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The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European Union level of protection

Giovanni Zampetti

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The recent challenges for the European system of fundamental rights: Protocol No. 16 to the ECHR and its role facing constitutional and European Union level of protection

Giovanni Zampetti*

Abstract

This paper focuses on the problematic consequences related to the introduction of an advisory opinions procedure to the European Court of Human Rights as outlined by Protocol No. 16 to the European Convention on Human Rights. In particular, moving from the characteristics and the rationale underlying this new procedural mechanism of judicial protection, its possible interferences with other judicial instruments of rights protection involving national judges at the supranational (EU) and national level are examined, namely those with the reference for a preliminary ruling to the Court of Justice of the European Union, and the constitutional review of legislation (the incidental control of constitutionality in the Italian system of Constitutional Justice is taken into account). In this framework, examining the critical issues potentially arising from this innovation in view of the current balance concerning the three systems considered (national, supranational and regional international), the analysis seeks to answer the question of whether the latter may increase or, conversely, decrease an "overall" effectiveness of protection.

Keywords:

Protocol No. 16; advisory opinions procedure; reference for a preliminary ruling; question of constitutionality; European system of fundamental rights; overall effectiveness of protection.

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1. Introduction: preliminary remarks

Protocol No. 16 to the European Convention on Human Rights (ECHR) was approved by the Committee of Ministers of the Council of Europe on 10 July 2013, and has been open for signature by the High Contracting Parties since 2 October 2013. It is an optional Protocol, producing effects solely with respect to those Parties that will have proceeded to its ratification and after ten ratifications are completed. To date, the tenth ratification recently took place, by France on 12 April 2018, and according to its article 8 the Protocol will enter into force for the states concerned on 1 August 2018[1].

The Protocol establishes a mechanism enabling the highest national jurisdictions of the Member States to voluntarily request advisory opinions on the interpretation of the Convention from the European Court of Human Rights (ECtHR). This is extremely innovative in the context of the Conventional system, consisting of introducing a new form of institutionalized judicial dialogue between national judges and the ECtHR. In this way, the attribution of a very specific competence to the Court of Strasbourg – one able to alter its jurisdiction – could in the future yield the inevitable and additional effect of determining an evolution of its role as well.

[1] See article 8: "*This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7"*. On the basis of the present state of ratifications, available on the official site of Council of Europe at *http://conventions.coe.int*, among the 47 Member States of the Convention, Protocol no. 16 has thus far been ratified by Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine. Nine other Contracting Parties have signed but have not ratified the Protocol (Andorra, Greece, Italy, Netherlands, Norway, Republic of Moldova, Romania, Slovak Republic, Turkey). Consequently, only five Member States of the Convention that are also UE member States have ratified the Protocol, namely Estonia, Finland, France, Lithuania and Slovenia (five others have just signed the Protocol, and are Greece, Italy, Netherlands, Romania, Slovak Republic).

Since its approval, the main features concerning the Protocol and its content have already been fully examined[2]. In particular, the undefined theoretical placement of the mechanism and, at the same time, the range of potential changes that it might be able to determine (and that its practical working may cause even beyond its formal structure) must be taken into careful consideration. In this regard, only an initial level of analysis concerns the doubt as to whether the potential "torsion," highlighted here, in the Court's role may improve the effectiveness of human rights' protection in the context of the ECHR itself. In fact, the inquiry cannot be limited to this issue, since the innovation and its scope - even if depending on the future practice and, before that, on the outcomes of the ratification process - will generate interferences with the other instruments at the disposal of the national judge in the domain of protecting fundamental and constitutional rights: the reference for a preliminary ruling to the Court of Justice of the European Union (CJEU) under article 267 TFEU in the EU legal order, and the question of constitutionality before the Constitutional Court in legal orders equipped with an incidental method of constitutional review. It is thus very important to point out and critically examine these interferences arising from the operative adoption of the advisory opinions procedure, concerning mechanisms that are all characterized by the direct link between the national judge and a Court entrusted to issue an answer to a question potentially emerging in the same pending case when, at the crossing of three different levels of protection (national, EU law, and international concerning the ECHR), the judicial protection of what appears to be a "similar right" is at stake.

[2] There is a large body of literature on Protocol no. 16 and on the characteristics of the advisory opinions procedure. See, *inter alia*, E. CRIVELLI, *Il protocollo n. 16 alla Cedu: la tutela dei diritti nella prospettiva del nuovo rinvio interpretativo alla Corte di Strasburgo*, in *Studi in onore di Maurizio Pedrazza Gorlero*, Napoli, 2014, 145 ff.; K. DZEHTSIAROU-N. O'MEARA, *Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?*, in *Legal Studies*, 2014, 444 ff.; L.A., SICILIANOS, *L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – À propos du Protocole n°16 à la Convention européenne des droits de l'homme*, in *Rev. trim. dr. h.*, 2014, 9 ff.; N. POSENATO, *Il Protocollo n. 16 alla CEDU e il rafforzamento della giurisprudenza sui diritti umani in Europa,* in *Dir. pubbl. comp. eur.*, 2014, 1421 ff; J. GERARDS, *Advisory Opinions, Preliminary Ruling and the New Protocol No. 16 to the European Convention of Human Rights. A Comparative and Critical Appraisal*, in *MJECL*, 2014, 630 ff.; C. GIANNOPOULOS, *Considerations on Protocol N°16: Can the New Advisory Competence of the European Court of Human Rights Breathe New Life into the European Convention on Human Rights?*, in *German Law J*, 2015, 337 ff.; W. JÓŹWICKI, *Protocol 16 to the ECHR. A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?*, in E. Kużelewska, D. Kloza, I. Kraśnicka, F. Strzyczkowski (eds.), *European Judicial Systems as a Challenge for Democracy*, Antwerp, 2015, 183 ff.; E. LAMARQUE (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo,* Torino, 2015; A. PAPROCKA-M. ZIÓŁKOWSKI, *Advisory opinions under Protocol No. 16 to the European Convention on Human Rights*, in *Eur. Const. Law Rev.*, 2015, 274 ff.; A. DI STASI, *Introduzione alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2016, 77 ff.; I. RIVERA, *Il Protocollo n. 16 alla CEDU e la richiesta di parere consultivo, ovvero una forma di "rinvio convenzionale" alla Corte di Strasburgo: alcune considerazioni a tre anni dall'adozione,* in *Studi int. eur.*, 2016, 455 ff.

In this perspective then, in spite of the general favour found in the doctrine for the new form of dialogue between the national judge and the ECtHR as a result of the complex scenario that will be described, the question that should be raised is whether the proliferation of judicial instruments and seats of protection, concerning at least three different levels, is able to increase or decrease an "overall" effectiveness of protection and to guarantee a satisfying balance between the various systems and legal orders involved and their respective positions.
Following these coordinates, the structure of the paper will be as follows. First, the content of Protocol No. 16 to the ECHR will be analyzed, highlighting the unclear rationale of the new mechanism in light of the implications it may have for the ECtHR's role. Then, the analysis will take account of the first of the aforementioned interferences caused by the advisory opinions procedure: the one with article 267 TFEU. In this context, the starting point will be Opinion 2/13 of the CJEU in its part directly relating to Protocol No. 16. Further, the second interference – between the advisory opinions procedure and the constitutional review of legislation – will be examined, holding as paradigmatic the model of the question of constitutionality at the core of the system of Constitutional justice in the Italian legal order. In the final part, some final remarks will be made, critically evaluating the impact of the innovation on the ECHR system and, above all, on the existing balance concerning the interaction of the three different levels considered.
That said, a brief explanation of the origin of the new procedure lately codified in Protocol No. 16 and of its placement in the ECHR system seems appropriate at the outset.

2. Inside the European system of fundamental rights protection. Protocol No. 16 and the new advisory opinions procedure: origin, aims and problematic features.

The conception of the procedure defined by Protocol No. 16 comes from the practical aim, highlighted by its drafters, of reducing the problem of the excessive workload of the Strasbourg Court[3]. At first glance, then, the Protocol should apparently be inserted into those mechanisms outlined in recent years as part of the wider reform process involving the ECtHR

[3]See the Annual Report 2016 of the Court - https://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf. In the Foreword by President Guido Raimondi it is stated that "at the end of 2016 the number of cases pending before the Court was in the region of 80,000. This is a far cry from the 160,000 cases that were pending in 2011 …", but "It should be pointed out that the number of applications allocated increased by more than 30% in 2016. This was the result of the situation in various countries, relating in particular to systemic problems with regard to conditions of detention."

since the establishment of the individual application procedure, currently in operation, in 1998[4].

This process has been in place since at least since 2005, and in this framework two previous Protocols have been adopted with the aim of modifying the procedure at the core of the ECtHR's jurisdiction: Protocol No. 14, in force since 1 June 2010[5], and Protocol No. 15 – entering into force as soon as all the States Parties to the Convention have signed and ratified it – whose art. 4 will reduce from six to four months the time limit within which an application may be made to the ECtHR after the date of a final domestic decision as indicated in article 35 of the ECHR[6].

At any rate, unlike these two last initiatives, for the first time in the recent past Protocol No. 16 proposes an instrument aiming at modifying the Court's own jurisdiction, seeking to introduce a new form of advisory competence in this regard[7].

In order to better understand the aim pursued[8], it has to be considered that the concept of providing an advisory opinions procedure related to the idea of reducing the workload of the Court dates back, in turn, to 2006 when, concerning "*the issue of the long-term effectiveness of the ECHR control mechanism*," the Group of Wise Persons tasked with reporting to the Committee of Ministers observed that "*it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue*

[4] As is well known, the ECtHR is tasked with deciding on applications by individuals when the latter are unsuccessful before national courts: see article 34 ECHR, according to which every individual may claim to be a victim of violation of the Convention lodging an application to the Court, and article 35, relating to the principle of subsidiarity in between the admissibility criteria, providing that the Court may only deal with the matter after all domestic remedies - that according to the jurisprudence of Court must be "effective" - have been exhausted.

[5] In order to increase the efficiency and the rapidity of the procedure established by article 34 of the ECHR, Protocol no. 14 has in particular (i) provided a unique judge deciding applications manifestly inadmissible; (ii) extended the competences attributed to committees of three judges; (iii) established a new criterion of inadmissibility concerning the necessity of the recurrence of a «significant disadvantage».

[6] It bears pointing out that article 1 of Protocol no. 15 will insert a new recital at the end of the Preamble to the Convention, making explicit reference for the first time to the principle of subsidiarity and to the margin of appreciation of the States as guaranteed by the Strasbourg Court: "*the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and … in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention*". On Protocol no. 15 amending the Convention see, *inter alia*, G. MALINVERNI, *Le Protocole n°15 à la Convention européenne des droits de l'homme*, in *Rev. trim. dr. h.*, 2015, 51 ff.

[7] Formally the Preamble of Protocol no. 16 presents the procedure as an "*extension of the Court's competence to give advisory opinions*." According to article 46, paragraph 3, of the Convention the Committee of Ministers, while supervising on the execution of a final judgment, may ask the Grand Chamber of the Court to express itself on a problem of interpretation of a judgment: then, a significant substantial difference occurs in this case with the advisory opinions procedure drawn up by Protocol 16, since the matter of interpretation recalled in art. 46 cannot concern the content or scope of the rights enshrined in the Convention.

[8] For a description of the process leading to the adoption of the new advisory opinions procedure see Explanatory Report to Protocol no. 16, available at https://www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf

between courts and enhance the Court's "constitutional" role. In this regard requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding"[9].

Then, the final Declaration of the Conference of Izmir on the future of the Court held in April 2011 invited the Committee of Ministers to consider whether to introduce a procedure allowing the highest national jurisdictions to ask the ECtHR for advisory opinions regarding the interpretation of the provisions of the Convention and the clarification of the Court's jurisprudence, and in this way serving as guidelines for preventing further violations[10].

Subsequently, the Conference of Brighton on the future of the Court held in April 2012 discussed a complete package of reforms including an agreement in principle to the drafting of Protocol No. 16 to the Convention, stating with its final declaration that the interaction between the ECtHR and national authorities could have been consolidated by the introduction into the ECHR system of another power of the Court: the one to render, upon specific request in the framework of a pending case, advisory opinions on the interpretation of the Convention[11].

Finally, the Steering Committee of COE made a draft Protocol which was adopted in October 2013[12].

What appears, then, is the idea that the creation of a new platform for judicial dialogue, facilitating the application of the Convention and the Court's case law by national courts, could help resolve, *ex ante* and on a domestic level, a number of questions on the interpretation of the Convention's provisions, while at the same time having a beneficial effect on the resources of the Strasbourg Court.

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[9] See the Report to the Committee of Ministers of the Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005), as recalled by paragraph 1 of the Explanatory Report.

[10] See the Declaration of Izmir by the High Level Conference on the Future of the European Court of Human Rights - https://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf. Specifically on the point of Advisory opinions, it is stated in the Declaration that the Conference, "*Bearing in mind the need for adequate national measures to contribute actively to diminishing the number of applications, invites the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations*."

[11] According to the Brighton Declaration on the Future of the Court agreed on 20 April 2012, "*the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties*."

[12] See the Draft of the Steering Committee at https://rm.coe.int/168045fdc5%20CDDH (CDDH Final Report on Measures Requiring Amendment of the European Convention on Human Rights).

But besides this practical intent, as already pointed out a substantive aim is also pursued with the adoption of the Protocol: that of fostering the interaction between national judges and the Court, and effectively implementing the Convention's provisions in the domestic forum under the guidance of the ECtHR itself – and all this allegedly in accordance with the principle of subsidiarity[13].

The main features of the procedure outlined by Protocol No. 16 thus have to be taken into account, keeping in mind these two intertwined aims – one practical, and the other substantive.

First of all, only the highest courts and tribunals of the Contracting Parties, as indicated by the latter, would be authorized to make references to the ECtHR[14], and their requests, arising in the context of a pending case and regarding "*questions of principle related to the interpretation or application of the rights and freedoms of the rights and freedoms defined in the Convention or the Protocols thereto*," would be optional[15]. Moreover, a Court panel may accept or refuse the request in light of its object; in this way, ECtHR case law progressively defines the scope of the provision of art. 1[16], and, above all, "*advisory opinions shall not be binding*"[17].

Another significant feature of the mechanism, as explained in the Explanatory Report to the Protocol, is the fact that the delivery of an advisory opinion related to a pending case "*would not prevent a party to that same case subsequently exercising their right of individual application under Article 34 of the Convention*," with the further specification that when the opinion has effectively been followed by the national judge, "*it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be*

[13] See the Preamble of Protocol no. 16: "*Considering that the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity*."

[14] According to the Explanatory Report, "*Limiting the choice to the 'highest' courts or tribunals is consistent with the idea of exhaustion of domestic remedies, although a 'highest' court need not be one to which recourse must have been made in order to satisfy the requirement of exhaustion of domestic remedies under Article 35, paragraph 1 of the Convention. It should avoid a proliferation of requests and would reflect the appropriate level at which the dialogue should take place*." Moreover, see article 10 of the Protocol stating that "*Each HCP to the Convention shall, at time of signature or when depositing its instrument of ratification, acceptance or approval, by means of a declaration addressed to the Secretary General of the Council of Europe, indicate the courts or tribunals that it designates for the purposes of Article 1, paragraph 1, of this Protocol. This declaration may be modified at any later date and in the same manner*."

[15] Article 1, paragraph 1, of the Protocol. See also paragraphs 2 and 3 of the same article: "*The requesting court or tribunal may seek a advisory opinion only in the context of a case pending before it. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case*."

[16] Article 2: "*A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion, having regard to Article 1. The panel shall give reasons for any refusal to accept the request. If the panel accepts the request, the Grand Chamber shall deliver the advisory opinion*."

[17] See Article 5.

declared inadmissible or struck out." Moreover, the Explanatory Report also specifies that "*Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions*"[18].

It should be noted at this point that the general model inspiring the draft of Protocol No. 16 seems to have been the preliminary ruling procedure to the European Court of Justice under art. 267 TFEU. In this regard, similarities but also essential differences between the two mechanisms have been already fully pointed out[19]. In particular, the fundamental difference lies in the rationale itself, as the procedure outlined in the TFEU is inserted in a legal order and conceived for its own uniform reinforcement, while in the same way shaping its internal system of fundamental rights protection. It is because of the preliminary ruling procedure, involving the national judge acting as a judge of the EU in an integrated judiciary, that the CJEU has so far played its role of guaranteeing a uniform interpretation, and then application, of EU law in all the member states. In other words, the CJEU itself has the monopoly on the interpretation of EU law, and this is revealed by the obligation for the highest courts to refer under the 3rd par. of art. 267 TFEU, and by the *erga omnes* effects of the decisions of the Court[20]. This rationale, related to the nature of the EU legal order and reflected in the

[18] See the Explanatory Report on Article 5.

[19] A comparison between the two instruments in J. GERARDS, *Advisory Opinions, Preliminary Ruling and the New Protocol No. 16 to the European Convention of Human Rights. A Comparative and Critical Appraisal*, [see *above* ft 2], 640 ff. See also P. GRAGL, *(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No.16*, in *Eur. law rev.*, 2013, 229 ff.

[20] See Article 267, paragraph 3, TFEU: "*Where any such question* [the one concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions] *is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court*." In this sense, as regards the relevance of the procedure under Article 267 TFEU, T. VON DANWITZ, *Le dialogue de juge à juge. Considérations sur le devoirs réciproques des juges dans le cadre de la cooperation juridicitionnelle instaurée par l'article 267 du T.F.U.E.*, in *La Cour de justice de l'Unione européenne sous la présidence de Vassilios Skouris (2003-2015). Liber amicorum Vassilios Skouris*, Bruxelles, 2015, 713 ff., 725 may affirm that the cooperative system established by the preliminary reference procedure under article 267 TFEU is a "prevue manifeste de l'integration des orders juridiques européens et démontre qu'ils se développent ensemble au sein d'une union des juridictions." See also E. DUBOUT, *Une question de confiance: nature juridique de l'Union européenne et adhésion à la Convention européenne des droits de l'homme,* in *Cahiers dr. eur.*, 2015, 73 ff., 83 who underlines how the preliminary reference to the CJEU "rend possible l'imbrication des orders juridiques et le dédoublement fonctionnel des juges internes." On the obligation to refer, stating that "*when there is no judicial remedy under national law against the decision of a court or tribunal of a Member State, that court or tribunal is, in principle, obliged to bring the matter before the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of EU law is raised before it*," see, for instance, Judgment of 20 December 2017, *Global Starnet Ltd*, C-322/16, paragraph 24, that recalls judgment of 9 September 2015, *Ferreira da Silva e Brito and Others*, C-160/14, also referring to the settled case-law of the Court as regards the extent of the same

structure of the procedure that links the national judge and the CJEU, is then the crucial element that has formally and conversely prevented the procedure outlined in Protocol No. 16 from being obligatory for last-instance jurisdictions with general and binding effects of the opinions[21]. In fact, according to the current role of the Court of Strasbourg and its jurisdictions, the interpretative elements contained in its judgments – delivered on a case-by - case basis and concerning the various Member States of the ECHR – are not meant or able to determine a uniform interpretation and application of the Convention, aiming to guarantee a minimum standard of protection instead[22].

If this is true, despite the formal features of the procedure just described, it seems nevertheless relevant to notice that this new form of dialogue, apparently "soft," should be critically analyzed because of the changing role of the Court that might potentially result in light of its objectives.

Some elements, as anticipated, would in fact press towards a "torsion" in the Court's role enabling it to secure the system's uniformity. This might be the result of the fact that (i) even if related to a specific case, the Court would deal with questions of principle, potentially concerning aspects of vital importance (and in this regard it can be foreseen that judges might be called upon when dealing with issues concerning, in principle, the compatibility of national laws with the ECHR); (ii) the Court itself will and should consider the opinions delivered as valid case-law which it would follow when possibly deciding on subsequent individual applications, in this way encouraging domestic courts to follow the opinions and discouraging

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obligation in specifying that the judge is bound to it "*unless it has established that the question raised is irrelevant or that the provision of EU law concerned has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt*" (paragraph 38).

[21] Again, comparing the procedure at hand with the one under Article 267 TFEU, see P. GRAGL, *(Judicial) Love is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Draft Protocol No.16* [see above ft 19], 233-234: "the compulsory function of art. 267(3) TFEU for Member States courts of last resort […] is definitely one of the most important elements with regard to uniform interpretation and application of Union law, which helped to develop the European Union's integrated legal system. It is thus evident that the introduction of such an obligatory procedure into the convention system would stand in stark contrast to the optional character of the advisory opinion procedure in particular and the Convention's principle of subsidiarity in general."

[22] See Article 22 of the ECHR itself: "*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*." After all, the above-mentioned Report of the Group of Wise Persons to the Committee of Ministers had already stated that " *... the introduction of a preliminary ruling mechanism on the model of that existing in the European Union was discussed. However, the Group reached the conclusion that the EU system is unsuitable for transposition to the Council of Europe*" (paragraph 80).

at the same time applicants from lodging applications once fully implemented by national judges[23].

And in this context, the unclear logic characterizing the structure of the mechanism seems, rather, confirmed by the reference in the Preamble to the Protocol to the principle of subsidiarity in view of the asserted reinforcement of the implementation of the Convention. Indeed, concerning the domestic level and the crucial role of national courts for the application of the Convention, the matter seems to be inverted once they would be guided by the ECtHR in their activity, without being able to continue to develop their own position on Convention issues but simply, and progressively, importing the interpretation coming directly from Strasbourg[24].

Only the real working of the procedure could answer with certainty the doubts expressed here, but the ambiguities shaping the innovation already seem identifiable[25]. Furthermore, at present, there is still uncertainty as to the utility of the instrument for reducing the workload (also in light of the possibility of still lodging an individual application after the opinion, once the pending case has been concluded), and as to whether it would have positive effects in the

[23] According, for example, to L.A. SICILIANOS, *L'élargissement de la compétence consultative de la Cour européenne des droits de l'homme – À propos du Protocole n°16 à la Convention européenne des droits de l'homme*, in *Rev. trim. dr. h.*, 2014, 9 ff., 29, despite the non-binding character of the advisory opinions, "Ils auront néanmoin des effets juridiques indéniables non seulement au sein de la Cour, mais aussi au niveau national et international, en favorisant, à terme, l'aspect *erga omnes* de l'interpretation de la Convention."

[24] G. LÜBBE-WOLFF, *How Can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?'*, in *HRLJ*, 2012, 11 ff., 13-14, according to whom, among other things, the mechanism of the Advisory opinions would allow national judges to "make the imperative of human rights a matter of *import* rather than a matter of domestic production and genuine domestic belief». In this sense, the Author doubts «that the instrument would be conducive to better integration into and assimilation of the Convention system. To advertise it as reinforcing the principle of subsidiarity seems to me to turn the matter upside down. I would rather see it as opposed to the idea of subsidiarity in its procedural as well in its substantive sense."

[25] For a summary of the critical and negative aspects potentially related to the new procedure see the Final Report cited above at ft 12, in particular paragraphs 58-59: "*The following general arguments have been advanced against the proposal to extend the Court's jurisdiction to give advisory opinions: a. The purpose of the proposal is unclear and may not be suitable to the current state of the Convention system, which is in several ways distinct from other judicial systems that allow for the possibility of requesting advisory opinions. b. It could increase, rather than decrease, the Court's case-load by creating a new group of cases that would otherwise not be presented. c. The Court is already over-loaded and could have difficulty in absorbing this new competence satisfactorily. d. The Court is already able to deal with many cases revealing potential systemic or structural problems and regularly does so. e. Implementing the proposal could also lead to additional work for national courts. f. It would introduce a delay into national proceedings whilst the national court awaited the Court's advisory opinion. This would be inevitable and would be taken into account by the national court when considering whether to make a request. g. The authority of the Court could be put in question if the national court did not follow the advisory opinion, if non-binding (see further para. 18 below). h. Implementation of a new system may create a risk of conflict of competence between national constitutional courts and the European Court of Human Rights, depending on the characteristics of the model chosen"* (on this last point h, see *infra*, par 4).

long term, especially as concerns avoiding the accumulation of similar applications and in this way further helping prevent systemic violations of the ECHR from taking place[26].

In any event, the attempt to foster a preventive action by the ECtHR, with the aim of pursuing a more potential uniformity in the interpretation of the Convention, must be adequately analyzed, given the fact that the insertion of the newcomer in the overall scenario in which the national judge operates may clearly interfere with the other mechanisms of judicial cooperation already in use at the different levels of protection.

A wider context, then, must now be taken into account, starting from the potential interference of the advisory opinions procedure to the ECHR with the preliminary reference procedure to the CJEU under art. 267 TFEU, to whose model - as already shown – the former generally refers.

3. Advisory opinions procedure and preliminary ruling procedure under article 267 TFEU: problematic elements in light of Opinion 2/13 of the CJEU

This first possible interference might occur when, in the context of a pending case, a higher court of a Member State of the EU finds itself dealing with a matter of EU law or national law implementing EU law potentially violating some provisions of the ECHR corresponding, in substance, to those of the Charter of Fundamental Rights of the EU (CFREU). In this case, the judge may refer alternatively to the Luxembourg Court, being subject to the obligation to decide on matters concerning the interpretation of EU law under par. 3 of art. 267 TFEU, or to the Strasbourg Court according to the new procedure, the content of which has been ratified by the State concerned[27].

This issue was already examined by Opinion 2/13 given by the CJEU on 18 December 2014, which, as is known, deemed the draft agreement on the accession of the EU to the ECHR not compatible with art. 6(2) TEU or with Protocol no. 8 EU, thus precluding the introduction of the ECtHR's external scrutiny of acts of the EU.

[26] It is well known, however, that in the ECHR system and in the framework of the individual applications procedure, an instrument enabling the Court of Strasbourg to deal with cases revealing potential systemic or structural problems through the indication of the remedies that the State should adopt to solve the violation or to avert that the violation might continue to be repeated in the future already exists, namely the Pilot Judgment procedure: see, firstly, the case of the ECtHR, *Broniowski v. Poland*, no. 31443/96, 22 June 2004, and then, in 2011, its codification in Rule 61 of the Rules of the Court.

[27] As already mentioned, this is thus far the case of Estonia, Finland, France, Lithuania, Slovenia.

As it is impossible in this setting to take account of the other multiple reasons upon which that Opinion was founded[28], it must first of all be pointed out, in the specific matter, that the Draft agreement of 5 April 2013, receiving a negative judgment by the CJEU, made no reference to Protocol No. 16 or to issues related to it[29]: it is in fact evident that the Union could not accede to a Protocol that was not yet adopted at the time[30]. Nevertheless, despite awareness of this circumstance, both the Opinion and the View of Advocate General Kokott delivered on 12 June 2014 drew attention to Protocol No. 16 that had intervened in the meantime.

In particular, it is stated in the Opinion, regarding the potential situation after the accession, that "*since the ECHR would form an integral part of EU law, the mechanism established by that protocol could — notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR — affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU*," adding that "*it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties*"[31].

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[28] For a complete analysis of controversial Opinion 2/13, fully negative despite the obligation for the EU to adhere to the ECHR under art. 6 TEU, see for all B. DE WITTE, Š. IMAMOVIĆ, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, in *Eur. law rev.*, 2015, 683 ff. It is well known that Opinion n. 2/94 of 28 March 1996, delivered by the CJEU, had stated that, according to Community law then in force, the Community was not competent to adhere to the Convention. In order to override this conclusion, art. 6(2) TEU, as amended by the Treaty of Lisbon entering into force on 1 December 2009, has provided a specific legal basis for the accession: "*the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*." To this extent, additional conditions for the accession and the introduction of the external scrutiny of EU action by the Strasbourg Court have been established by Protocol no. 8 to the Treaty of Lisbon.

[29] See the Final report to the CDDH at https://www.echr.coe.int/Documents/UE_Report_CDDH_ENG.pdf.

[30] Again, B. DE WITTE, Š. IMAMOVIĆ, *Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court*, [see *above* ft 28], 696 critically inserting in their analysis the issue about Protocol no. 16 among the "Problems unrelated to accession." Also see, for example.,C. ZANGHÌ, *La mancata adesione dell'Unione europea alla CEDU nel parere negativo della Corte di giustizia UE,* in *Studi int. eur.*, 2015, 33 ff., 66-67, stating in this regard that the autonomy of the EU legal order could not be threatened by the Draft agreement but by Protocol no. 16 itself and the choice of the national jurisdiction involved.

[31] See paragraphs 197-198 of the Opinion. It is sufficient to recall that the Agreement (article 3, paragraph 6) had outlined the procedure of the "*Prior involvement*" of the CJEU in cases in which the EU would have been a "*co-respondent*" (a mechanism, in turn, meant to allow the EU to take part in proceedings – individual applications - instituted against member States when a violation of the ECHR would have been complained of when implementing EU law and, conversely, to allow the EU member States to take part in those ones instituted against the EU), so as to ensure, with no binding effect to the ECtHR, that the CJEU could have the opportunity to assess the compatibility of EU law with the rights at issue defined in the Convention in case it had not

On this basis, the Court then inferred that a reason for its negative assessment on the agreement was the lack of any provision, meant as able to guarantee a chronological priority for the former[32], concerning a mechanism of coordination between the procedure under art. 267, par. 3, TFEU and the advisory opinions procedure formalized by Protocol No. 16.

Leaving aside the reference made to the prior involvement procedure[33], it bears noting that an attempt to explain this part of the Court's Opinion specifically related to Protocol No. 16 has been made on account of the two different situations – before and after the potential accession of the EU to the ECHR – formally concerning a matter of interpretation of the ECHR in the hands of a national judge of one of the Member States of the EU also being a Contracting Party to the Convention[34].

In this respect, consideration must first be made of the situation before the accession – that is the one still persisting to date – governed by art. 6(1) TEU[35] and articles 51(1) and 52(3) of the Charter[36] in the framework of the indirect relations between EU law (in particular the CFREU) and the ECHR. In this context, on the one side, in order to protect fundamental rights the CJEU has frequently based its judgments on principles coming from the ECHR and using the ECtHR's case-law, while on the other, the latter, when receiving applications concerning violations of the Convention allegedly committed by a Member State in implementing EU law, has, in parallel, shaped the doctrine of "equivalent protection" assuming a presumption of compliance of EU law with the protection guaranteed by the

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previously proceeded to that assessment. On the prior involvement see, *inter alia*, R. BARATTA, *Accession of the EU to the ECHR: the rationale for the ECJ's prior involvement mechanism*, in *CML Rev.*, 2013, 1305 ff.

[32] See paragraphs 199-200 of Opinion 2/13: "*By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.*"

[33] On the allegedly unclear statements of the Court's that "first refers to the general conflict between the Protocol and preliminary ruling and then describes a form of this conflict involving the prior involvement procedure," see, for example, P. TACIK, *After the Dust Has Settled: How to Construct the New Accession Agreement After Opinion 2/13 of the CJEU,* in *German Law J*, 2017, 919 ff., 940.

[34] The reference is, in particular, to D. HALBERSTAM, *"It's the Autonomy, Stupid"! A Modest Defense of Opinion 2/13 on the EU Accession to the ECHR, and the Way Forward,* in *German Law J*, 2015, 105 ff., especially 120 ff.

[35] Art. 6(1) TEU: "*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*."

[36] Art. 51(1) CFREU: "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*." Art. 52(3) CFREU: **"***In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*."

ECHR[37]. Given this, even though according to art. 6(3) TEU, the fundamental rights of the ECHR are to be considered as general principles of Union's law[38], a question of interpretation of the ECHR regarding a right corresponding to those guaranteed by the CFREU would still remain a matter related to the ECHR, in the absence of any formal incorporation of the convention's provisions into EU law as legally operative norms[39]. Instead, from the EU's formal perspective, the same eventuality would yield different consequences once accession was concluded, since according to art. 216(2) TFEU[40] the Convention's provisions would be binding for the EU and its Member States as an integral part of EU law. In this case, an issue of interpretation of the ECHR would in fact formally become a matter of interpretation of EU law: following this, a reference made to the ECtHR and not to the CJEU could determine a risk of undermining for the system outlined by article 267 TFEU[41]. In fact, from the perspective of EU law, when domestic courts apply the Convention in a field equally covered by the scope of the fundamental rights enshrined in the CFREU, in giving precedence to the mechanism established by Protocol No. 16 they would be asking the ECtHR as to a question on the interpretation of the Convention when in fact they should be asking the CJEU as to the same question involving the ECHR as EU law[42]: and this risk would be more evident

[37] On the use of the criterion of the "*presumption of equivalent protection*" of fundamental rights assured by EU law see *Bosphorus v. Ireland*, no. 45036/98, 30 June 2005; *Michaud v. France*, no. 12323/11, 6 December 2012. For an application susbsequent to Opinion 2/13 see *Avotiņš v. Lettland*, no. 17502/07, 23 May 2016.

[38] Art. 6(3) TEU: "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*."

[39] In this sense D. HALBERSTAM, *"It's the Autonomy, Stupid"! A Modest Defense of Opinion 2/13 on the EU Accession to the ECHR, and the Way Forward,* [see above ft 34], 121, stating that "From the perspective of the CJEU, this is bad, of course. But at least the Member State court is not thereby mixing up the two courts and the legal systems over which the two courts have jurisdiction."

[40] Art. 216(2) TFEU: "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*».

[41] To sum up on this point, with regard to formal consequences allegedly deriving by the accession according to the reasoning of the CJEU see D. HALBERSTAM, *"It's the Autonomy, Stupid"! A Modest Defense of Opinion 2/13 on the EU Accession to the ECHR, and the Way Forward* [see *above* ft 34], 121: "Before accession, an ECHR question is mostly that: a question about the interpretation of the ECHR. Article 52(3) FRC refers to the ECHR for content, but that provision does not incorporate the ECHR into EU law as a legally operative norm. After accession, by contrast, an ECHR question indeed becomes a question of EU law, at least insofar as the question implicates the EU's own ECHR obligations. This means that the advisory opinion process creates a real risk of undermining the EU's preliminary reference procedure after accession, and far more so than before." As C. KRENN, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13,* in *German Law J,* 2015, 147 ff., 155 also points out, "Because the ECHR will become an integral part of EU law, domestic courts can directly apply the Convention within the scope of EU law. If, for instance, an EU regulation's conformity with the ECHR is at stake, a Member State apex court might engage in 'forum shopping', turning to the ECtHR for advice by relying on Protocol No. 16. In cases where a lower court has asked the CJEU for a preliminary ruling on this question, not even the CILFIT doctrine might help, as it does not prevent domestic last instance courts from seeking a 'second' answer from the Strasbourg court."

[42] Again, according to D. HALBERSTAM, *"It's the Autonomy, Stupid"! A Modest Defense of Opinion 2/13 on the EU Accession to the ECHR, and the Way Forward,* [see *above* ft 34], 121, "after accession, the CJEU must be

especially where a tendency towards the alternative use of the advisory opinions procedure were to develop.

In this sense Opinion 2/13 expressed great concern about the necessity of safeguarding the autonomy and effectiveness of art. 267 TFEU, in the case of rights of the CFREU corresponding to those of the ECHR, due to the absence of any mechanism of coordination between the two procedures.

Besides the remaining statements of the Court, this part of the Opinion and its interpretation just referred have been fully and specifically criticized as well, disagreeing also with the explanation just discussed[43]. Indeed, and actually mirroring the current situation, the above-mentioned View of Advocate General Kokott had dealt with the issue as well, conversely opting for a positive conclusion. The View states that a threat to the preliminary ruling procedure under art. 267 TFEU could already occur regardless of the accession of the EU to the ECHR, since it depended only on the possibility that a national judge of a Member State of the EU having ratified Protocol No. 16 would raise a question of interpretation of the ECHR to the ECtHR that could be well framed as a question concerning the scope of a fundamental right of the CFREU addressed to the CJEU.

In other words, the role of the CJEU could be indirectly affected by the use of the instrument outlined by Protocol No. 16 made by the highest courts of member states, even if the EU itself would not take part of the system and even if only some of its Member States would ratify the document. This is because "*when the EU accedes to the ECHR, the ECHR as such will be an integral part of the legal order of the EU, so that CJEU will be responsible for its interpretation by means of preliminary rulings (Article 267 TFEU). Its role in relation to the interpretation of the ECHR within the EU could, however, be jeopardised by the fact that the*

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considered the authoritative interpreter of the ECHR-as-EU-law for all matters that fall within the scope of EU law. After accession, therefore, the mistaken Member State court that rings up Strasbourg instead of Luxembourg would be asking a non-EU court a question of EU law." On the issue see also T. LOCK, *The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?*, in *Eur. Const. Law Rev.*, 2015, 239 ff., 262, stressing that the court did not expressly specify the "more serious concern which is that, after the accession, the Convention would become an integral part of EU law as far as member states were acting within its scope. Thus from the point of view of EU law, a request for an advisory opinion under Protocol No. 16 could be regarded as a request to interpret EU law, which potentially fall foul of the autonomy of the EU law."

[43] F. KORENICA, D. DOLI, *A View on CJEU Opinion 2/13's Unclear Stance on and Dislike of Protocol 16 ECHR*, in *Eur. Public law*, 2016, 269 ff., 282, arguing that, on basis of art. 6(3) TEU, according to which "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*," ECHR rights would be already incorporated into the Treaties: in this sense there would be "no substantive difference – in terms of incorporation of ECHR – between the ECHR *as an act* and *its rights* when it comes to the application and interpretation of the ECHR. ECHR *rights* are already part of EU Treaties, and, as a result, interpreting those rights means interpreting the rights of EU Treaties, therefore interpreting the EU law."

highest courts and tribunals of the Member States which have ratified Protocol No 16 to the ECHR might be tempted, in application of its provisions, to refer questions concerning the interpretation of the ECHR to the ECtHR rather than to the Court of Justice. Ultimately, this phenomenon would not, however, be a consequence of the accession of the EU to the ECHR. Even without the proposed accession of the EU, courts and tribunals of Member States which have ratified Protocol No 16 can turn to the ECtHR with questions on fundamental rights relating to the interpretation of the ECHR, instead of referring to the Court of Justice questions that are identical in substance but relate to the interpretation of the Charter of Fundamental Rights"[44].

Moving from these assumptions, instead of dwelling on formal mechanisms adjusting the potential relations between the two procedures, the Advocate General enhanced the provision of art. 267, par. 3, TFEU itself, codifying the obligation for national courts of last instance to refer to the CJEU and taking precedence over national law as well as over any international agreement ratified by single Member States: this would equally apply to the case of Protocol No. 16, with regard to disputes falling within the scope of EU law and its system of fundamental rights' protection, against which references for preliminary rulings to the CJEU outlined by the Treaty must maintain priority, in order to guarantee the crucial respect for the Luxembourg Court's judgments stemming from them[45].

If this is true, what bears noting in this setting is the strong defence of the preliminary ruling procedure in its essence made by the CJEU: whatever reading of the Court's Opinion may be offered, and in particular the one stressing the necessity for the CJEU to be formally considered the first authority interpreting the ECHR as EU law for all matters falling within the scope of this latter[46], the deeper meaning of the CJEU's statements, expressed before any ratification of Protocol No. 16 by Member States had intervened, is absolutely essential for

[44] See paragraphs 139-140 of the View, concluding (paragraph 142) that the draft agreement was not affecting the powers of the CJEU in such a way as to be incompatible with the first sentence of Protocol no. 8.

[45] See paragraph 141 of the View: "*In order to solve this problem, it is sufficient to refer to the third paragraph of Article 267 TFEU, which imposes on the Member States' courts and tribunals of last instance a duty to refer matters to the Court of Justice for a preliminary ruling. The third paragraph of Article 267 TFEU takes precedence over national law and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No 16 to the ECHR. It follows from this that the Member States' courts and tribunals of last instance are required — in so far as they are called upon to determine a dispute within the scope of EU law — to refer questions concerning fundamental rights primarily to the Court of Justice and to respect primarily the decisions of that court*."

[46] Furthermore, according to the above-mentioned explanation offered by D. HALBERSTAM, *"It's the Autonomy, Stupid"! A Modest Defense of Opinion 2/13 on the EU Accession to the ECHR, and the Way Forward,* [see *above* ft 34], 122, "The fact that Strasbourg might involve Luxembourg in answering this question via the prior involvement procedure adds insult to injury from the CJEU's perspective because the entire proceeding should be in Luxembourg, subject to the jurisdiction of the CJEU."

safeguarding the procedure provided for by art. 267, par. 3, TFEU, and its primacy[47], aimed at ensuring a uniform interpretation and application of EU fundamental rights within the scope of EU law competences[48].

If one considers the essential role that through the preliminary ruling procedure the CJEU has played in building and shaping the EU legal order itself, and, to the extent relevant here, the system of fundamental rights it provides, the CJEU's concerns may be clearly understood: defending the role of the procedure, the Court meant in fact to defend the intimate nature of EU law and its specific characteristics, while at the same time preserving its persisting key role in the integration process and in fundamental rights' protection, in the face of the new competence that, though not yet activated, had in the meantime been attributed to the ECtHR by the Protocol.

In the entanglement potentially deriving from the coexistence of the two procedures, the specific perspective expressed by the CJEU mirrors the will to "speak first" assured by the precedence that the mechanism outlined by art. 267 TFEU should take over the advisory opinions procedure introduced by Protocol 16 to the ECHR in order to preserve all the potential of the system of fundamental rights protection inserted into the wider legal order of the EU.

All this appears justified by the particular features of the perspectives offered by the EU integration process[49] and, from the CJEU's perspective, by the fact that the enduring

[47] See Opinion 2/13 of the CJEU, paragraphs 174-176: "*In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited). In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in van Gend & Loos, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83)*."

[48] It is excluded, in fact, that the Charter may constitute an instrument of fundamental rights' protection beyond the EU competences: see for instance Italian Constitutional Court, decision n. 80 of 11 March 2011, also recalling the case-law of the CJEU subsequent to the entry into force of the Lisbon Treaty (5 October 2010, C-400/10 PPU, *McB*; 12 November 2010, C-399/10, *Krasimir*).

[49] In this sense, according to A. MORRONE, *Il bilanciamento nello Stato costituzionale. Teoria e prassi delle tecniche di giudizio nei conflitti tra diritti e interessi costituzionali*, Torino, 2014, 39, every elaboration should start from the EU, taking into consideration the "political perspectives" of the integration that differs from the – as yet intended – subsidiary system of protection of individual rights outlined by the Convention.

possibility to express its voice and to carry out its own balancing activities, in accordance with the EU's specific structure and objectives, is ensured[50].

Besides the practice that will develop in the near future and the always possible breach of EU law pointed to by the Advocate General[51], when exercising its power of assessment regarding the respect of the conditions established for the EU's accession to the ECHR, the Opinion then strongly recalled the relevance and the rationale of the preliminary ruling procedure in and for the EU legal order[52].

It seems clear that this claim for a dominant perspective also reflects the dimension of the issues involved, here going well beyond the structure of Protocol No. 16 and the mechanism of the advisory opinions in the ECHR system considered separately. In this regard, the analysis would be only partial if the problematic aspects emerging from a second

[50] Besides cases occurring in practice that showed different interpretations to similar rights given by the CJEU and the ECtHR, see in general what is observed by D. AUGENSTEIN, *Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law,* in *German Law J*, 2013, 1917 ff., 1937: "What renders the interpretation of EU fundamental rights autonomous in relation to Europe's diverse national constitutional traditions are precisely the formal – jurisdictional – and substantive – proportionality – constraints imposed upon them by the fundamental market freedoms."

[51] As C. KRENN, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13,* [see *above* ft 41], 155 points out, "The Court's concerns need to be seen against the backdrop of the preliminary reference procedure being the most important - and yet the most fragile - procedural venue in the EU judicial system. However, this can occur only in exceptional circumstances." Taking into consideration the divergences between the View and Opinion 2/13 on the specific point, according to I. ANRÒ, *L'adesione dell'Unione Europea alla CEDU. L'evoluzione dei sistemi di tutela dei diritti fondamentali in Europa*, Milano, 2015, 293-294, if the EU Commission were to find that art. 267 TFEU is violated by Protocol no. 16, an infraction proceeding could be started. In general, on the issue of the non-compliance of last-instance national courts with the obligation to refer, C. LACCHI, *Multilevel Judicial Protection in the EU and Preliminary References,* in *CML Rev.*, 2016, 679 ff., 706 points out that a solution "could be a higher involvement of the Commission in scrutinizing national courts' decisions under Article 267," although pointing out that the Commission is generally reluctant about bringing judicial infringements before the CJEU (see ft 162). Moreover, recalling that individuals "do not have remedies to obtain an ECJ preliminary ruling against a court's refusal to refer," having "the possibility to engage State liability for breaches of EU law committed by last instance national courts according to *Köbler* [Case C-224/01]," the same Author observes that "only in September 2015, in *Ferreira da Silva* [Case C-160/14], did the ECJ rule for the first time that a national court had breached its duty to make a reference […]" (page 680).

[52] Unlike the date when Opinion 2/13 was delivered, as already mentioned Protocol no. 16 has now been ratified by 10 Contracting Parties, including 5 Member States of the EU and entering for them into force on 1 August 2018, this event testing the validity of some solutions proposed subsequently to the Opinion: see, for example, T. LOCK, *The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?,* [see *above* ft 42], 263. Stating that "the safe solution would be an express and binding undertaking by the EU's member states not to sign up or to Protocol No. 16 and for those that have already done so not to ratify the Protocol," or I. PERNICE, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est suspendue – Remarques à propos d'un avis surprenant de la Cour de justice de l'Union européenne du 18 décembre 2014*, in *Cahiers dr. eur.*, 2015, 47 ff., 62, arguing that "une declaration par laquelle l'Union européenne clarifie que la procedure de l'article 267 TFEU, dans son champ d'application, aura la priorité dans tous les cas où des États membres auraient ratifié le Protocole n° 16 devrait remédier le problème de 'l'articulation entre le mécanisme institué par le Protocole n° 16 et la procedure de renvoi préjudiciel prevue à l'article 267 TFUE' soulevé par la Cour."

interference[53] – the one with the incidental method of constitutional review of legislation – were not taken into account.

4. Advisory opinions procedure and incidental constitutional review of legislation. The Italian case: the role of the national judge and the one of the Constitutional Court

As noted above, moving to the national constitutional level, an overlap could occur between the request to the ECHR for an advisory opinion and the incidental question of constitutionality in cases of potential violation of the Convention by national law, as Protocol No. 16 does not consider the inner relationship between national judges and Constitutional Courts[54]. This is true for States that have this type of constitutional control in their system of constitutional justice (and also, of course, before a constitutional judge)[55]: in this sense, an inquiry taking the Italian system into account as relates to cases of potential violation of the ECHR by national law, seems paradigmatic. In fact, on the one hand, on the basis of the indirect mode – the only one available for individuals – of access to the Constitutional Court that is at the core of the system[56], a question of compliance with the Convention is converted there into a matter of compatibility with the Constitution; on the other hand, the Italian Constitution is also equipped with a significant Bill of constitutional rights. However, what makes the interference even more dangerous from the standpoint of the constitutional order is

[53] According to M. DICOSOLA, C. FASONE, I. SPIGNO, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System*, in *German Law J*, 2015, 1387 ff., 1413-1414 " … in Opinion 2/13 the CJEU oversimplified the reality by raising the issue of the bilateral relationship between the ECtHR and itself when a right is protected to a different extent by the Charter and the ECHR. However, Constitutions are also competing sources of authority for the protection of fundamental rights and so are their Courts, which are inserted into a network of relationships starting from those with the respective domestic supreme courts». Furthermore, «Given their proximity to citizens, national Constitutional Courts are best placed to accommodate supranational norms and case law within their domestic jurisdictions, while preserving, at the same time, a suitable degree of national constitutional ownership.»

[54] On the issue, again, M. DICOSOLA, C. FASONE, I. SPIGNO, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System*, [see *above* ft 53], 1404-1405 pointing out «the lack of any particular acknowledgment in Protocol no. 16 of the role of Constitutional Courts and judicial bodies that carry out the constitutional review of legislation as being one of the ultimate guarantors of constitutional rights at the domestic level in most Contracting Parties». In this way «It is the importance and the potential clash between performing the constitutional review of legislation and applying the ECHR that is neglected in Protocol no. 16.»

[55] See articles 134, 136 and 137 of the Italian Constitution; art. 1 of constitutional law no. 1 of 1948; art. 23 of law no. 87 of 1953. After its provision by the Constitution of 1948, the Italian Constitutional Court effectively entered into function in 1956.

[56] On the incidental method of judicial review that characterizes the Italian system of Constitutional Justice see V. BARSOTTI, P.G. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, Oxford, 2016, 54 ff.

that, unlike the German case for instance, where the individual, under certain circumstances, may lodge an application directly to the *Bundesverfassungsgericht* inferring a violation of the Convention by national authorities[57], from the perspective of the ECHR system the case-law of the Court of Strasbourg itself does not consider the incidental method of constitutional review in Italy as an effective domestic remedy necessarily to be exhausted in order to accede to the subsidiary protection under art. 35 ECHR[58].

In this respect, a short description of the framework concerning the relevance of the Convention in the Italian legal order seems appropriate. As just discussed, a violation of the ECHR by a national law can turn into an indirect violation of the Italian Constitution. In fact, while, according to the consequences drawn by the "limitations of sovereignty" allowed by art. 11 of the Constitution[59], the national judge has the power to set aside a law conflicting with EU law having direct effect, the settled case-law of the Italian Constitutional Court has clarified that, differently, a conflict arising between national legislation and the ECHR Convention must be considered a constitutional question to be submitted by the same judge to the Court pursuant to art. 117, par. 1, of the Constitution[60].

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[57] Comparing the Italian to the German system allowing the individual, under certain circumstances, to appeal the *Bundesverfassungsgericht* in the event of violation of the obligations derived from the Convention see B. RANDAZZO, *Giustizia costituzionale sovranazionale. La Corte europea dei diritti dell'uomo*, Milano, 2012, 228-229, pointing out that where a solution like the German one, lacking the risk of playing a marginal role in a multilevel system of rights protection, arises for the national constitutional judge.

[58] See *Parrillo v. Italy*, no. 46470/11, 27 August 2015, in particular paragraphs 101-102, recently recalling the traditional jurisprudence of the ECtHR on the point (*Brozieck v. Italy*, no. 10964/84, 19 December 1989; *Cofferati v. Italy*, no. 46967/07, 24 February 2009; *Scoppola v. Italy*, no. 10249/03, 17 September 2009). In this context, under the ECtHR's perspective, notes C. PINELLI, *Gli adattamenti costituzionali attraverso il contributo della giurisprudenza della Corte europea dei diritti dell'uomo,* in *Dirittifondamentali.it*, 2016, 18 that the Italian Constitutional Court acts first of all as a "judge of laws" and not as a "judge of rights, " this circumstance being its "Achilles' heel."

[59] According to the (relevant) part of article 11 of the Constitution, "*Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations*."

[60] Art. 117, paragraph 1, of the Constitution, as amended by constitutional law no. 3 of 18 October 2001, states that "*Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligation*s." On the mentioned case-law of the Italian Constitutional Court (ICC), precluding the national judge from setting aside national norms conflicting with the Convention, see decisions 348 and 349 of 24 October 2007, on the issue more recently recalled, *inter alia,* by decision 96 of 5 June 2015. On the constitutional jurisprudence after the constitutional amendment of Article 117 of the Constitution, see L. MEZZETTI, F. POLACCHINI, *Primacy of Supranational Law and Supremacy of the Constitution in the Italian Legal System,* in L. Mezzetti (ed.), *International Consitutional Law*, Torino, Giappichelli, 2014, 141 ff., especially 164-170. On the solution devised by the ICC since 2007. see also E. MALFATTI, *La tutela dei diritti fondamentali nel sistema convenzionale,* in ID., *I «livelli» di tutela dei diritti fondamentali nella dimensione europea*, Torino, 2013, 86 ff., especially 107-114; A. DI STASI, *Introduzione alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2016, 85 ff. For a brief summary of the ECHR's position for the Italian legal order, see also V. ZAGREBELSKY, R. CHENAL, L. TOMASI, *Manuale dei diritti fondamentali in Europa,* Bologna, 2016, 55 ff. In a wider perspective, P. RIDOLA, *La Corte costituzionale e la Convenzione europea dei diritti dell'uomo: tra gerarchia delle fonti nazionali e*

Nevertheless, given the characteristics of the ECHR system and the obligations assumed by the State in participating in it, the specific nature of the jurisdiction of the Court of Strasbourg with its particular role in interpreting the Convention's provisions requires, as pointed out by the Italian Constitutional Court itself, that the national judge take into account the "substance" of the ECtHR's case-law[61]: on this basis, national courts and the Constitutional Court itself are both required to interpret internal law in compliance with the Convention[62].

A question of constitutionality regarding the violation of the Convention by a national law must then be brought to the Constitutional Court only when a "consistent interpretation" should be excluded and, when examining the question related to ECHR, in order to declare the law unconstitutional and make it void, the latter must first assess whether the Convention itself, for the way it is interpreted by the ECtHR as well, is compatible with the Constitution as a whole.

In fact, according to the above-mentioned art. 117, par. 1, of the Constitution, the entire constitutional text has a higher rank than the ECHR, which was introduced into the Italian legal order with the status of ordinary law: it follows that the Constitutional Court, required to evaluate all the rights and interests at stake in order to guarantee the highest overall protection, must safeguard the possibly different balancing offered by the Constitution as prevailing on the level expressed by the ECHR[63].

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armonizzazione in via interpretativa, in ID., *Diritto comparato e diritto costituzionale europeo*, Torino, 2010, 187 ff.

[61] On the duty of the interpretation of national law in compliance with the Convention see decision 49 of 14 January 2015 of the Italian Constitutional Court, adding that national courts should comply with the ECtHR's case-law where this latter is "well established" or when consisting of a "pilot judgement." On the text of the norms as a limit to the interpretation in compliance with the Convention, stemming from this circumstance the necessity to submit a question of constitutionality to the Court, see decision 43 of 24 February 2017.

[62] For a complete analysis of the relationship between the Italian Constitutional Court and the European Court of Human Rights see, recently, D. TEGA, *The Italian Way: A Blend of Cooperation ad Hubris,* in *ZaöRV,* 2017, 685 ff. Also on the issue V. BARSOTTI, P.G. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context* [see *above* ft 56], 222 ff.

[63] About this problematic issue, see for instance M. LUCIANI, *Le funzioni sistemiche della Corte costituzionale e l'interpretazione "conforme a*," in *Federalismi.it*, 2007, 13, making the example – relevant in terms of different balances – of freedom of commercial expression, which in the jurisprudence of the Italian Constitutional Court is related to the stricter limits of the freedom of economic initiative; this is unlike the Strasbourg Court's jurisprudence stating that freedom of expression also includes commercial information. On the characteristics of the evaluation reserved for the Constitutional Court mentioned in the text see V. BARSOTTI, P.G. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, [see *above* ft 56], 72, where a translation of decision 170 of 2013 recalling the previous jurisprudence is offered. The same authors – page 230 – recall how «under the influence of European standards, the Constitutional Court has endorsed a higher level of protection of rights in its cases regarding, for example, trial *in absentia* (Judgment 317/2009) and the rights to a public hearing in criminal proceedings (Judgments 93/2010 and 80/2011), and the limits of retroactive legislation (Judgments 191/2014, 170/2013, 78/2012, and 209/2010),» while a divergent opinion from the ECtHR was adopted by the ICC «in Judgment 264/2012 touching upon the retroactive legislative repeal of a privileged treatment of some class of retired people, and in Judgment 263/2011 concerning the scope of the *lex mitior* principle in criminal law.» In a more general perspective see G. AMATO, *Corte costituzionale e Corti europee. Fra diversità nazionali e vision comune*, Bologna, 2015, 97, moving from the contractual nature of the

Within the framework just described, on the one hand, the Italian Constitutional Court, with its role, ensures compliance by the national legal order with the Convention, thus contributing to legal certainty when annulling an unconstitutional law with *erga omnes* effects; on the other hand, when necessary, the same Court has to "defend" the primacy of the Constitution over the Convention itself[64].

It is in this overall context that the potential use of the new advisory opinions procedure, when Protocol No. 16 would be in force, may interfere with the question of constitutionality that every court or tribunal is empowered to address the Constitutional Court where a matter of violation of the ECHR may be relevant[65]. In particular, since lower courts will not be able to make requests to the ECtHR under the Protocol but only to submit a question to the Constitutional Court, an issue in this regard would arise only if the latter were to be included in the list of judicial bodies competent to request opinions[66]. In this case, a problematic relationship between the Court and the advisory opinions mechanism, and then with the ECtHR, might be expected, in spite the optional nature of the request and the non-binding effects of the opinion. In fact, for instance, when in practice a request would actually imply, more or less explicitly, a matter of compatibility of a national law with the ECHR, the Constitutional Court could choose on the one hand merely to follow the opinion, thereby

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convention and defining as "tutela *mediana*" the protection provided by the Convention compared to the one assured by the single national orders that subscribed it. In this sense, the Convention may represent a higher standard for some of the latter or lower for some others, whereas where a national legal order has higher standards, lower ones coming from the Convention must not be considered as binding.

[64] The above-mentioned decision 49 of 2015 speaks in terms of "*predominio assiologico della Costituzione*" on the Convention while specifying that the duty of the national judge to interpret internal law in compliance with the Convention is conditioned upon the primary task of adopting an interpretation in line with the Constitution.

[65] For some problematic aspects of this interference, see BY E. CANNIZZARO, *Pareri consultivi e altre forme di cooperazione giudiziaria nella tutela dei diritti fondamentali: verso un modello integrato?,* in E. Lamarque (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo,* [see above ft. 2], 84 ff.

[66] A draft law authorizing the ratification and execution of Protocols 15 and 16 to the ECHR was first approved by the Chamber of Deputies on 26 September 2017 and then transmitted to the Senate (A.C. 2801/A.S. 2921): it provided that the Supreme Court of Cassation [Suprema Corte di Cassazione], the Council of State [Consiglio di Stato], the Court of Auditors [Corte dei conti] and the Sicilian Council of administrative justice [Consiglio di giustizia amministrativa per la Regione siciliana] were entitled to make requests for opinion to the Grand Chamber of the European Court of Human Rights under Protocol no. 16. Concerning the Constitutional Court, the draft had foreseen that the Court itself may have provided for its own inclusion within the requesting courts under article 1 of the Protocol in accordance with articles 14, paragraph 1, and article 22, paragraph 2, of law 87 of 11 March 1953. To date, the draft, however, expired with the end of the 17th legislature on 22 March 2018. On the issue regarding the Constitutional Court, see O. POLLICINO, *La Corte costituzionale è una "alta giurisdizione nazionale" ai fini della richiesta di parere alla Corte di Strasburgo ex Prot. 16 Cedu?,* in E. Lamarque (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo* [see above ft 2], 17 ff., whose position is generally favourable for including the ICC between the highest jurisdictions empowered to request for opinions.

confirming a pure loss in terms of interpretative powers regarding the assessment of compliance of national legislation with the Convention; otherwise, the Court could in practice disregard the opinion, thus further enhancing the – still prevailing – internal level of protection, while in this way, however, creating a situation of tension with the ECtHR.

As regards the highest courts, these would instead have the choice between activating constitutional review or requesting an opinion under Protocol No. 16, without any formal obligation to give precedence to the former. Depending on the developing practice, and considering that they should refer to the Constitutional Court when a law conflicts with the Convention and it is not possible to solve the contrast by a consistent interpretation, the use of the advisory opinions procedure in order to clarify in advance doubts of interpretation might initially be able to alter the relations between last instance courts and the Constitutional judge as defined on the national level[67]. In fact, a tendency in this direction may increase the risk that the use of the advisory opinions mechanism could encourage judges receiving the opinions to proceed to disputable operations of consistent interpretation, even beyond the limit marked by the text of national provisions, in order to apply, all the same, the interpretative elements offered by the Court of Strasbourg without subsequently involving the Constitutional Court[68]. Paradoxically, on the one hand, considering its above-mentioned two-fold role *vis-à-vis* the Convention, the latter, cut off from the circuit of "dialogue," could not exert its role of ensuring compliance of national laws to the ECHR through constitutional review; on the other hand, it could not be in the position of establishing, when necessary according to the constitutional order, the prevalence of the level protection guaranteed by the Constitution once all the relevant interests and values concerned were taken into account [69].

[67] Even if in theory, as again stated by E. CANNIZZARO, *Pareri consultivi e altre forme di cooperazione giudiziaria nella tutela dei diritti fondamentali: verso un modello integrato?,* in E. Lamarque (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo,* [see above ft. 2], 85, the fact that the highest jurisdictions would refer to the ECtHR before addressing the ICC seems paradoxically more in line with the jurisprudence of the ICC itself, requiring judges to previously ascertain, and in a definitive way, the existence of a conflict arising between a national law and the ECHR, so as subsequently to be able to ask the ICC to remove it by the declaration of unconstitutionality.

[68] On the issue, see what is pointed out by G. SORRENTI, *Un'altra cerniera tra giurisdizioni statali e Corti sovranazionali? L'introduzione della nuova funzione consultiva della Corte di Strasburgo da parte del Prot. 16 Cedu,* in Lamarque (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo,* [see *above* ft 2], 145 ff., 161-162, namely the risk that, on the basis of the principles received by the ECtHR's opinions, judges will be tempted to use the lens of consistent interpretation, even forcing the text of internal law: in this way, dialogue stimulated by Protocol no. 16 could cut off the Italian Constitutional Court that, according to the Author, should conversely keep a primary role in fundamental rights protection.

[69] On this aspect see, again recently, Decision no. 166 of 13 July 2017.

The Constitutional Court itself, then, if inserted into the list of jurisdictions competent to make requests, when able to intervene could limit its attitude towards referring to the ECtHR, while at the same gradually reacting to the above-mentioned tendency towards being stricter in giving precedence to the balances of constitutional rights and interests as resulting primarily, if not only, from the Constitution[70].

If all this could entail a partial and progressive decrease in the legitimacy of the Court of Strasbourg and of the Convention system even beforehand, beyond the issues involving the preliminary reference procedure under art. 267 TFEU, it could ultimately and seriously call into question whether to proceed with the ratification of Protocol No. 16 for contracting parties, as the Italian example has shown, while seeking to safeguard an effective constitutional review[71].

5. Final remarks: a delicate balance and the risks involved in the proliferation of different judicial mechanisms for the "overall" effectiveness of protection

The analysis carried out thus far has first of all showed the complexity of the interactions between the three levels of protection at present existing in Europe, each of which expressing a different standpoint[72], burdening the national judge with a difficult and increasing key role. The adoption of Protocol No. 16 and the introduction of a new judicial competence for the Court of Strasbourg in addition to the existing individual application subsequent to the national judgment, has its source in the need to reduce the ECtHR's workload: depending on future practice, the procedure's structure and characteristics do not in principle seem able to ensure the achievement of this aim. At the same time, it appears uncertain whether the use of

[70] See M. DICOSOLA, C. FASONE, I. SPIGNO, *The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights: A First Comparative Assessment with the European Union and the Inter-American System,* [see *above* ft 53], 1412 «… Constitutional Courts could […] feel uncomfortable with the advisory opinion mechanism, which […], if activated would be more binding in terms of ECHR interpretation than one could expect, based on Article 5 of Protocol No. 16. Since, by contrast with the prescription of Article 267 TFEU, the request of advisory opinions is optional, in order to preserve its autonomy a Constitutional Court might be reluctant about submitting its case law on fundamental rights to the standards set by the ECtHR for the pending case. Constitutional Courts might strategically avoid requesting advisory opinions if they perceive those opinions as being not merely guidance, but as limiting their discretion to find the most suitable solution for the domestic jurisdiction.»

[71] As regards Italy, as just pointed out, the Protocol was only signed on 2 October 2013.

[72] Without mentioning the possibility indicated as "tripla pregiudizialità" by R. ROMBOLI, *Corte di giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, in *Rivista AIC*, n. 3/2014, 33, that is to say the event that, a case pending, a judge might at the same time consider the conditions to exist for raising all three preliminary questions (the constitutional question, the European Union question, and the question of the convention).

the mechanism may determine an increase in the effectiveness of the protection of the rights of the Convention on the domestic level where, paradoxically, the use of the advisory opinions procedure may also determine delays in defining judicial proceedings[73].

In this regard, the new procedure seems to have been conceived under a contradiction: on the one hand, in order to suit the essence of the regional-international system of protection itself, the requests could not be conceived as mandatory and/or the opinions as having binding effects, though these different features would have been more useful in the Convention system's view to guarantee the success of the procedure. On the other hand, despite the formal characteristics, the practical use of the opinions, while also taking part in the Court's case-law, could all the same strengthen a changing in the role of the Court connected with the progressive definition of a uniform standard of interpretation of the Convention[74].

Moreover, given the interferences with the other instruments used by the national judge in the domain of fundamental and constitutional rights' protection, this change could be evident in practical terms when national courts express a more favourable option for the requests for an advisory opinion. But this does not seem to be in line with the substantial and procedural subsidiary role that is still in principle attributed to the protection offered by the Convention and the ECtHR, whose intervention may be accepted by national authorities and courts of the Contracting Parties only if the higher and overall standards guaranteed by constitutional balances - together with their supranational obligations too - are not sacrificed on the altar of

[73] As a further structural difference of the advisory opinions procedure compared to the preliminary ruling procedure under article 267 TFEU, it must be also considered that the disputing parties on the domestic level are not automatically allowed to take part to the hearings or to submit written observations to the Court. Article 3 of the Protocol merely establishes at this regard that "*The Council of Europe Commissioner for Human Rights and the High Contracting Party to which the requesting court or tribunal pertains shall have the right to submit written comments and take part in any hearing. The President of the Court may, in the interest of the proper administration of justice, invite any other High Contracting Party or person also to submit written comments or take part in any hearing*." The Explanatory Report, paragraph 20, states only that "*It is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings."*

[74] It is no coincidence that, in listing "*Arguments in favour of opinions being binding*," the Final Report cited above at ft 12, paragraph 62, had stated that these "*included that the Court is the central authority for ensuring uniform application of the Convention. Should the request come from a court and the opinion be merely optional, this would lead to loss of the potential gain expected from the procedure, since the applicant would probably subsequently apply to the Court, which would have acknowledged his rights in the context of the advisory opinion procedure: a binding advisory opinion would offer finality. The extent to which the advisory opinion would be binding could depend on the nature of the case: if in relation to a specific systemic/ structural problem, then the advisory opinion would be binding for the requesting authority; if on interpretation of the Convention, then a general binding effect for all States Parties. It is difficult to envisage a non-binding advisory opinion when it is optional to make the request: this would imply that the domestic authority could apply a solution contrary to that indicated by the Court, following which the individual would almost certainly make an application to Strasbourg; this would run contrary to the purpose of the system*."

uniformity[75]. Otherwise, such a situation may in itself justify an approach in the sense of postponing the decision to ratify the Protocol by some States[76], without overlooking the additional risks for the legitimacy of the ECtHR itself, already a debated topic linked to the activism of the Court and its judgments, which may occur as a backlash[77].

In conclusion, returning to the question raised in the beginning, with its unclear logic – and with the flexible structure of the mechanism it provides – Protocol No. 16 may be able to affect the existing fragile coherence and balance between the different levels in a way that does not allow it to be concluded that an overall effectiveness of protection may, as such, be increased by the proliferation of judicial instruments deployed in the field.

Protocol No. 16 to the ECHR has been positively addressed as the "Protocol of dialogue"[78]. In this regard, one may observe that not only substantial advantages but also evident theoretical limits have been revealed as regards judicial dialogue, in particular noticing that the latter may

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[75] As pointed out by G. LÜBBE-WOLFF, *How Can the European Court of Human Rights Reinforce the Role of National Courts in the Convention System?'* [see *above* ft 24], 14, even recalling art. 53 of the Convention, also on the part of the Court, an approach «capable of preserving loyalty to the Convention system in the long run, will be an approach based on the idea that the Convention system is *subsidiary* not only in a procedural, but also in a substantive sense: that it is a system designed not to create *uniform* human rights standards all over Europe, but to step in where minimum standards have not been met». See also D. GRIMM, *Constitutionalism: Past, Present, and Future*, Oxford, 2016, 286: «the ECtHR has no mandate to unify law in Europe. It shall ensure a minimum standard of basic rights that is recognized by all member states of the Council of Europe, not implement the same basic rights standard for all. Particularly when the aim is to reasonably reconcile colliding basic rights positions, sufficient scope must remain for national solutions.»

[76] A wait-and-see approach has been taken, for instance, by the United Kingdom. See the Written Ministerial Statement of Ministry of Justice of Tuesday 28 October 2014 on Protocols 15 and 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (https://www.parliament.uk/documents/commons-vote-office/2014-October/28th%20October/5.JUSTICE Protocols.pdf): "*Although the Government was pleased that it could help secure agreement on advisory opinions in the Brighton Declaration, it has long made clear that it is unconvinced of their value, particularly for addressing the fundamental problems facing the Court and the Convention system. The Government will therefore neither sign nor ratify Protocol 16 at this time. It will instead observe how the system operates in practice, having regard particularly to the effect on the workload of the Court, and to how the Court approaches the giving of opinions*."

[77] On the precarious legitimacy of the ECtHR see D. TEGA, *The Italian Way: A Blend of Cooperation ad Hubris*,[see above ft 60], 711, which points out that «in the last decades the protection of human rights has been a powerful legitimizing factor both for international and national courts» but noticing that «Nowadays, however, we experience conflicts over this task that may weaken the legitimization arising from it, particularly putting into question the role of international courts without the support of national constitutional courts. That conflict may be reduced by asking the ECtHR to keep in mind it subsidiary nature, to refrain from behaving like a constitutional court, and to put greater effort into considering and respecting the constitutional traditions of the legal systems at stake. If rights are a source of legitimacy for the ECtHR, it needs more transparency and rigor in its decisions and should, more generally, employ a higher degree of self-restraint in order to avoid the confusion which fuels the anxious relationships with national jurisdictions.» On the general issue see also C. KRENN, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13* [see above ft. 41], 167, pointing out that «The legitimacy of the Strasbourg court and its effects on domestic legal systems is a recurring and heatedly debated topic, in particular in recent times.»

[78] See the Opening speech by former President Dean Spielmann held in Strasbourg on 30 January 2015 on the occasion of the "Solemn hearing for the opening of the judicial year of the European Court of Human Rights", addressing Protocol no. 16 as the "protocol of dialogue with the highest courts of our member states": https://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf.

perform its function where a clear political framework has been defined regulating modalities and legal consequences of all the actors' behaviours[79]. To the contrary, as regards the issue at hand, it is the structure itself defining the new instrument introduced in the Conventional system to appear uncertain at the root, despite seeking to establish a new form of institutionalized dialogue (so far has been only indirect and informal)[80]. In such an entanglement of procedural mechanisms aimed at guaranteeing substantial protection[81], judicial dialogue should not appear, as it risks doing here, to be a sort of aim in itself rather than a helpful means in this direction[82]. And in the context described, besides the risk of

[79] See, for instance, M. LUCIANI, *Interpretazione conforme a Costituzione*, in *Enc. dir.*, Annali IX, Milano, 2016, 391 ff., in particular 473-474, arguing that dialogue may be practiced only if some preliminary conditions are satisfied, among them the fact that political decisions clearly draw relations between sources and legal orders. To this extent, this Author deems the current multiplication of legitimacies and the pluralism of sources of law a price too high to be still tolerable in terms of legal certainty.

[80] As regards the content of Protocol No. 16 see, for example, E. CANNIZZARO, *Pareri consultivi e altre forme di cooperazione giudiziaria nella tutela dei diritti fondamentali: verso un modello integrato?,* in E. Lamarque (ed.), *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo* [see *above* ft 2], 89, who judges positively the introduction of the advisory opinions mechanism, changing the consolidated nature of ECtHR and preventing violations of the Convention *ex ante*, but deeming that it would have been better to accompany the procedure by the (not easy) adoption of coordination mechanisms to reduce the complexity of the system and protect victims' right by defining their claims in a reasonable time. In this way, the new procedure would paradoxically risk increasing complexity, while at the same time reducing the efficiency of the overall system and the expectations relying on it.

[81] Without considering, regarding the interactions between the different levels of protection, the possibility that individuals may lodge an application with the ECtHR itself, based on the violation of the right to a fair trial under article 6 of the ECHR when a national court fails to refer to the CJEU under article 267, paragraph 3, TFEU: see ECtHR, *Ullens de Schooten and Rezabek v. Belgium*, no. 3989/07 and 38353/07, 20 September 2011; *Dhabi v. Italy*, no. 17120/09, 8 April 2014; *Schipani v. Italy*, no. 38369/09, 21 July 2015. In this regard, C. LACCHI, *Multilevel Judicial Protection in the EU and Preliminary References,* in *CML Rev.*, 2016, 679 ff., especially 698 ff., pointing out that the current line of case law developed by the Court on this point recognizes that non-compliance with the obligation to refer under art. 267 TFEU may infringe art. 6(1) of the ECHR when national courts do not indicate the reasons for the denial according to the exceptions outlined in the *CILFIT* doctrine by the CJEU.

[82] Justifying the conclusions reached on the issue by Opinion 2/13 of the CJEU, G. TESAURO, *Il ruolo della Corte di giustizia nella tutela dei diritti fondamentali e il parere negative sull'adesione alla CEDU,* in A. Tizzano, *Verso i 60 anni dai Trattati di Roma. Stato e prospettive dell'Unione europea,* Torino, 2016, 93 ff., 106-107 considers the advisory opinions procedure outlined by Protocol no. 16 as a "copia *minoris generis*" of the one under art. 267 TFEU, adding that judicial dialogue should be seen as a serious topic not allowing "small solutions" able to stimulate literature but creating confusion in the work of judges itself. For a summary of the critics concerning the new instrument inserted in the Convention system see F.G. JACOBS, *Le renvoi préjudiciel devant la Cour de Justice – un modèle pour d'autres systems transnationaux?*, in *La Cour de justice de l'Unione européenne sous la présidence de Vassilios Skouris (2003-2015). Liber amicorum Vassilios Skouris*, Bruxelles, 2015, 271 ff., 282, who points out the aim of reducing the ECtHR's workload and yet affirms that «Toutefois, la nouvelle competence pourrait avoir pur effet d'augmenter de façon significative cette charge de travail, et ce, même si l'impact du Protocole n° 16 est totalement imprévisible. De plus, toute demande d'avis acceptée devra être traitée de manière prioritaire pour éviter un retard inacceptable dans la procedure nationale. On peut se demander si ce mécanisme offre un avantage, étant donné aussi que la jurisdiction de renvoi (de même, *a fortiori*, quel es juridictions des autres États contractants) sera libre de s'écarter de l'avis consultatif. Enfin, le système est discutable dans son principe, la Convention ne visant pas à établir une loi uniforme. Dans ces circonstances, il me semble puvoir être répondu aussi bien, voire peut-être mieux, à des questions de principe dans le cadre de l'examen complet du droit et des faits que la Cour opère dans l'exercice classique de sa compétence.»

weakening the way constitutional rights are specifically guaranteed in national legal orders[83], in terms of mechanisms connecting the national judge with Courts involved in rights' protection beyond the Constitution, as highlighted by Opinion 2/13 a crucial role to safeguard seems rather to be the one exerted by the reference for a preliminary ruling under art. 267 TFEU, always facing, however, the delicate relationship between national and EU law[84], structurally one of the main expressions of the EU integration process itself.

[83] However, in decision n. 49 of 2015 the ICC itself incidentally evaluated the introduction of Protocol no. 16 and the non-binding effect of the advisory opinions delivered on request, pointing out the "*option in favour of initial confrontation based on argumentation, in a view of cooperation and dialogue between courts, rather than of top-down imposition of an interpretative line on question of principle that still haven't find a consolidated judicial asset and whose solution is then uncertain for national judges*» (see paragraph 7 of "*Considerato in diritto*," our translation).

[84] The so called "*counter-limits doctrine*" was reaffirmed by the Italian Constitutional Court with Order no. 24 of 26 January 2017, referring under art. 267 TFEU to the CJEU questions concerning the interpretation of art. 325(1) and (2) TFEU and the previous judgment of the Court of Luxembourg of 8 September 2015, in case C-105/14, *Taricco*: "*The recognition of the primacy of EU law is an established fact within the case law of this Court pursuant to Article 11 of the Constitution; moreover, according to such settled case law, compliance with the supreme principles of the Italian constitutional order and inalienable human rights is a prerequisite for the applicability of EU law in Italy. In the highly unlikely event that specific legislation were not so compliant, it would be necessary to rule unconstitutional the national law authorising the ratification and implementation of the Treaties, solely insofar as it permits such a legislative scenario to arise (see Judgments no. 232 of 1989, no. 170 of 1984 and no. 183 of 1973)*" (see paragraph 2 in the English translation of the Order at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf).