the EU secondary legal act with the European Convention and its additional protocol and not its interpretation [20, paragraph 242]. The Court considers that the current wording of the draft agreement limits its jurisdiction. In its opinion, if it fails to submit the final version of interpretation of the EU secondary legal act to the ECtHR and only declares compliance of the disputable act with the European Convention, the ECtHR will be entitled to interpret the disputable act of the EU in the case discussion process, which directly contradicts the principle that entitles the right of final interpretation of the EU Law only to the European Court of Justice [20, paragraph 246]. The opinion of the Court was criticized in the literature of international law. The position of those scholars should be shared, who believe that the Court possesses especially formal approaches to the draft agreement on accession [6, p. 12]. The comment of the European Court of Justice is unreasonable given to the fact that discussion of compliance of the EU legal act with the European Convention means interpretation of this act itself. It is impossible to imagine the case, when the Court does not carry out interpretation of the disputed provision and establishes its compliance or incompliance with the Convention without justification. It is obvious that the European Court of Justice considers legal truth as disputed for “protection” of its jurisdiction. However, in order to ensure legal certainty, in the process of preparation of the explanatory note of the draft agreement on accession, more distinct formation of the authorities granted to the European Court of Justice was available within the frameworks of the prior involvement procedure.

*Interaction of co-defendant mechanism and autonomy of the legal order of the European Union*

The European Court of Justice expressed its comments regarding the mechanism of the co-defendant. First of all, its dissatisfaction is related to the case when the EU or its member state applies to the ECtHR for awarding the status of co-defendant. According to the EU Supreme Court, despite the fact that in such situations the ECtHR will not assess the actual circumstances of the case and will review the justification and compliance of the request submitted by the EU or its member state with the appropriate criteria established for awarding the status of co-defendant to the contracting party of the European Convention, it will also be entitled to discuss the issue of distribution of the competences between the EU and its member state on the basis of the EU Law [20, paragraph 224]. According to the EU Supreme Court, discussion of this issue by the ECtHR shall mean interference in its exclusive competence [20, paragraph 225]. It is interesting that the European Court of Justice only reviews this problem and does not suggest possible solutions. *Lazowsky and Wessel* partially agree with the Court's position. According to their opinion, the protection of competence of the European Court of Justice is one of the core preconditions for provision of autonomy of the EU Law [16, p. 198]; however, they believe that in the process of fulfillment of the external control, absolute prohibition of interpretation of the EU Law for the ECtHR does not comply with the Strasburg System [16, p. 199]. Integration in the Convention system shall mean recognition of the fact that the court of the contracting party does not have the power to say the "final word" concerning interpretation of the internal legal act in relation to the European Convention [16, p. 199]. Accordingly, threatening efficiency of the Convention system at the expense of the provision the autonomy of the EU Law is wrong. In addition, the absolute limitation of the jurisdiction of the ECtHR for the protection of the competencies of the European Court of Justice is not the best solution.

According to the judgment of the EU Supreme Court, the second impediment for accession is the current wording of the clause 7, article 3 of the draft agreement. According to the Court, the above provision will not prejudice the liability of the EU and its member states on the basis of the article hereof, on which the EU member states carried out reservation in line with the article 57 of the European Convention [20, paragraph 227]. The Court's opinion is completely shareable. The clause 7, article 3 of the draft agreement completely contradicts to the article 2 of the Protocol No. 8 of the EU basic treaties, clearly stating that the accession agreement should not have an impact on the reservations of the member states in relation to the European Convention and its Protocols.

The third comment stated in relation to the co-defendant mechanism shall refer to the issue of imposing liability to the defendant and the co-defendant. According to the draft agreement, joint liability shall be imposed to the defendant and the co-defendant for violations of the Convention. In addition, the ECtHR is authorized to impose liability to either defendant or co-defendant only on the basis of the request of the defendant and the co-defendant and taking the opinion of the applicant into account. The European Court of Justice considers that in such cases the ECtHR can discuss the issue of distribution of competences between the EU and its member state. It believes that liability for violation of the European Convention may be imposed to the defendant or the co-defendant only on the basis of the relevant provisions of the EU Law, which, if needed, must subject the jurisdiction of the European Court of Justice [20, paragraph 234]. The EU Court expressly states, that granting such right to the ECtHR will be equivalent to replacement of the competence of the European Court of Justice [20, paragraph 234]. *Krenn* agrees with the EU Court's position. He believes that the EU member states will be interested in the approach of the ECtHR within the framework of the EU in relation to distribution of competences [13, pp. 152-153]. Opinions of the Court and *Krenn* are difficult to share. In cases if the EU or its member state assumes liability for violation of the Convention, in expressing its

readiness for compensation of damages, of course it is necessary to execute such agreement by the ECtHR and to finish the judicial proceeding.

*Disputes among the parties – the article 5 of the draft agreement vs. the article 344 of the Treaty on the Functioning of the European Union*

Article 5 of the draft agreement is not enough for the European Court of Justice for the provision of the principles set forth by the article 344 of the Treaty on the Functioning of the European Union. It believes that consideration of a dispute between the EU and its member states or between EU member states concerning application or interpretation of the Convention is the exclusive authority of the European Court of Justice [20, paragraph 204]. According to the Court, article 5 of the draft agreement reduces the scope of applicability of article 55 of the European Convention; however, it does not exclude the possibility of submission of the application by the European Union or its member state against other member state in the ECtHR [20, paragraph 207]. According to the Court's assessment, the existence of such risk does not comply with article 344 of the Treaty on the Functioning of the European Union [20, paragraph 214].

In the opinion of Mrs. Kokott, the Advocate General of the European Court of Justice, the draft agreement on accession should contain a provision, which will grant primacy to the EU system of justice with regard to the ECtHR [32, paragraph 115]. In this regard, the EU Supreme Court clearly stated that it is necessary to indicate in the draft agreement obviously that the ECtHR has no jurisdiction in the disputes between the EU and its member states or between the EU member states concerning *ratione materiae* use of the Convention in the EU Law [20, paragraph 213]. It can be said that the Court suggested its own version of the accession agreement to the Contracting Parties of the Convention.

Certain scholars do not consider the opinion of the European Court of Justice as appropriate; they believe that the accession agreement should not include issues related to the internal regulations of the EU [6, pp. 11-12]. It should be noted that the comment of the EU Supreme Court is justified. Article 5 of the draft agreement does not consider the court system as the mechanism for the consideration of disputes concerning application and interpretation of the European Convention. Accordingly, in the terms of current edition of article 33 of the Convention and the explanatory note of the draft agreement, the EU or its member states shall have the right to file an application with the ECtHR against another member state. Therefore, the neutral approach proposed by the authors in the draft agreement is not consistent with article 344 of the Treaty on the Functioning of the European Union.

*Area of common foreign and security policy – accession excluding provision*

The common foreign and security policy of the EU is a serious challenge to the accession process; moreover, its current situation excludes accession of the EU to the European Convention. So-called “Intergovernmental cooperation method” is applied in the area of common foreign and security policy, which means unanimous decision-making in the format of the Council of the EU and the existence of the limited jurisdiction of the European Court of Justice [12, p. 110]. In addition, the adoption of the EU legislative acts in this area is prohibited [29, First paragraph of the article 24]. According to EU primary law, the jurisdiction of the European Court of Justice over common foreign and security policy is limited. It only carries out the monitoring of compliance of the activities of the EU institutions with the competencies granted under the founding treaties of the EU [29, First paragraph of the article 24] and discusses the legality of restrictive measures applied to individuals and legal entities by the Council of the EU [30, Article 263]. The court does not have the competence for assessment of compliance of the legal acts adopted in the area of common foreign and security policy with basic treaties of the EU [30, Article



275]. Therefore, within the scope of the prior involvement procedure, the Court cannot consider the compliance of legal acts related to common foreign and security policy, actions and omissions with the European Convention. In this case, it will go beyond the scope of its jurisdiction and violate Protocol No. 8 of the basic treaties of the EU. Accordingly, the ECtHR will face a version of assessment of interpretation of the EU legal provision or action proposed by the national court. The European Court of Justice acknowledged the situation and declared that competence of assessment of legality of the EU legal acts, actions and omissions (including with respect to basic human rights) should not be exclusively awarded to the body, which is not the part of the EU institutional system [20, paragraph 256]. It supports the discussion of compliance of the EU legal acts, actions and omissions with the European Convention by the ECtHR in such conditions when the European court of justice does not possess such authority, will contradict to the requirements stipulated by Protocol No. 8 of the basic treaties [20, paragraph 257]. The legal literature discusses a solution to the problem related to common foreign and security policy as “mission impossible” [6, p. 14]. *Pierce* does not share the Court’s opinion. According to him, the European Court of Justice does not consider the principle of rule of the law and develops abstract concepts [22, p. 222]. It indicates that the basic treaties of the EU do not stipulate the issue of prohibition of certification of the legality of the EU legal acts, actions and omission by the international court [22, p. 221]. According to *Pierce*, under the decision of the European Court of Justice, the aim of accession of the EU to the European Convention has lost its importance due to the fact that it will have a negative impact on the effectiveness of the European Convention system [22, p. 222].

The European Court of Justice perfectly used the procedure of discussion of the draft agreement in accession in order to expand its competencies. For completion of the accession process it is necessary either to review the basic treaties of the EU and grant overall competence to the European Court of Justice in the area of common foreign and security policy, or to amend article

57 of the Convention, on the basis of which the EU will exercise a general reservation. It is obvious, that the member states of the Council of Europe will not accept amendments to the Convention. In this case, unlike the other contracting parties, the EU will prevail. In addition, the efficiency of the European System of Human Rights will be seriously threatened, as the ECtHR and the European Court of Justice will not be able to carry out control over compliance of the actions of the EU in the area of common foreign and security policy with the human rights. The only solution for the provision of accession of the EU to the European Convention is to reflect the position of the European Court of Justice in the basic treaties, which is a difficult task from a political as well as legal standpoint. It will be difficult for the EU member states to achieve a consensus on granting the supranational status of the area to common foreign and security policy, despite the fact that accession to the European Convention is the obligation of the EU.

According to the decision of the European Court of Justice, the accession process “went into deadlock” and its completion is a distant prospect. The European Court of Justice and the ECtHR have an informal relationship, which is primarily aimed not at the formation and uniform development of the common European System of Human Rights, but at a “harmonious” coexistence of the EU legal system and the European Convention.

### *Conclusion*

This article provides an overview of the impediments of the EU accession process to the European Convention and assesses the prospects of completion of this process. Accession of the EU to the European Convention is the substantive issue on the European political agenda. Notwithstanding the fact that the political decision on accession has already been made, the legal systems of the European Convention and the EU are harmonized, accession cannot be completed in legal manner yet. The failure of the second attempt of

accession of the EU to the European Convention is due to the EU Supreme Court. It is clear that the European Court of Justice is trying to impede this process. It is important to note that several comments of the European Court of Justice concerning the draft agreement on accession – the need for coordination of article 53 of the European Convention and article 53 of the Charter of Fundamental Rights, limitations on the scope of the Additional Protocol No. 16 of the Convention, limitations on the jurisdiction of the ECtHR concerning the disputes between the parties - should be shared. Their solution is not particularly difficult. The authors of the draft agreement on accession had an opportunity to predict such issues and to arrange them in line with the EU primary law. However, comments on the dissemination of the jurisdiction of the ECtHR over the common foreign and security policy, the prevailance of the “mutual trust” principle between the EU member states over the convention system, the prior involvement system and the imposing of individual liability by the ECtHR to the co-defendant and the defendant, is unjustified. Certain comments can be easily provided, however at the expense of the reduction of the effectiveness of the European Convention, the issue of the declaration of the “mutual trust” principle in the draft agreement will be disputable between the member states of the Council of Europe and the European Commission.

The limitation of the jurisdiction of the ECtHR in the area of common foreign and security policy is the unfulfilled task. Making general reservations is prohibited by the Convention. At the same time, amending to the European Convention and granting the right to make such reservations to the EU is contrary to the principle of the equality of the Contracting Parties of the Convention. Consequently, there is only one legal way to ensure accession – amendment to the founding treaties of the European Union and overall dissemination of the competencies of the European Court of Justice in the area of common foreign and security policy. This area is a particularly important part of the sovereignty of the EU member states; it is difficult to imagine that the member states will give up their power in this regard. In addition, the

amendments to the basic treaties of the EU are related to their prolonged terms. Therefore, in the terms of the current edition of the primary law of the EU and the European Convention, there is no prospect for the accession of the EU to the European Convention.

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