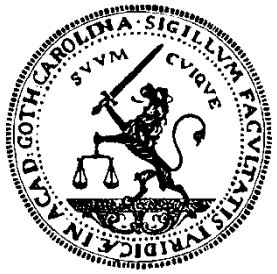

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EU accession to the ECHR in light of the specificity of the Union and Union law

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Contents

Summary

Accession of the EU to the ECHR has been subject to discussion since the late 1970s. Due to a lack of legal basis in the treaties, accession has not been possible until the entering into force of the Treaty of Lisbon in 2009. Article 6(2) TEU now stipulates an obligation for the Union to accede to the Convention under the condition that the agreement relating to the accession makes provisions for preserving the specific characteristics of the Union and Union law.

Even though the EU has come a long way in developing its own fundamental rights protection regime, several reasons has been given for the Union to accede to the ECHR. Most importantly, it will represent a step toward a more coherent human rights regime within Europe as well as bringing within the scope of ECHR the acts of the institutions of the EU.

The process of drafting an accession agreement has been long and complex as there has been several interest that the drafting group has had to respect, balance and sometime compromise. Most notably, the requirement to draft an agreement that respects Union autonomy has forced the drafters to construct a rather complex legal framework in order to accommodate a federal-like international entity as the Union within the system of the Convention next to its own Member States.

At the heart of the accession agreement lays the co-respondent mechanism, designed to solve the issue of correctly addressing ECtHR applications to the Member States and the Union respectively; and the institution of a process ensuring the involvement of Court of Justice prior to any proceedings before the ECtHR in which the EU will act as respondent or co-respondent. Both the co-respondent mechanism and the process for prior involvement may be criticized for their complexity and that they put the Union in a privileged position compared to the other 47 high contracting parties of the Convention.

Additionally, it could be said that the system set up by the draft accession agreement institutionalises and incentivises the continued application of the doctrine of equivalent protection established through the famous *Bosphorus* ruling. While the doctrine should not be upheld in its current shape and form, having regard to the specific nature of the European Union, a modified application of the deference shown through the doctrine seems likely, and perhaps even necessary, at least in cases where the EU has acted as a supranational entity and is involved in proceedings as co-respondent.

Sammanfattning

EUs anslutning till Europakonventionen har varit föremål för diskussion ända sedan slutet av 1970-talet. På grund av bristande rättslig grund i fördragen, har anslutning dock inte varit möjligt förrän ikraftträdandet av Lissabonfördraget år 2009. Artikel 6(2) FEU föreskriver nu en skyldighet för EU att ansluta sig till konventionen under förutsättning att avtalet om Unionens anslutning avspeglar nödvändigheten att bevara unionens och unionsrättens särdrag.

Trots att EU redan har ett välutvecklat skydd för grundläggande rättigheter, har flera anledningar lagts till grund för att unionen bör ansluta sig till Europakonventionen. Framförallt kommer unionens anslutning att innebära ett steg mot en mer sammanhållen ordning av mänskliga rättigheter inom Europa. Dessutom kommer EUs anslutning medföra att även EUs institutioner kommer att omfattas av Europakonventionens bestämmelser och kan ställas till svars inför Europadomstolen.

Arbetet med att utforma ett anslutningsavtal har varit både tidskrävande och komplicerat. Den arbetsgrupp som har haft till uppgift att utforma avtalet har tvingats respektera, balansera och ibland kompromissa ett flertal, ibland motstående, intressen. Framförallt har kravet på att utarbeta ett avtal som respekterar unionens autonomi tvingat arbetsgruppen att konstruera ett relativt komplext rättsligt ramverk, anpassat för att rymma en federal-liknande, internationell organisation som EU inom Europakonventionens system, jämte sina egna medlemsstater.

I anslutningsavtalets kärna ligger den så kallade ”co-respondent-mekanismen”, som är ämnad att lösa problemet med att korrekt adressera klagomål till Europadomstolens mellan medlemsstaterna och unionen; samt instiftandet av en process för att garantera att EU-domstolen involverats före ett förfarande vid Europadomstolen där EU ska delta som tilltalad eller så kallad ”co-respondent”. Både ”co-respondent-mekanismen” och den föreslagna processen för att garantera att EU-domstolen involveras kan kritiseras för deras komplexitet och att de sätter unionen i en privilegierad position jämfört med de 47 stater som redan är anslutna till konventionen.

Det system som inrättas genom det föreslagna anslutningsavtalet kan också sägas institutionalisera och ge incitament till en fortsatt tillämpning av den doktrin som fastställts i det välkända *Bosphorus*-målet, där det fastställdes att EU måste anses erbjuda ett skydd för grundläggande rättigheter likvärdigt det som Europakonventionen ger. Även om *Bosphorus*-doktrinen inte bör godtas i sin nuvarande utformning, ter det sig lämpligt, kanske rent av nödvändigt, att, med hänsyn till unionsrättens särart, Europadomstolen i någon form fortsätter att visa EU-rätten den vördnad som *Bosphorus*-doktrinen grundats på, åtminstone i de fall där EU agerat som ett överstatligt organ och är involverad i en process i egenskap av ”co-respondent”.

Preface

Done at last.

Thank you to my ever supporting mother and father.

Thank you to my supervisor Xavier Groussot whom has inspired many of the choices I have made during my final years at Lund University.

Thank you to all my wonderful friends I have made during my time in Lund.

Abbreviations

CDDH	Steering Committee for Human Rights
CFEU/Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
NHRI	European Group of National Human Rights Institutions
NGO	Non-governmental Organization
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

With the entering into force of the Lisbon treaty in 2009, following Article 6(2) TEU, the European Union is under an obligation to accede to the European Convention on Human Rights and Fundamental Freedoms. Annexed to the treaties is also Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, stating that the "agreement relating to the accession […] shall make provisions for preserving the specific characteristics of the Union and Union law".

This has proven quite the task for the working group under the Steering committee for Human Rights that has been responsible of drafting the accession agreement. Most notably, the requirement to draft an agreement that respects the specific characteristics of the Union and Union law has forced the drafters to construct a rather complex legal framework, all while trying to balance and reconcile, as far as possible, Union interests with other important interests and principles of accession.

While the work group finalized a draft accession agreement in April 2013, there is still a lot of work to be done before the EU may actually accede as a party to the Convention. First, the CJEU will need to give its opinion on draft agreement. Following that, a complete accession still requires not only a unanimous vote in the Council of Europe and a two-thirds majority in the European Parliament, but also ratification of the draft agreement by all the EU and Council of Europe Member States. A draft agreement that has compromised to much other important values in order to meet requirements of preserving the specific characteristics of the Union and Union law might not be accepted further down the line.

1.2 Aim and research questions

The aim of this paper is to examine and analyse the draft agreement for the accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms in light of the requirement that the accession agreement must make provisions for preserving the specific characteristics of the Union and Union law as required by Protocol (No 8), annexed to the treaties, relating to Article 6(2) TEU. In this part, the following are the main research questions set out to be answered:

- What is meant by "the specific characteristics of the Union and Union law"?

- What is the purpose of accession and which are the interests that have guided the accession negotiations?
- Which are the main issues of accession in light of Union specificity?
- How has the need to preserve the specific characteristics of the Union and Union law affected other important interests and principles of accession?

Seeing how the relationship between the ECtHR and the CJEU has been characterised by a certain degree of deference, based partially on the specific character of the Union legal system, another, related, aspect of accession is that of if and how it will alter the relationship between the two European Courts. In this part, the following are the main research questions set out to be answered:

- How will accession affect the relation between the ECtHR and the CJEU?
- How will accession affect the application of the doctrine of equivalent protection?
- How will the accession agreement affect the future application of the doctrine of equivalent protection?

1.3 Method and materials

The method used in this paper is partly that of a traditional legal dogmatic approach and partly that of a more problem oriented method. The parts that describes, *de lege lata*, fundamental rights within the EU legal order, EU autonomy and the application of the doctrine of equivalent protection within the European Court of Human Rights, builds primarily on the Treaties of the European Union, case-law and opinions from the Court of Justice of the European Union, case-law from the European Court of Human Rights and peer reviewed articles and publications by legal scholars.

Next to these more descriptive parts are the discussions that, in light of the premises set by the normative basis, concern certain problem areas identified during the accession process, relating to accommodating the Union within the framework of the ECHR and adapting the Convention system to "fit in" a non-state, federal-like, international legal entity next to its own Member States. For this part, and the discussions on which ramifications this might have for reaching the goals and purposes of accession, this paper draws primarily from peer reviewed articles and publications by legal scholars, official documents from the Council of Europe and official documents from the institutions of the European Union.

To take in a practical perspective representing the interests of individual applicants seeking to avail their rights before the ECtHR, submissions by European national human rights institutions and non-governmental organizations to the informal working group established under the Steering Committee for Human Rights responsible with the task of drafting the accession agreement, have also been used.

1.4 Delimitations

The prospect of the European Union's accession to the European Convention on Human Rights has come with several complex issues, both legal and political. The most prominent issues discussed in legal doctrine and in the process of drafting an accession agreement may be divided into three separate categories; 1) Institutional issues – relating to the Unions participation in the institutional and administrative framework of the ECHR; 2) Substantive issues – relating to the scope of accession as well as issues of competence and jurisdiction of the two European Courts; and 3) Procedural issues – relating to procedural mechanisms needed to accommodate a special legal entity such as the European Union within the framework of the Convention side by side with its Member States.[1]

The focus of this paper are the issues related to accession caused by the specificity of the Union and the need to respect it as an autonomous legal order. For that reason, this paper will not go into any of the institutional issues, nor any issues relating to the scope of accession - i.e. which protocols to the Convention the Union should ratify once it accedes.

In particular, this paper will look to three specific issues that have been especially contentious during accession discussions, i.e.; the creation of a co-respondent mechanism; the issue of involving the Court of Justice prior to any proceedings before the ECtHR in which there is a question regarding the interpretation or validity of EU law; and if and how the well-established doctrine of equivalent protection and how the relationship between the two European courts may be altered following accession.

It should be added that while it is clear that the autonomy of the Union legal order is a fundamental aspect of Union specificity, the exact definition of autonomy within the context of EU law is not entirely certain.[2] The full understanding of EU autonomy is not the focus of this paper, but rather its role as a precondition for Union accession to the ECHR and its implications in that context.

[1] For an overview and legal assessment, see Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011.

[2] van Rossem, Jan Willem, "The Autonomy of EU Law: More is Less?", in Wessel, R. A. and Blockmans, S. (eds.), *Between Autonomy and Dependence*, 2013, Springer, p. 14.

1.5 Disposition

The paper contains two separate chapters, each divided into several sub-chapters.

Chapter 2 focuses on the process leading up to accession and is divided into four sub-chapters. First, it looks to the history and development of fundamental rights within the European Union leading up to accession (Chapter 2.1). Second, the purpose of accession is examined (Chapter 2.2). Third, a brief summary of the negotiation process is given (Chapter 2.3). Forth, focus is put on the premises of accession, i.e. the leading principles that has been guiding the accession negotiation process and requirements to Union autonomy (Chapter 2.4).

Chapter 3 describes some of the main issues with accommodating the Union within the framework of the convention, how these issues have been solved in the draft accession agreement, and what are the main problematic with the solutions presented in the finalized draft accession agreement. The chapter is divided into three sub-chapters. First, focus is put on the problem of correctly addressing applications before the ECtHR to the Member States and to the Union respectively and the suggested solution, i.e. the co-respondent mechanism (Chapter 3.1). Second, the issue of involving the CJEU prior to any proceedings before the ECtHR in which the EU will act as respondent or co-respondent will be discussed (Chapter 3.2). Third, the paper will look to what effect accession may have on the relationship between the ECtHR and the CJEU, especially how it will affect the application of the doctrine of equivalent protection (Chapter 3.3).

2 The road to accession

2.1 The evolution of fundamental rights within the EU

The possibility of accession of the EU to the ECHR has been subject to discussion since the late 1970s.[3] At the time, while by no means a foreign concept, the matter of fundamental rights protection within the sphere of Community law was still in its infancy. Somewhat of a pioneer, it was the Court of Justice that, about ten years earlier, had started to incorporate and develop a Union conception of human rights through famous rulings such as *Stauder*[4], *Internationale Handelsgesellschaft*,[5] *Nold* [6], *Rutili*[7] and *Hauer*[8].

The real catalyst for this developing human rights doctrine within the European Union, which had started as a co-operation based mainly on economic interests, was however the unwillingness of national constitutional courts to accept the supremacy of a legal system which did not have in place the proper safeguards protecting fundamental rights. In the famous *Solange I*[9]decision by the German Constitutional Court, the German Court held that, as long as there was no Community fundamental rights catalogue equivalent to that guaranteed by the German Constitution, the German Constitutional Court would reserve the right to review the compatibility of Union law with the German Constitution. For the Union to maintain the recently developed doctrines of supremacy and direct effect of Community law, it was thus rather clear that a system of judicial review of violations of fundamental rights was necessary.[10]

While the evolution of fundamental rights protection within the Union primarily may have had the CJEU in the driver seat with a progressive legal incorporation of fundamental rights in the shape of general principles of Union law, these judicial advancements was followed and subsequently strengthened by a legislative protection of fundamental rights.[11]

From a legislative point of view, the developments of human rights protection within the Union following the *Solange I* decision saw

[3] CDDH(2011)009, Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights.
[4] Case 29/69 *Stauder* [1969] ECR 419.
[5] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
[6] Case 4/73 *Nold* [1974] ECR 491.
[7] Case 36/75 *Rutili* [1975] ECR 1219.
[8] Case 44/79 *Hauer* [1979] ECR 3727.
[9] Decision of 29 May 1974, BVerfGE 37, 271.
[10] Skouris, Vassilios "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance", *European Business Law Review*, Vol. 17, 2006, pp. 225–239
[11] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011.
, p. 999f.

discussions on whether the Community should develop its own catalogue of fundamental rights; if it should accede to the ECHR; and whether the two options were mutually exclusive.[12] While a unilateral approach was dominant in the years following the *Solange I* decision,[13] the Commission made its first, unsuccessful, proposal that the Community should adhere to the ECHR in 1979.[14] Following the Court of Justice Opinion 2/94[15] it stood clear that even if there would have been a political will to accede, the lack of a legal basis in the Treaties meant that the Community did not have the competence needed to do so.[16]

Without the unanimity required to amend the Treaties, focus was put on the creation of a Community bill of rights, i.e. the Charter of Fundamental Rights of the European Union ('the CFEU').[17] With the entering into force of the Lisbon treaty, the Charter was elevated to primary law status coupled with the obligation of the Union to accede to the ECHR in Article 6(2) TEU. However, accession cannot be made unconditionally. Annexed to the treaty was also Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms,[18] stating that the "agreement relating to the accession […] shall make provisions for preserving the specific characteristics of the Union and Union law".

To summarize, the link between the EU fundamental rights protection and the ECHR jurisprudence has always, ever since fundamental rights became a question for the Union, been growing stronger. The evolving relationship between the European courts is reflected both in Union legislation as well as the growing number of judgments given by the CJEU in which it refers not only to the provisions of the ECHR but also individual judgments of the ECtHR. Even if the preference of the judges of the Luxembourg court, as seen in Opinion 2/94, might have been an existence separated from the ECtHR, the CJEU has always acted in a co-operative manner – trying to

[12] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 999.
[13] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 999.
[14] Schermers, Henry G., "The European Communities Bound by Fundamental Human Rights", *Common Market Law Review*, Vol. 27, 1990, p 256; Accession of the Communities to the European Convention on Human Rights, Commission Memorandum, *Bulletin of the European Communities*, Supplement 2/79, COM (79) final.
[15] Opinion 2/94 [1996] ECR I-1759
[16] Giorgio, Gaja, "Accession to the ECHR", in Biondi et. al. *EU law after Lisbon*, 2012, Oxford University Press, pp. 180-194, p. 180
[17] Anderson Q.C., David and C. Murphy, Cian, "The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe", *EUI Working Papers*, LAW 2011/08, 2011, p. 1ff.
[18] Protocol (No 8), annexed to the TEU and TFEU, relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2010, O.J. C83/273.

create *"a legal reality resembled to what it would be like if the EU were a party to the ECHR".*[19]

The role of the Convention in this legal regime of "informal accession" is manifold. Since the entering into force of the Lisbon Treaty, with the elevation of the CFEU to become legally binding with the same value as the EU Treaties, the Convention presents itself significant in several aspects of the Unions now multi-layered approach to fundamental rights.[20] Like the Ghosts of Christmas past, present and yet to come, Article 6(1), 6(2) and 6(3) TEU obliges the Union not only to look to general principles of the Union as its sole source of fundamental rights, but moves it into an era where the "dynamic" general principles have to coexist with the codified rights and principles of the CFEU as well as the prospect and obligation of ECHR accession and the following submission to an external fundamental rights review mechanism, to which it will be bound not only as a matter of internal Union law, but also one of international law.

2.2 The promises of accession

Seeing how the Union has come such a long way with regard to the protection of fundamental rights, a reasonable question is, what it is that makes Union accession to the ECHR such a desirable endeavour? The protection of fundamental rights within the European Union already holds a high standard;[21] all of the EU Member States are already signatories to the ECHR; and the CFEU has been elevated to primary law status. Considering the complexities related to accommodating the Union within the ECHR framework, there must be some reasons making accession worth the trouble.

In fact, several reasons may be presented for the Union to accede to the Convention, albeit some stronger than others. The arguments may essentially be split into two categories; arguments of substantial nature, relating to the *de facto* expansion of human rights protection an accession would entail, and arguments of a more political nature, relating to the positive effects accession would have in a wider, more political sense, where results may not be as tangible but would still further human rights and European integration in a long term perspective. The European Parliament has identified the main arguments for accession as follows[22]:

[19] de Witte, Bruno, "The use of the ECHR and Convention case law by the European Court of Justice", in Popelier, P., Van de Heyning, C. and Van Nuffel, P. (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the national courts*, 2011, Intersentia, p. 18.

[20] Weis, Wolfgang, "Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon", *European Constitutional Law Review*, Vol. 7, 2011, p. 64f.

[21] To such a degree that the ECtHR har recognized fundamental rights protection within the Union as equivalent to that of the ECHR. See Bosphorus *Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005.

[22] CDDH-UE(2010)03, European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, p. 3.

First, accession would represent an advancement of the European integration process and be a *"further step towards political Union".*

Second, it is argued that accession would increase the legitimacy and credibility of the Union. This would address any accusations of double standards of fundamental right protection when it comes to EU calling upon third countries[23] or demanding of its Member States to respect the ECHR while not standing under any external control mechanism itself. Similarly, accession would increase legitimacy in terms of addressing any criticism (seen against the backdrop of for example *Solange I*) that fundamental rights protection within the EU is a means for the preservation of Union supremacy and autonomy, rather than an end in itself.[24]

Third, accession would represent a step towards a more coherent human rights regime within the whole of Europe. While Article 52(3) of the CFEU states that

> *"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 these rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"*

it must not be forgotten that at the very core of the Union, there is a predominant idea of free movement and internal market integration. Accordingly, even if the stated means of interpretation of EU fundamental rights and principles is that to mirror, where applicable, those of the ECHR, the very nature of the Union presupposes a greater emphasis on economic rights and liberties when interpreting fundamental rights.[25] An example of this mind-set could be seen in the CJEU's *"willingness to equate fundamental market freedoms in the EU treaty, such as the free movement of goods and services, with fundamental rights".*[26] Although the relationship between the CJEU and the ECtHR has been characterised by an increasing amount of mutual respect and informal co-operation, there are areas of fundamental rights protection where the case law of the two European Courts, at times, have diverged (primarily regarding the right to respect for private life under Article 8 ECHR and the right to a fair trial under Article 6 ECHR).[27] Thus, through the establishment of an external control mechanism of Union compliance with fundamental rights, accession will hopefully

[23] CDDH-UE(2010)03, European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, p. 3.
[24] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 649 and p. 676ff.
[25] Oliver, Peter, "Case C-279/09, *DEB* v. *Germany* Judgment of the European Court of Justice (Second Chamber) of December 2010", *Common Market Law Review,* Vol. 48, 2011, p. 2028.
[26] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 676.
[27]Scheeck, Laurent, "The Relationship between the European Courts and Integration through Human Rights", *Heidelberg Journal of International Law,* Vol. 65, 2005, p. 854f; Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 658f

serve as a mean to ensure greater coherence and protection of fundamental rights within in Europe.

Fourth, beyond coherence, and maybe most importantly, accession of the Union to the ECHR would close a gap in fundamental rights protection through bringing within the direct scope of the ECHR the acts of the institutions of the European Union. At present, infringements that can only be attributed to actions of the Union, and not to an act by any Member State, are immune to ECtHR review.[28] This was for example the situation in the case *Connolly*[29], where a former employee of the European Commission tried to bring a case against all the (then) EU Member States before the ECtHR. *Connolly* had in proceedings before the CJEU, been denied to submit written observations to the opinion of the Advocate General. Feeling that he had been deprived of his procedural rights, *Connolly* turned to the ECtHR. However, since the EU was not a party to the Convention, *Connolly* had no option other than to direct his claim towards the EU Member States. The ECtHR found, that since the allegation could not be attributed to any kind of domestic act, none of the Member States could be held responsible.[30] Since the EU Member States were the only possible respondents, *Connolly* had no case before the ECtHR. While these types of cases might not be common, it is still a lacuna in European fundamental rights protection. As European "unionisation" and the competences of the Union increases, it will be all the more important that citizens can avail their right to fundamental rights protection not only against the Member States, but also against the Union itself. As such, Union accession will likely be a big step for human rights protection within Europe.

2.3 The process of accession

The road to accession of the Union to the ECHR has been long and paved with both political and legal obstacles. The task of integrating the two different legal orders has in the end seemingly proved to be less than impossible and many steps have been taken on the lingering path of accommodating the EU under the wings of the Convention. One of the biggest hurdles to accession was cleared through the entering into force of the Lisbon Treaty; the European Union now not only have the competence to accede to the Convention but also an obligation to do so.[31] On part of the

[28] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11, Issue 4, 2011, p. 658f

[29] *Connolly v. 15 Member States of the European Union*, App. No. 73274/01, 9 December 2008; confirmed in *Beygo v 46 Member States of the Council of Europe*, App. No. 36099/06, 16 June 2009, and *Rambus Inc. v Germany*, App. No. 40382/04, 16 June 2009.

[30] Lock, Tobias, "Accession of the EU to the ECHR: Who would be responsible in Strasbourg?, in Ashiagbor, Diamond, Countouris, Nicola and Lianos, Ioannis (eds.), *The European Union after the Treaty of Lisbon*, 2012, Cambridge University Press, p. 113f.

[31] Article 6(2) TFEU

Convention, the entering into force of Protocol no. 14 to the ECHR 1st of June 2010 ,[32] has made accession possible both legally and structurally.[33]

However, while the foundation and framework for accession is set, the task of drafting an accession agreement fully compatible with the two European legal orders has been a matter of great complexity – adaptation has proved a difficult task, both from a legislative and a political point of view. From June 2010 until October 2011, the CDDH-UE[34], an informal working group established under the Steering Committee for Human Rights responsible with the task of drafting "a legal instrument [...] setting out the modalities of accession", held in total eight meetings with the European Commission encompassing also exchanges of views with representatives of civil society. During these meetings, the working group identified and discussed the several outstanding issues that have to be addressed to make accession possible. Many of these issues have likely meant a lot of headache for the drafters – not only must the draft agreement meet political demands, but the solutions to the issues must be held within the confinements set up by the Lisbon Treaty on the one hand, and the ECHR on the other.[35] On 14th October, 2011, the CDDH-UE presented their final draft accession agreement with explanatory report. At that point, the Steering Committee for Human Rights considered that given the political implications of some of the remaining issues, it had done all it could at that stage and left the agreement in the hands of Committee of Ministers of the Council of Europe.[36]

On 13 June 2012, the Committee of Ministers instructed the CDDH to pursue negotiations with the European Union, in an ad hoc group "47+1", with a view to finalizing without delay the accession instruments.[37] After four meetings spread over the course of approximately a full year, that ad hoc group, on 5 April 2013, presented what is to be considered the finalized draft accession agreement. Now, the CJEU will be asked to give its opinion on the texts compatibility with the EU treaties.[38]

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[32] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Council of Europe Treaty Series, No. 194.

[33] Groussot, Xavier and Pech, Laurent, "Fundamental Rights Protection in the European Union post Lisbon Treaty", *Fondation Robert Schuman Policy Paper*, European Issue no. 173, 2010, p. 10.

[34] The CDDH-UE informal group was composed of 14 members, 7 coming from EU Member States and 7 from States which are not members of the EU.

[35] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review*, Vol. 48, 2011, p. 1034.

[36] CDDH(2011)009, Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights.

[37] COE webpage, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp, accessed at 2013-10-19

[38] COE webpage, http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1394983&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=10, accessed at 2013-10-19

Assuming that the Luxembourg court finds the finalised draft agreement compatible with the treaties, the mandatory procedure prescribed by Article 218 TFEU regarding the conclusion of international agreements with third countries or international organisations must be followed. While the finalised draft agreement indeed represents a "milestone" in the accession negotiations, a complete accession still requires not only a unanimous vote in the Council of Europe and a two-thirds majority in the European Parliament, but also ratification of the draft agreement by all the EU and Council of Europe Member States.[39]

2.4 The premises of accession

In order to understand some of the choices made by the drafting groups, it is thus crucial to be aware of the political and legal constraints under which the agreement has been drafted and the associated interests whom the drafting group have had to respect, balance and, sometimes, compromise. Of course, with so many parties involved in the accession negotiations, there is bound to be an abundance of diverging interests at play. Additionally, although somewhat criticised for the lack of transparency and involvement of "civil society's participation" in the drafting procedure, it is clear from the correspondence between the drafting group and several NGO's that the drafting group have put some effort into getting a diversity of opinion and that they have considered the views of stakeholders that have human rights as their primary interest during the drafting of the accession agreement.[40]

However, there are a few overarching principles that have been particularly important for the work of the drafters. These principles have served as guidelines during the drafting process and all have likely had an influence on what is the final draft agreement presented in the beginning of April 2013.

2.4.1 Principles relating to the interests of the individual

The first group of principles important to accession are those relating to the interests of the individual. Reconnecting to the rationale of Union accession to the ECHR, it was noted early on in the working process of the CDDH-UE that a guiding principle of drafting the accession agreement must be that the Unions accession should be to the benefit of the rights of individuals and their right of access to justice.[41] In its resolution of 19 May 2010, the European Parliament noted the importance of finding adequate answers and solutions to the main technical questions of accession "in order to enable the

[39] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 660.
[40] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 661f
[41] CDDH-UE(2010)01, Summary of discussions of the informal meeting of member states' representatives in the CDDH (Strasbourg, 4 May 2010), p. 2.

EU's accession to the ECHR to be used for the benefit of citizens".[42] Accordingly, important principles, such as the principle of equality of the parties in proceedings, the need to preserve the applicant's procedural position and rights, and the need to avoid a complicated or cumbersome mechanism which would slow down proceedings were all acknowledged as guiding principles by the CDDH-UE for the purpose of drafting the accession agreement.[43] Indeed, for an individual applicant, the benefits of a complete and coherent European fundamental rights regime could easily be lost somewhere along the tracks of a long and cumbersome procedure.

2.4.2 Principles relating to the integrity of the ECHR

The second group of principles are those relating to the integrity of the ECHR system. First, and most importantly, there is the need to, as far as possible, preserve the system of the convention, even though the EU is a non-state party acceding to a legal instrument created for states. As put in the words of the European Parliament *"*[It is] *important, in the interests of those in both the Union and third countries who are seeking justice, to give preference to accession arrangements that will have the least impact on the workload of the European Court of Human Rights."*[44] The ever increasing caseload of the ECtHR has long been a problem in Strasbourg and even if measures are being taken to remedy the ECtHR backlog, the Strasbourg Court still have a long way to go.[45]

A second important principle is that of preserving the equality of the parties to the convention.[46] However, not only is the EU a non-state party, it is also a *sui generis* international organization with a federal like structure of which all its 27 Member States are already signatories to the ECtHR. As such, issues of equality are inevitable and extend to several aspects of accession; EU participation and voting rights within the Committee of Ministers; the adaptation of certain procedural mechanisms to accommodate the specificity of the EU judicial structure within the framework of the convention; and, in light of the current relationship between the EU and the ECHR, the actual standard of fundamental rights protection to which the ECtHR will hold the different contracting parties responsible. A system of fundamental rights protection where the signatory states are not equal to each other would

[42] CDDH-UE(2010)03, European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, p. 4.
[43] CDDH-UE(2010)12, Draft elements prepared by the Secretariat on Procedures before the European Court of Human Rights (Chapter C of the draft list of issues), p. 5.
[44] CDDH-UE(2010)03, European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, p. 4.
[45] Interlaken Declaration, High Level Conference on the Future of the European Court of Human Rights, 19 February 2010.
[46] CDDH-UE(2010)12, Draft elements prepared by the Secretariat on Procedures before the European Court of Human Rights (Chapter C of the draft list of issues), p. 5.

ultimately lose its legitimacy. Thus the equality of the parties has been one of the pivotal points during accession discussions.

The third principle relating to the ECHR is the need to respect the Court's responsibility to ensure the good administration of justice in the cases before it, i.e. that the ECtHR remains as master of the proceedings.[47]

2.4.3 The autonomy of the Union legal order

The last type of "principle" relates to the interests of the EU and is not as much a guiding principle as it is an absolute and fundamental aspect of the European Union legal order.[48] Disregarding any political aspects, the dominantly biggest hurdle to accession has been the requirements to draft an agreement that will let the Union accede to the ECHR without adversely affecting the autonomy of the Union legal order. The effects of any adaptations made specifically to accommodate the Union under the Convention system may represent a detriment to the other important principles of accession and fundamental rights protection. The constraints set up by Union autonomy in relation to international agreements concluded by the Union has thus made accession to the ECHR a difficult balancing act where several interests have to be weighed against each other.

However, while it is clear that the preservation of Union autonomy is a precondition for accession, the complexity of the accession process has not been reduced by the fact that it is not entirely clear what the exact definition of autonomy is within the context of EU law.[49] While the full understanding of EU autonomy is outside the scope of this paper, it is nevertheless necessary to have a brief look at the concept and how it affects EUs international commitments to be able to fully understand and discuss the choices made by the drafters of the accession agreement.

2.4.3.1 Internal autonomy

The concept of autonomy of the European Union was first addressed by the Court of Justice in the landmark case of *Costa v ENEL*[50] as a result of a structural development ranging back a few years earlier.[51] In their ruling, the CJEU established that the law of the treaties was an independent source of law that "*could not […] be overridden by domestic legal provisions […] without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."*[52]

The main rationale behind the concept of Union autonomy is the importance of uniform interpretation of EU law throughout the whole Union. Different

[47] CDDH-UE(2010)12, Draft elements prepared by the Secretariat on Procedures before the European Court of Human Rights (Chapter C of the draft list of issues), p. 5.
[48] van Rossem, Jan Willem, "The Autonomy of EU Law: More is Less?", in Wessel, R. A. and Blockmans, S. (eds.), *Between Autonomy and Dependence*, 2013, Springer, p. 18.
[49] van Rossem, Jan Willem, "The Autonomy of EU Law: More is Less?", in Wessel, R. A. and Blockmans, S. (eds.), *Between Autonomy and Dependence*, 2013, Springer, p. 14.
[50] Case 6/64, *Costa v. ENEL*, [1964] ECR 585.
[51] Barents, R., *The Autonomy of Community Law*, 2004, Kluwer Law International, p. 242.
[52] Case 6/64, *Costa v. ENEL*, [1964] ECR 585, p. 594.

interpretations of EU law within different Member States would undermine the rights guaranteed by the Union legal order and rob it of its Union character.[53] As such, the autonomy of the Union legal order is a concept of fundamental significance for the very nature of the EU[54] and arguably, it is the most essential characteristic of the Union body of law.[55]

Since *Costa v ENEL*, the Court of Justice have had several opportunities to elaborate on the concept and while the early understandings of Union autonomy were mostly focused on the relationship between the Union and its Member States, for example as a basis for primacy and direct effect of Union law, the concept does encompass several external aspects reflecting the relationship between the EU legal order and international law.[56] As expressed by Haberstam and Stein, the *"internal dimension of European constitutionalism is only half to promise of an autonomous legal order".*[57]

2.4.3.2 External Autonomy

The external dimension of autonomy has, quite naturally, developed primarily through the opinions of the CJEU on international agreements. Through the Opinions of the Court of Justice relating to previous draft agreements envisaged or entered by the Union, the CJEU has made clear that any such agreements must not violate Union autonomy[58], and set out the constraints to which any international agreement entered by the Union must abide. In particular, the CJEU has made clear that international law must not impinge upon the unique judicial structure of the Union.[59] Thus, also with regards to external autonomy the rationale of unity can be seen through the CJEUs concern to *"remain in control of the interpretation and application of EU norms".*[60]

Thus, in order to understand the meaning of external Union autonomy one has to look at the opinions of the CJEU in relation to the international agreements previously entered or envisaged by the Union where the external autonomy of the Union has been an issue. It was in Opinion 1/91 on the draft agreement on the European Economic Area (EEA)[61] that these issues were first addressed by the CJEU. It has since been confirmed and re-

[53] Barents, R., *The Autonomy of Community Law*, 2004, Kluwer Law International, p. 8.
[54] ABC of Union law, http://eur-lex.europa.eu/en/editorial/abc_c05_r1.htm. Accessed 2013-10-19
[55] Barents, R., *The Autonomy of Community Law*, 2004, Kluwer Law International, p. 243.
[56] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1029.
[57] Haberstam, Daniel and Stein, Eric, "The United Nations, the European Union, and the king of Sweden: Economic sanctions and individual rights in a plural world order", *Common Market Law Review,* Vol. 46, 2009, p. 62.
[58] Opinion 1/91 [1991] ECR I-6079; Opinion 1/92 [1992] ECR I-2821; Opinion 1/00 [2002] ECR I-3493; Opinion 1/09 [2011] ECR I-1137.
[59] van Rossem, Jan Willem, "The Autonomy of EU Law: More is Less?", in Wessel, R. A. and Blockmans, S. (eds.), *Between Autonomy and Dependence,* 2013, Springer, p. 16
[60] van Rossem, Jan Willem, "The Autonomy of EU Law: More is Less?", in Wessel, R. A. and Blockmans, S. (eds.), *Between Autonomy and Dependence,* 2013, Springer, p. 19
[61] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1029.

established by the Court in several following Opinions on international agreements concluded or envisaged by the Union, most recently in its Opinion 1/09 on the draft agreement for a Union patent court.[62] For the sake of Union accession to the ECHR, three points are especially crucial.

First, while an international agreement may establish a system of courts to which the Union will be submitted, those courts must not be allowed to decide on the distribution of competences between the Union and its Member States. Such a system is likely adversely affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Union legal order. This was one of the reasons why the first envisaged EEA agreement was deemed incompatible with the EU Treaties. The draft EEA agreement envisaged the setup of an EEA court which would have jurisdiction in disputes between the "Contracting Parties" of the EEA agreement. The crux, however, was that the expression "Contracting Party", as defined in the agreement, could have several different meanings, depending on the case brought before the Court. In a dispute, it was therefore not unlikely that the Court could be called upon to interpret the expression "Contracting Party" within the meaning of the EEA agreement. To be able to do so, the Court would have had to examine and rule on the distribution of competences between the Community and its Member States. Thus, the envisaged agreement was incompatible with Community law.[63]

Second, the CJEU must not be robbed of its exclusive right to interpret Union law. This means that an international agreement "must not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement."[64] This was again the case in the first draft of the envisaged EEA agreement. The EEA court would have had jurisdiction to interpret the EEA agreement, whose provisions were drafted identically or in close resemblance of their counterparts in the EEC Treaty. In order to interpret the agreement, the EEA court would thus be required to interpret the corresponding provisions in the EEC Treaty. Coupled with the fact that the EEA court, in their interpretation of the provisions, would only be bound by the rulings given by the CJEU prior to the date of signature of the agreement and not those after, this would encroach upon the exclusive jurisdiction of the CJEU to interpret EU law in a way incompatible with the Treaty.[65]

Lastly, as a third condition of external autonomy, "an international agreement must not alter the essential character of the powers which the Treaties confer on the institutions of the Union and on the Member States and which are indispensible to the preservation of the very nature of the

[62] Opinion 1/92 [1992] ECR I-2821; Opinion 1/00 [2002] ECR I-3493; Opinion 1/09 [2011] ECR I-1137.
[63] Opinion 1/91 [1991] ECR I-6079, para. 34-36.
[64] Opinion 1/00 [2002] ECR I-3493, para. 13.
[65] Opinion 1/91 [1991] ECR I-6079, para. 38-46.

European Union." [66] Any such transfer of powers must follow the Treaty amendment procedure set out in Article 48 TEU. This includes, but is not limited to, divesting the decisions of the CJEU of their binding nature.[67] In Opinion 1/91, this was the third reason of the Court of Justice for declaring the envisaged EEA agreement incompatible with the Treaty. The envisaged agreement set up a system where the courts and tribunals in the EFTA States, under certain circumstances, would be able to ask questions and make references to the Court of Justice. However, the answer of the CJEU would be purely advisory. According to the Court, "such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding".[68]

2.4.3.3 Autonomy codified

The constraints set by Union autonomy on accession are not only found in the previous opinions of the CJEU. The case law of the court is reflected in the treaty provisions regulating the accession and thereto related protocols. Although autonomy is not explicitly mentioned in said provisions, their meaning is clearly that the terms of Union accession to the ECHR must be drafted to preserve Union autonomy. [69]

Article 6(2) TEU stipulates that "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."*

Article 1 and 2 of Protocol No. 8 relating to Article 6(2) TEU further clarifies the meaning of the Article.[70] According to the Protocol, the accession agreement must not only *"make provisions for preserving the specific characteristics of the Union and Union law"*, but also *"ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions".*

Furthermore, Article 3 of Protocol No. 8 states that "Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union," which in turn provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided therein."

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[66] Lock, Tobias, "Accession of the EU to the ECHR: Who would be responsible in Strasbourg?, in Ashiagbor, Diamond, Countouris, Nicola and Lianos, Ioannis (eds.), *The European Union after the Treaty of Lisbon*, 2012, Cambridge University Press, p. 119ff

[67] Opinion 1/91 [1991] ECR I-6079, para. 61-65, Opinion 1/92 [1992] ECR I-2821, para 32 and 41, Opinion 1/00 [2002] ECR I-3493, para. 12.

[68] Opinion 1/91 [1991] ECR I-6079, para. 61-65.

[69] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11, Issue 4, 2011, p. 662f

[70] Protocol (No 8), annexed to the TEU and TFEU, relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2010, O.J. C83/273.

The scope of Article 6(2) and the relating Protocol is somewhat unclear since it fails to explain the meaning of *"the specific characteristics of the Union and Union law"*. The provisions must however be read in light of the opinions given by the CJEU in relation to international agreements previously entered or envisaged by the Union.[71] Some guidance as to how the Protocol should be interpreted was also given by Court of Justice in its Discussion document on certain aspects of accession released 5 May 2010.[72] In the document, with Protocol No. 8 as a basis, the court put emphasis on the need to preserve the special characteristics of the Union's system of judicial protection, an aspect fundamental to union autonomy.[73] This would, according to the Court, at least require the institution of "*a mechanism* [...] *which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention*.". As will be seen *infra*, the prior involvement of the CJEU in proceedings before the ECtHR is indeed one of the focal points of the draft accession agreement.

2.4.4 Striking a balance

Making the Union subject to an external review mechanism will raise issues of Union autonomy whether one likes it or not. In fact, it seems that autonomy is not only the cause to many of the issues related to accession, but sometimes also the very restraint to their solution. The issues related to Union autonomy may be both procedural in nature as well as legal substantial. Accordingly, the implications the accession of the Union to the Convention will have on Union autonomy has been scrutinized to no end during the process of drafting the accession agreement and discussed thoroughly in legal doctrine. The drafters have been extraordinarily responsive to the "feedback"[74] from the European courts for the purposes of finding a solution that does not conflict with the Treaties[75] while at the same trying to meet the demands of non-EU countries and to respect as far as possible the guiding principles of accession. At stake is accession under the Treaties as they stand. Should the Court of Justice in its opinion, following the procedure set out in Article 218(11) TFEU,[76] decide to declare the draft agreement incompatible with Union law, the Union may be forced to amend

[71] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 662f
[72] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 5 2010.
[73] van Rossem, Jan Willem, "The Autonomy of EU Law: More is Less?", in Wessel, R. A. and Blockmans, S. (eds.), *Between Autonomy and Dependence,* 2013, Springer, p. 16.
[74] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 5 2010; Joint communication from Presidents Costa and Skouris, 2011.
[75] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 14.
[76] See Article 218(11) TFEU

the Treaties before concluding any agreement on accession.[77] In such case, it is unlikely that Member States would stop at negotiating amendments to facilitate accession, and the floodgates would be opened for Member States to renegotiate the Treaties as a whole.[78]

At the same time, a draft accession agreement accepted by the Court of Justice is by no means the end of the line. As the accession agreement has to be ratified individually by all the 47 parties to the ECHR, a draft agreement that has compromised other important values might not be accepted further down the line.

[77] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review,* Vol. 48, 2011, p. 997.
[78] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1049.

3 Issues related to Union autonomy and accession

There are several issues connected to the accession of the EU to the ECHR of which the most prominent may be divided into three separate categories; institutional issues – relating to the Unions participation in the institutional and administrative framework of the ECHR; substantive issues – relating to the scope of accession as well as issues of competence and jurisdiction of the two European Courts; and procedural issues – relating to procedural mechanisms needed to accommodate a special legal entity such as the European Union within the framework of the Convention side by side with its Member States.[79] The focus of this paper are the issues related to accession caused by the need to respect the Union as an autonomous legal order and will not go into any of the institutional issues, nor any issues relating to the scope of accession - i.e. which protocols to the Convention the Union should ratify once it accedes. This chapter will focus on three issues that have been particularly contentious during accession discussion. First, it will look to the institution of a co-respondent mechanism. Second, it will look to the issue of involving the Court of Justice prior to any proceedings before the ECtHR in which there is a question regarding the interpretation or validity of EU law. Third, it will look to the well-established doctrine of equivalent protection and how the relationship between the two European courts may be altered following accession.

3.1 The correct addressing of applications to Member States and the Union

The accession of the Union to the ECHR poses a rather specific situation. As an instrument originally designed only for states, the Convention does not possess the proper mechanisms needed to harbour a non-state autonomous legal entity such as the Union, side by side with its Member States. [80] Due to the federal-like structure of the Union and how Union law is implemented into the legal orders of the Member States, situations might arise where it is not clear whether it is only the acting Member State that should be held responsible for a specific violation under the Convention or if responsibility should comprise the Union as well.[81] Where there is no

[79] For an overview and legal assessment, see Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011.
[80] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 38.
[81] Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of

discretion for the Member State to implement Union law, it has merely acted as an executive body, and responsibility should be shared with the Union (the legislative body). Similarly, it is ultimately the Member States that agrees upon and enacts the provisions of the EU treaties on which basis the EU institutions, bodies, offices or agencies act.[82] This special structure of the Union clearly has some implications on accession and as a consequence the need has been recognized for a mechanism that ensures that applications to the ECHR *"are correctly addressed to Member States and/or the Union as appropriate".* [83]

The need of such a mechanism also presents itself with regard to the difficulty for an individual applicant to determine from which legal order the alleged violation of the Convention stems, and in turn the effects such difficulties could potentially have for an individual in terms of admissibility of a case. Take for example a case where a national authority has acted against an individual based on the provisions of an EU regulation. The individual applicant is in such situation likely to address her complaint only to the Member State, even if the national authorities had no discretion in applying the EU regulation. Should this affect the admissibility of the case? If so, the ECtHR would likely, in their assessment of the applicant's choice of defendant, have to decide on the distribution of competences between the Union and its Member States to be able to rule on admissibility. Not only would such arrangement, similarly to the jurisdiction provision in the first envisaged EEA agreement[84], amount to an infringement of the autonomy of Union law, but it would be devastating for the individual applicant who would not have their case tried.[85]

The following section will first describe the drafting groups presented solution to these problems, the so called co-respondent mechanism. Secondly, it will look to some of the benefits of the mechanism. Lastly, it will discuss some of the critique directed against the mechanism.

3.1.1 The co-respondent mechanism

During the discussions on accession, perhaps as an indication of the complexity of the matter, there were several different suggestions on how a mechanism that would ensure that applications to the ECHR are correctly addressed to Member States and/or the Union as appropriate could be set up.

14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 13.

[82] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 38.

[83] Protocol (No 8), annexed to the TEU and TFEU, relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2010, O.J. C83/273; CDDH-UE(2010)12, Draft elements prepared by the Secretariat on Procedures before the European Court of Human Rights (Chapter C of the draft list of issues), p. 4

[84] Opinion 1/91 [1991] ECR I-6079, para. 31 to 35.

[85] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1013; Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review*, Vol. 48, 2011, p. 1038f

Some of the discussed solutions involved, for example, that the Union and the Member States would draw up a declaration of competence that would inform individual applicants and non-Member States of the division of responsibilities within the Union.[86] It could also be solved through the establishment of a preliminary reference procedure between the ECtHR and the CJEU, where the Strasbourg court would turn to its colleagues in Luxembourg to delineate the distribution of competences between the Union and its Member States.[87] However, many of these proposals had flaws in that they either would have been too complex and/or burdensome for the individual applicant, or that they were likely to conflict with Union autonomy as defined by the CJEU in their opinions on international agreements.[88]

In the end, the drafters of the accession agreement found the middle road in the co-respondent mechanism, which would let the Union or the Member States join proceedings as co-respondents respectively where the other party was subject to an allegation under the Convention.[89] Article 3 of the accession agreement stipulates that the following paragraph shall be added at the end of Article 36 ECHR.

> "The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings."

The mechanism is envisaged to trigger in two different scenarios. For the European Union in the case of an application directed against one or more EU Member States:

> "the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, including decisions taken under the TEU and under the TFEU, notably where that violation could

[86] Draft Opinion of the Committee on Foreign Affairs for the Committee on Constitutional Affairs on institutional aspects of the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of 9 February 2010, (2009/2241(INI))

[87] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1047. Making reference to Badinter, "Adhésion de l'Union européenne à la convention européenne de sauvegarde des droits de l'Homme", French Senate, available at: www.senat.fr/europe/r25052010.html#toc1, accessed at 2013-10-19.

[88] For example through forcing the ECtHR to interpret the distribution of competences between the Union and the Member States, or through the transfer of new functions to the EU institutions, "circumventing" the amendment procedure in Article 48 TEU. For further elaboration on the suggested mechanisms, see Lock, Tobias, "Accession of the EU to the ECHR: Who would be responsible in Strasbourg?, in Ashiagbor, Diamond, Countouris, Nicola and Lianos, Ioannis (eds.), *The European Union after the Treaty of Lisbon*, 2012, Cambridge University Press.

[89] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 37.

have been avoided only by disregarding an obligation under European Union law."[90]

Conversely, if there is an application directed against the European Union, the Member States may become co-respondents to the proceedings

> "Where an application is directed against the European Union, the Union Member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the TEU, the TFEU or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments."[91]

The mechanism is triggered only at the request of a High Contracting Party and by decision of the Court. Simply put, a High Contracting Party (the Union or the Member States) may make a reasoned request to join the proceedings as co-respondent in a case notified by the Court. The Court then makes a decision in light of the reasons given by the High Contracting Party concerned. If it is "*plausible"* that the specific conditions for triggering the mechanism are met, the High Contracting Party will join as co-respondents.

As stated by the new paragraph, a party that joins proceedings as co-respondent becomes full party to the case. The co-respondent is thus not only allowed the limited participation in proceedings of a third party intervener (regulated under Article 36(2) ECHR), but will have all rights and obligations of an original respondent, such as the right to defense and the obligation to execute a judgment given by the ECtHR.[92]

3.1.1.1 The benefits of the co-respondent mechanism

The co-respondent mechanism solves some of the issues resulting from the unique structure of the European Union judicial system. First, while it is almost certainly impossible to fully remove all the complexities that the special structure of the Union judicial system imposes within the framework of the Convention system, the co-respondent mechanism removes from the applicant the burden of determining the distribution of competences between the Member States and the Union. Additionally, coupled with the mechanism for the prior involvement of the CJEU to any proceedings before the ECtHR in which the EU will act as respondent or co-respondent *(see infra)*, the co-respondent mechanism allows for a system where the

[90] 47+1(2013)008rev2, Final report to the CDDH, ANNEX I, Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental freedoms, Article 3(2).
[91] 47+1(2013)008rev2, Final report to the CDDH, ANNEX I, Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental freedoms, Article 3(3).
[92] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 39.

applicant only needs to exhausts the domestic remedies of one of the legal orders in order to fulfil the criteria of Article 35 ECHR.[93]

Second, the mechanism addresses the issue of holding a Member State or the Union responsible for a violation for which it has no legislative power to remedy. According to Article 3 paragraph 7 of the draft agreement:

> "If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondents shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible."

Thus, in cases where the co-respondent mechanism is applied, the applicant is assured that the correct party is held responsible in case of a violation.[94]

From a Union point of view, by removing from the ECtHR the task of interpreting, as well as any possibility to make decisions on, the distribution of competences between the Union and the Member States, the mechanism also is a means of respecting Union autonomy.

3.1.1.2 Criticism against the co-respondent mechanism

The co-respondent system has not gone without criticism. Just like many of its alternatives, the co-respondent mechanism too has been criticised based on its complexity. Furthermore, it has been pointed out in legal doctrine that there is a risk of an abuse of procedure or that the mechanism leads to the creation of an unfavourable position of the applicant.

3.1.1.2.1 A binding or voluntary mechanism?

One of the big discussion points with regard to the co-respondent mechanism during the drafting process has regarded its voluntary nature.[95] Up until the final draft of the accession agreement, there was no clause or document to force or guarantee that either the EU or a Member State would join proceedings where the criteria for the mechanism would be fulfilled. Some commentators, as well as fourteen of the non-EU state parties to the convention[96], found this rather unfortunate as a voluntary based co-

[93] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1039.
[94] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1039f.
[95] Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 13; ETUC Submission, European Trade Union Confederation (ETUC) submission dated 16 June 2011, para. 37; Lock, Tobias, "End of an epic? The draft agreement on the EU's accession to the ECHR", *Yearbook of European Law*. Vol. 31 No. 1, 2012, pp. 162-197.
[96] CDDH 47+1(2013)003, Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland,

respondent mechanism could be said to run counter to the very purpose of its creation which was "*to avoid gaps in the participation, accountability and enforceability in the Convention system"*.[97] Not only would it put in the hands of the potential "perpetrator" the choice of her own "prosecution", but the fact that a potential co-respondent has an option whether or not to join proceedings next to the original respondent could also lead to a situation where, even though a claim is successful, the judgment cannot be fully enforced since the (lone) main respondent would not have the competence to bring the violation to an end. [98]

In a study carried out by the CDDH in 2002 on technical and legal issues of the EU accession to the ECHR, the study group considered that *"it would probably be difficult to give the Court the power to oblige the EC/EU to join a case as co-defendant, for this might be seen as prejudging questions relating to the respective responsibilities of the Contracting Parties or in effect render inoperative certain admissibility criteria of the EC/EU".*[99] The reasons for making the co-respondent mechanism voluntary could also be based on an underlying fear of violating Union autonomy. If the EU could be bindingly obliged to join as co-respondent, based on an interpretation made by a body other than the Court of Justice on the distribution of competences between the Union and its Member States, the mechanism, similarly to the jurisdictional clause in the first envisaged EEA Agreement, would be incompatible with the treaties.

While there is no clause in the final draft agreement itself, a declaration by the European Union to be made at the time of signature of the Accession Agreement has been drafted in Appendix II to the final draft agreement. To reconcile the conflicting interests of *a)* not prejudging any questions of responsibility; *b)* avoiding gaps in the participation, accountability and enforceability in the Convention system; and *c)* remaining respectful of Union autonomy; the draft declaration states that:

> "Upon its accession to the Convention, the European Union will ensure that[…] it will request to become a co-respondent to the proceedings before the European Court of Human Rights or accept an invitation by the Court to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met"[100]

Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights, p. 4.

[97] Lock, Tobias, "End of an epic? The draft agreement on the EU's accession to the ECHR", *Yearbook of European Law*. Vol. 31 No. 1, 2012, pp. 162-197; 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 39.

[98] Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 13; ETUC Submission, European Trade Union Confederation (ETUC) submission dated 16 June 2011, para. 37.

[99] CDDH(2002)010 Addendum 2, Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, para. 59.

[100] 47+1(2013)008rev2, Final report to the CDDH.

Thus, there will be a declaration by the Union to *voluntarily* agree to become a co-respondent whenever possible and, as such, any issues of prejudgment should be eliminated. Furthermore, this nuance seem especially important from an Union autonomy point of view as the EU will not be compelled by an external body to join proceedings, but only do so out of its own will.

Illustrative of the complexity (and perhaps sanctity) of Union autonomy may be the fact that some commentators ask themselves the question whether the co-respondent mechanism could still, even in its purely voluntary construction, gives the ECtHR too much of a discretion in determining whether a party may join as co-respondent to the initiated proceedings or not. The question is whether the construction where the ECtHR have the power to *deny* a High Contracting Party the right to join as co-respondent (likely a result of the principle that the ECtHR should remain master of the proceedings)[101] does the job at preserving Union autonomy any better than a construction where it would have the power to oblige a party to join.[102] On that note, Ritleng criticises the draft mechanism for its vague formulation which *"leaves the Strasbourg Court a margin of discretion"* to decide whether the EU or a Member State should be joined as co-respondent or not, and instead suggests that a solution similar to the one provided in Article 6 of Annex IX to the UNCLOS (which regulates the distribution of responsibility and liability under the Convention between State Parties and international organizations based on a declaration of distribution of competences) would have been a more suitable approach.[103]

With regard to the interest of avoiding gaps in participation, accountability and enforceability in the Convention system, these aspects still seems somewhat compromised as this "soft" solution could still leave some leeway to the EU in terms of participation, for example through their own interpretation of whether the conditions set out in Article 3, paragraph 2 of the Accession Agreement are met or not. Additionally, as pointed out by Lock, it is interesting that *"the Member States do not appear to have undertaken a similar obligation in the reverse case where the EU is the main respondent."*, something that may be appropriate for the Member States to do in order to meet the requirements of Protocol No. 8.[104]

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[101] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1015.

[102] Eckes, Christina, "EU External representation in context: Accession to the ECHR as the final step towards mutual recognition", in Blockmans, S. and Wessel, R. (eds.), *Principles and practices of EU external representation*, CLEER working papers 2012/5, 2012, p. 113f.

[103] Ritleng, Dominique, "The accession of the European Union to the European convention on Human Rights and Fundamental Freedoms: A Threat to the Specific Characteristics of the European Union and Union Law?", *Uppsala Faculty of Law Working Paper 2012:1*, 2012, p. 12f.

[104] Lock, Tobias, "Shared responsibility after EU accession to the ECHR revisited", http://www.sharesproject.nl/shared-responsibility-after-eu-accession-to-the-echr-revisited/, Accessed at: 2013-09-26.

Arguably, there may be some benefits to this "kvasi-voluntary" construction of the co-respondent mechanism, other than to keep it within the boundaries of Union autonomy and avoiding issues of prejudgment. Since the mechanism could impose a considerable procedural burden on applicants and Contracting Parties, particularly if the CJEU has not yet ruled on the compatibility with the Convention of the relevant provisions of EU law, it is important that the mechanism is not triggered unnecessarily.[105] Indeed, in many cases, the most appropriate way to involve the EU in proceedings will be through its intervention as a third party.[106] Even though the drafters of the accession agreement expect that the co-respondent mechanism may be applied only in a limited number of cases,[107] one of the benefits that come with the presented solution would be that it potentially could help to prevent any inappropriate and excessive use of the mechanism, since the EU and the Member States respectively is likely themselves in the best position to determine whether or not it is necessary to join as co-respondent or if it simply suffices to intervene as third party.

3.1.1.2.2 Inadequacy in relation to violations through omissions?

Another point of critique directed against the co-respondent mechanism is that it arguably falls short when it comes to addressing violations that arise through failures to legislate, or so called omissions. Beyond the obligation under the ECHR that the State Parties must not interfere with human rights, the Convention contains a number of positive obligations, which in essence requires national authorities to adopt reasonable and suitable measures to safeguard the rights of individuals.[108] Looking to the EU and its Member States, the difficulty to distinguish who of the parties must be held responsible in the case of an omission becomes perhaps even more problematic than in the case of a "pure" interference. Where there is no act or legislation behind a violation of the Convention, an assessment of the division of competences between the EU and the Member States is the only possible way to determine the distribution of responsibility. The key question becomes: "Who had the competence, and thus responsibility, to

[105] NHRI Submission, Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR for CDDH-UE meeting on March 15-18 2011, p. 1f.

[106] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 46.

[107] CDDH-UE(2011)11, Draft revised Explanatory report to the draft Agreement on the Accession of the European Union to the European Convention on Human Rights, para. 38 with footnote 18 according to which, during the negotiations, the view was expressed that, in recent years, the only cases which might have certainly required the application of the co-respondent mechanism would have been *Matthews v. United Kingdom*, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* and *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*. However, as expressed by Eckes, that estimation may be somewhat of a low estimate. See Eckes, Christina, "EU Accession to the ECHR: Between Autonomy and Adaptation", *The Modern Law Review*, Vol. 76, Issue 2, 2013, p. 267f.

[108] López-Ostra v. Spain, App. No. 16798/90, 9 December 1994.

act?" A question that, if investigated and answered by the ECtHR, likely would violate the autonomy of the Union legal order.[109]

Lock distinguishes two scenarios, in which an applicant may allege a violation of Convention rights by omission,

(1) A scenario where a provision of EU law mandates action by a Member State but the Member State has failed to act.

In such case, the co-respondent mechanism would not trigger, since the provision of EU law would not be contrary to the Convention. The application would be directed at the responsible Member State for its failure to comply. This scenario should not pose a problem as the interpretation of EU law would be unnecessary.

(2) A scenario where no legal provision exists, neither at EU level nor at Member State level.

The real problematic scenario arises where legal provisions exist in neither of the EU or national legal orders. The co-respondent mechanism could not be triggered since there would be no relevant provision of EU law at all. A literal reading of the final draft of the co-respondent mechanism would thus render the mechanism inapplicable, even where the division of competences between the Member States and the EU is not clear-cut. Thus, it could be argued that the draft agreement does not satisfy the requirement in Article 1 of Protocol 8 to the Lisbon Treaty, since it does not entirely ensure that applications under the Convention are addressed to the correct entity.[110]

3.1.1.2.3 Assigning responsibility between respondents

Another issue relating to the co-respondent mechanism is the tension between Union autonomy and the need for the ECtHR to assign responsibility to one or both of the respondents where a violation has been found. The problem is not explicitly inherent in the co-respondent mechanism itself, but rather stems from the notion that responsibility should be attributed based on the distribution of competences. However, since any external assessments of competence distribution between the Union and the Member States are carefully avoided with regard to the *application* of the co-respondent mechanism, the problem resurfaces when the time comes for the ECtHR to decide on the issue of attributing responsibility - a problem that might not be present within a system where the issue were solved in the

[109] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1042; Opinion 1/91 [1991] ECR I-6079, para. 34-35. *"the EEA Court will have to rule on the respective competences of the Community and the Member States […] It follows that the jurisdiction conferred on the EEA Court […] is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty.* ***This exclusive jurisdiction of the Court of Justice*** *[emphasis added by the author] is confirmed by Article 219 of the EEC Treaty".*

[110] Lock, Tobias, "End of an epic? The draft agreement on the EU's accession to the ECHR", *Yearbook of European Law*. Vol. 31 No. 1, 2012, pp. 162-197.

stage of determining the appropriate respondent through, for example, a declaration of competences or a reference procedure where the CJEU decides on the delineation of competences.[111]

In order to address the issue, the drafters of the accession agreement have envisaged a system of joint responsibility as the general rule, *"unless the Court, on basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible."*[112]. In this regard, the European Group of National Human Rights Institutions (NHRI) have expressed a view that the apportionment of liability in co-respondent cases is important, particularly in relation to just satisfaction and that a clear apportionment would better enable the NHRIs to assist in domestic implementation of judgments.[113] And while the system of joint responsibility prescribed in Article 3, paragraph 7 of the draft accession agreement ensures that the correct party, capable of removing the violation, will always be held responsible, it also creates a situation where the final decision of the ECtHR must be followed by an internal EU procedure where it is decided how responsibility ultimately shall be distributed between the Union and the Member States in each case.

Additionally, fourteen of the non-EU Member States that are signatories to the Convention have also directed sharp critique at this solution. They consider the fact that the ECtHR would not by itself be authorized to hold only one party responsible if there is no joint request by the parties to be inconsistent with the ECHR system.[114]

3.2 The prior involvement of the Court of Justice

Another contentious issue related to the accession has been the necessity of ensuring the involvement of Court of Justice prior to any proceedings before the ECtHR in which the EU will act as respondent or co-respondent. The

[111] It could be speculated, however, that this is not necessarily true. Considering the sanctity of Union autonomy, it could be imagined that the determination of liability by an external court could still be an issue even if the distribution of competences had been determined at an earlier stage to decide on appropriate respondents as the apportionment of responsibility could require new considerations.

[112] 47+1(2013)008rev2, Final report to the CDDH, Appendix I, Article 3(7).

[113] NHRI Joint submission, NGOs' perspective on the EU accession to the ECHR: The proposed co-respondent procedure and consultation with civil society (3 December 2010), p. 4; NHRI Submission, Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR for CDDH-UE meeting on March 15-18 2011, p. 3.

[114] CDDH 47+1(2013)003, Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights.

issue reflects both concerns of the autonomy of the Union legal order and the subsidiary nature of the ECtHR.

Simply put, because of the specificity of the Union judicial system, which encompasses both the national courts of the Member States as well as the CJEU, there is a risk that a case might come before the ECtHR where the Luxembourg court have not yet made a ruling on the interpretation of the Union laws that are allegedly in conflict with the Convention.

First, it should be mentioned that the issue of involving the CJEU should almost always be solved by default. In most cases, the Court of Justice will naturally be involved through the applicant's obligation to exhaust domestic remedies. Basically, actions of EU law can be divided into two categories. First, there is the "direct action" which is brought immediately before the Union courts. This would for example be the case where an individual is seeking to challenge the validity of a Union measure that is of direct concern to that individual, following the provision set out in Article 263(4) TFEU. The second category of action is the "indirect action" where a question of interpretation or validity of Union law has been raised before a national court. In such cases, national courts have a far-reaching obligation to request preliminary rulings from the CJEU on questions of interpretation and validity of EU law, following the case law of Foto-Frost[115] and the so called CILFIT-criteria.[116] Accordingly, as expressed by the presidents of the two European courts, the situation that the ECtHR would be called upon to rule on an alleged violation without the prior involvement of the CJEU "should not arise often".[117] The problem only really arises in the situation of; *a)* an indirect action where a national court, for whatever reason, declines to request a preliminary ruling from the CJEU in a case where a question of the compatibility of a national measure derived from Union law with any of the Convention rights are concerned;[118] or *b)* when the validity of an act lies outside the scope of CJEU jurisdiction and cannot be challenged under the Treaties.[119]

It has been argued by some commentators that, because the ECtHR would only have the jurisdiction to examine the compatibility of EU acts with the Convention, and not to interpret them in an internally binding manner, there would be no issues concerning EU autonomy even in cases where the CJEU were not previously involved, meaning that the procedure for the prior involvement of the CJEU is unnecessary. [120]

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[115] Case C-314/85 *Foto-Frost* [1987] ECR 4199.
[116] Case C-77/83 *CILFIT* [1984] ECR 1257.
[117] Joint communication from Presidents Costa and Skouris, 2011.
[118] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 65.
[119] Giorgio, Gaja, "Accession to the ECHR", in Biondi et. al. *EU law after Lisbon,* 2012, Oxford University Press, p. 192f.
[120] Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011, p. 1047, also with discussion to the opposite, whether such a procedure itself could go against Union autonomy; See also Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper,* European Issue no. 218, 2011, p. 16.

The final draft agreement does not state any other reason for implementing the new mechanism than the principle of ECtHR subsidiarity.[121] Indeed, for purposes of autonomy, there would not be much difference between a construction where the ECtHR may be called upon to rule on the compatibility of an act of the Union with the Convention without any prior involvement of the CJEU, and one where the ECtHR may decide to declare an act of the Union incompatible with the Convention contrary to a prior ruling by the CJEU. After all, it is the EU that accedes to the Convention and not the other way around; CJEU judgments will not be binding upon the ECtHR.[122]

But if Union autonomy were not an issue, it is curious why the CJEU so explicitly would state the opposite. In its Discussion document of 5 May 2010, with a reasoning based on autonomy coupled with the subsidiary nature of the Convention, the CJEU stated that the ECtHR must not be called on to decide on the conformity of an act of the Union with the Convention without the prior involvement of the Court of Justice. With reference to how the exclusive jurisdiction of the CJEU to declare acts of the Union invalid "is in integral part of the competence of the Court of Justice", the CJEU suggested that any other solution would be prone to affect the 'powers' of the institutions of the Union in a way contrary to Protocol No 8 to Article 6(2) TEU.[123] The "preservation of the monopoly of the Court of Justice of the EU in the interpretation of EU law" was also stressed in a press release by the Council of the European Union as an objective of the forthcoming accession negotiations.[124]

Maybe, the real fear, as suggested by Jacqué, is that the ECtHR could end up in a situation where they would have to interpret a provision of Union law to at all be able to determine its compliance with the Convention.[125] Here, the connection to the subsidiary nature of the ECHR seems all the more natural. The principle of subsidiarity is firmly established in the legal system of the ECHR and the Strasboug court is not "a Court of fourth instance" that *"will substitute itself for national authorities when it comes to interpreting acts of national law or a treaty"*.[126] With the arrangement of the judicial system of the Union, where the Court of Justice alone has jurisdiction in questions of application and interpretation of Union law,[127]

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[121] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 65-66.
[122] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 68.
[123] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 5 2010.
[124] Press release, 2998th Council Meeting, Justice and Home Affairs, Brussels, 25 and 26 February 2010, 6855/1/10 REV 1 (Presse 42).
[125] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1016.
[126] Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1017
[127] Article 19(1) TEU; Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1012.

ensuring the prior involvement of the CJEU becomes an issue of both subsidiarity and effectiveness. It is not really a question of "involving the Court of Justice as the supreme court of the European Union" but the only way "proceedings can be brought in order to carry out an internal review before the external [ECtHR] review takes place".[128] As often reiterated by the ECtHR, "the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights". [129]

3.2.1 Criticism against the prior involvement of the CJEU

Accepting that there is a need for a procedure ensuring the prior involvement of the CJEU, there initially were concerns on how such mechanism may be structured. The final draft agreement with explanatory report does not address the issue entirely but is content by suggesting that an internal EU procedure be put in place which would let the CJEU review "the compatibility with the Convention rights at issue of the provision of EU law which has triggered the participation of the EU as a co-respondent".[130] But even if there are still a lot of question marks on how the final product of the mechanism for the prior involvement of the CJEU will look, there are still some interesting points to make with regard to how the mechanism will affect the procedural position and rights of an individual applicant.

3.2.1.1 Length of procedures

The envisaged procedure for involving the CJEU has been one of the most contentious points of the draft accession agreement in the civil society organisation opinions submitted to the CDDH during the drafting process. The main concern expressed during discussions in relation to the prior involvement of the Court of Justice is related to the length of procedure before the ECtHR.[131] Justice delayed is sometimes justice denied and neither the CJEU nor the ECtHR are exactly known for their speedy judgments. If a case must go through the systems of both courts, it is not very likely that justice will come at greater speed. In 2011, the average duration of proceedings before the CJEU in references for preliminary

[128] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 5 2010, para. 11.
[129] Among others, *Scordino v. Italy*, App. No. 36813/97, 26 March 2006, para. 140.
[130] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 65.
[131] European Group of National Human Rights Institutions, Views of the European Group of National Human Rights Institutions on EU Accession to the ECHR submitted to the CDDH-UE Working Group (29 November 2010); AIRE & AI Contribution, Submission by the AIRE Centre and Amnesty International (14/03/2011); NHRI Submission, Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR for CDDH-UE meeting on March 15-18 2011; NHRI Submission, Submission of the European Group of National Human Rights Institutions to the Extraordinary Meeting of the CDDH (October 2011).

rulings was 16.4 months.[132] On part of the ECtHR, the impact of an ever-increasing caseload has long been a problem in Strasbourg. Although measures are being taken to remedy the ECtHR backlog, the Strasbourg Court still have a long way to go.[133]

Considering that the procedure in the cases where the Court of Justice will need to be involved will be even further prolonged through the introduction of a co-respondent mechanism,[134] these problems might be very real for the few applicants that end up in these situations. The nightmare scenario of course being a case where the Court of Justice has already been involved in the course of national proceedings but did not, for whatever reason, rule on EU law compatibility with the particular Convention rights at stake on that occasion, ultimately requiring a second involvement of the Luxembourg court.[135] Whether this scenario is real or purely academic remains to be seen, but the CJEU has at times been criticised for its eclectic use of references to the ECtHR or its shallow examination of those rights once they have been brought up. For example, the Luxembourg court have been known to refuse to deal with a question of Convention rights violation by the EU institutions if they are not raised by the parties and therefore considered *ultra petita.* On other occasions, the Court has even gone so far as to disregard such arguments even were they were put forward by the parties, based on the fact that the case could be decided on different grounds. It should be noted however, that the CJEU occasionally has decided to bring up questions of fundamental rights even where a party, or in cases of preliminary rulings, a national court has failed to do so.[136]

To address the issue of complex and time-consuming proceedings, the drafters of the accession agreement has envisaged the use of a procedure similar to the existing PPU procedure used before the CJEU.[137] The proposal has generally been welcomed as a positive addition to the draft agreement.[138] In contrast to regular references for preliminary rulings before the CJEU, the PPU cases had an annual average duration of between 2 - 2.5

[132] CJEU Annual Report 2011, Statistics concerning the judicial activity of the Court of Justice

[133] Interlaken Declaration , High Level Conference on the Future of the European Court of Human Rights, 19 February 2010; Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 17.

[134]Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 16.

[135] Lock, Tobias, "EU Accession to the ECHR: Consequences for the European Court of Justice", *Paper for EUSA Conference*, 2011, p. 30.

[136] de Witte, Bruno, "The use of the ECHR and Convention case law by the European Court of Justice", in Popelier, P., Van de Heyning, C. and Van Nuffel, P. (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the national courts,* 2011, Intersentia, p. 25ff.

[137] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 69.

[138] NHRI Submission, Submission of the European Group of National Human Rights Institutions to the Extraordinary Meeting of the CDDH (October 2011).

months since its introduction in 2008.[139] But is justice in haste just as bad as justice delayed? In case of the rather successful PPU procedure, such argument has generally been rejected. However, as expressed by Barnard in relation to that procedure: "if the Court becomes so inundated with cases under the PPU that it is unable to give each one the attention it deserves", that view might change.[140] Likely, the amount of cases that will trigger the mechanism for the prior involvement of the CJEU and the new accelerated procedure will not be very many.[141] However, the integrity of the existing PPU procedure, and the effects of adding to that caseload, should nonetheless still be of concern, and the drafters of the agreement should plan accordingly.[142]

3.2.1.2 Procedural burden for the applicant

Even if proceedings before the CJEU may be held short through an accelerated procedure, the prior involvement of the Court of Justice could still represent a considerable burden for the individual applicant, financially, legally and procedurally.[143] The draft explanatory report to the draft agreement does provide that applicants *"will be given the possibility to obtain legal aid"* for the purpose of submitting their observations to the CJEU, but is not more specific as for the conditions such legal aid would be given.[144]

The NHRIs are also conscious about their own right to submit observations in proceedings before the CJEU.[145] The draft explanatory report seems to exclude such possibility as it envisages a procedure that will only allow *"the parties involved"* to make observations before the CJEU[146] while *"the parties and any third party interveners"* will have the opportunity to assess the consequences of the Court of Justices ruling before proceedings are resumed at the ECtHR.[147]

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[139] CJEU Annual Report 2011, Statistics concerning the judicial activity of the Court of Justice

[140] Barnard, Catherine, "The PPU: is it worth the candle?", *European Law Review*, Vol. 34, 2009, p. 295.

[141] Joint communication from Presidents Costa and Skouris, 2011, para. 58.

[142] O'Meara, Noreen, "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR", *German Law Journal*, Vol. 12, No. 10, 2011, p. 1825.

[143] AIRE & AI Contribution, Submission by the AIRE Centre and Amnesty International (14/03/2011).

[144] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 66.

[145] NHRI Submission, Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR for CDDH-UE meeting on March 15-18 2011, p. 4; Proposals ETUC/CES, Comments and Proposals on the Draft agreement on the accession of the EU to the Convention (CDDH-UE (2011)04) and on the Explanatory report to the draft agreement on the accession of the EU to the Convention (CDDH-UE(2011)05) submitted by the European Trade Union Confederation (ETUC) to the CDDH-UE Working Group (10/03/2011), para. 29.

[146] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 66.

[147] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 69.

3.2.1.3 The effect of CJEU judgments

Another issue worth noting is what the actual effect of CJEU rulings given under the envisaged procedure for prior involvement will have, beyond providing the proper interpretation of the EU law at stake. Some aspects of the procedure are made clear in the final draft explanatory report, but a few dimensions remain unknown. What is made clear in the draft explanatory report is, first, that the CJEU will only assess the legal basis for the act or omission complained of by the applicant, and not the merits of the case;[148] second, that the Court of Justice's assessments will not bind the ECtHR. (otherwise, the whole purpose of an external control mechanism would be for naught);[149] and third, that the ECHR will resume its examination of the merits of the application after "the parties and third party interveners have had an opportunity to assess properly the consequences of the ruling of the CJEU".[150]

Even if the contours of the mechanism are established in the draft agreement and the explanatory report, there are still a few questions that are not entirely answered by the draft. Disregarding the question of how the mechanism will work from a procedural technical point of view (something that will have to be worked out internally by the EU[151]) the question remain what the actual effect of the CJEU rulings will be in the proceedings pending before the Strasbourg court. Similarly, it may not be entirely clear what effect the rulings will have internally for the EU institutions and the Member States.[152]

When the mechanism for involving the CJEU is triggered, there will be two possible outcomes of the CJEU assessment. Either the Luxembourg court will find that the Union act is in conformity with convention rights in which case the act will remain valid under EU law; or, it will find to the contrary, that the act is in violation of fundamental rights and declare the act invalid.

First, in cases where the CJEU finds that the act is in conformity with the Convention rights, the effect should not be very different to that of a ruling by any national court. While the rulings will not be binding on the Strasbourg Court, the prior involvement of the CJEU gives the ECtHR the possibility to show an amount of deference by taking into consideration the Luxembourg Courts ruling and its reasoning for reaching that particular ruling.[153]

In their communications with the CDDH-UE, the NHRI have expressed some reservation in this regard. The NHRI's fear that following the process of involving the CJEU, "the two Courts could potentially show excessive

[148] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 67.
[149] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 68.
[150] 47+1(2013)008rev2, Final report to the CDDH, Appendix V, para. 69.
[151] For further discussion, see Lock, Tobias, "Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review,* Vol. 48, 2011.
[152] Noreen O'Meara, German Law Journal, Vol. 12 No. 10 p. 1824f.
[153] Lock, Tobias, "EU Accession to the ECHR: Consequences for the European Court of Justice", *Paper for EUSA Conference*, 2011, p. 39f.

deference to one another [...] which could be to the detriment of the applicants."[154] While the submission is related to an earlier draft version from February 25 2011, which states more explicitly that the proceedings before the CJEU should be taken into account by the procedure of the ECtHR[155], the concerns are still valid considering the current relationship between the two European courts. The mechanism could be said to somewhat institutionalise the relationship of trust established through the *Bosphorus* doctrine and the procedure would indeed place the EU in a favoured position with regards to other contracting parties of the Convention, whose constitutional courts does not hold the same privilege.[156]

As expressed by Eckes, it is not unlikely that the opinion of the CJEU will set the framework of the following legal discussions in Strasbourg *"as parties will be invited to submit their observations after the Court of Justice has given its opinion on the case and will most likely follow in their arguments the Court's approach."*.[157]

Fourteen of the non-EU Member States that are signatories to the Convention expressed in January 2013 as a major concern that *"the impact on the Strasbourg Court of the assessment made by the Luxemburg Court should not be underestimated"* and that such procedure would indeed constitute a privilege for one Contracting Party, indicating that the issue is rather a shortcoming of the EU judicial system than a matter requiring an adaptation of the Convention system. They continued to note that *"the issue needs further consideration and should be seen in the wider context of derogations from the principle of equal footing"*.[158]

However, short of removing the procedure for prior involvement, it is not likely that much can be done at the drafting stage to address the issue, and it will ultimately be in the hands of the judges of the ECtHR to decide the amount of deference suitable to show towards their colleagues in Luxembourg.

Legally, the issue might be more complicated in cases where the CJEU instead finds that the Union act is not in conformity with the Convention

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[154] NHRI Submission, Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR for CDDH-UE meeting on March 15-18 2011, p. 3f.

[155] See CDDH-UE(2011)04, Draft agreement on the accession of the EU to the Convention, Article 4(5).

[156] Giorgio, Gaja, "Accession to the ECHR", in Biondi et. al. *EU law after Lisbon*, 2012, Oxford University Press, p. 193f; Eckes, Christina, "EU External representation in context: Accession to the ECHR as the final step towards mutual recognition", in Blockmans, S. and Wessel, R. (eds.), *Principles and practices of EU external representation*, CLEER working papers 2012/5, 2012, p. 114f

[157] Eckes, Christina, "EU External representation in context: Accession to the ECHR as the final step towards mutual recognition", in Blockmans, S. and Wessel, R. (eds.), *Principles and practices of EU external representation*, CLEER working papers 2012/5, 2012, p. 114

[158] CDDH 47+1(2013)003, Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights.

rights at stake and declares the Union act invalid. Although it might not be entirely clear what legal effects such ruling will have internally within the Union legal order, following Opinions 1/91 and 1/00 of the Court of Justice, the Luxembourg Courts rulings will likely have to remain internally binding.[159] As such, any implementing action relating to the invalidated act will retroactively be rendered illegal.[160] The question is then how this should affect whether the applicant would still be considered a victim within the meaning of the Convention or whether the proceedings before the ECtHR should be drawn to a close.[161] However, while the CJEU ruling may invalidate a general measure violating the Convention, the individual may still be subject to an enforceable national court decision that are now *res judicata.* As such, the status of the applicant would depend on the course of action taken by the national authorities following the CJEU ruling. If the national authorities do not officially remove the violation, the applicant will remain a victim.[162] It remains to be seen how this situation will be handled.

3.3 The doctrine of equivalent protection

One of the major topics relating to European human rights has long been the legitimacy of the silent cooperation and mutual respect shown between the ECtHR and the CJEU. In relation to accession, the question is if and, if so, how this relationship will be altered post accession. Specifically, one of the most contentious issues is whether the doctrine of equivalent protection established between the ECHR and the EU through the famous *Bosphorus*[163] decision would be at all reasonable to maintain following accession. As one of the main objectives of accession is the creation of a more coherent, and thus strengthened, fundamental rights regime in Europe, an external control mechanism that remains too respectful of its subject could render the benefits of accession illusory. This section will first, in brief, turn to the history and development of the relationship of mutual

[159]Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1021.

[160] Lock, Tobias, "EU Accession to the ECHR: Consequences for the European Court of Justice", *Paper for EUSA Conference*, 2011, p. 38.

[161] Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 16; O'Meara, Noreen, "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR", *German Law Journal*, Vol. 12, No. 10, 2011, p. 1824f; Lock, Tobias, "EU Accession to the ECHR: Consequences for the European Court of Justice", *Paper for EUSA Conference*, 2011, p. 38.

[162] Lock, Tobias, "EU Accession to the ECHR: Consequences for the European Court of Justice", *Paper for EUSA Conference*, 2011, p. 38; Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper*, European Issue no. 218, 2011, p. 16.

[163] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005.

respect established between the two European courts. Second, it will look to the well-established doctrine of equivalent protection and its current application. Third, and finally, it will look to the expected effects of accession on the relationship between the two courts and the problematic question of application or non-application of the doctrine of equivalent protection post accession.

3.3.1 Development of the doctrine of equivalent protection

As mentioned earlier, the evolution of the EU is that of a pure economic integration project without any competences in the human rights area, to that of a full blown political union where human rights is a fundamental aspect relevant to any Union action. Accordingly, the relationship between the Union and the Convention, whom had started out as two international entities with entirely different objectives, became all the more intricate as the competences of the Union institutions progressively treaded into areas of human rights law. Through the gradual transfer of powers from the national authorities of the Member States to the Union institutions, the lacunae in human rights protection within Europe became increasingly apparent as the EU, who were not a signatory to the Convention, could not be held responsible before the ECtHR.[164]

The "solution" found by the ECtHR (then the European Commission for Human Rights) to address the issue, in 1958, was to hold EU Member States responsible for violations made by the Union.[165] Although hardly effective, the approach showed that the Strasbourg Courts would not just stand by as the EU Member States, through their transferal of powers to the Union, committed to obligations that would hinder them from performing their obligations under the Convention.[166]

Pursuant to the developments within the EU human rights regime in the following years, with particular note of the model of "deference in sovereignty" constructed by the German Constitutional Court in their *Solange II*[167] judgment from 1986, the ECtHR adopted a more cautious approach "*opening the way for a mutual understanding between the Strasbourg Court and the EU human rights regime."*[168] through their

[164] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 876ff

[165] *X v Federal Republic of Germany*, ECHR, No. 235/56, Dec. 10.6.1958, Yearbook 2, 256 (300)

[166] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 878.

[167] Decision of 22 Oct. 1986, BVerfGE 73, 339.

[168] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 880.

judgment in the *M. & Co.* case[169], delivered in 1990. Similar to the approach taken by the German Constitutional Court, the Strasbourg Court held that:

> "The transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection. […] The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance."[170]

With the *M. & Co.* case, the Strasbourg court thus laid down the foundation for the line of case law that eventually resulted in the doctrine of equivalent protection.[171]

Two important aspects may be distinguished with regard to the notion of equivalent protection as constructed by the Strasbourg court in *M. & Co* and later reestablished in *Waite & Kennedy*[172] and *Beer & Regan*[173]. First, the Court recognized that there was a normative basis through which the EU provided the protection of fundamental rights. Second, it noted that the normative basis was complemented by a system of control – the European Court of Justice – through which the observance of human rights was enforced.[174] Thus, for the ECtHR to consider a legal order of fundamental rights protection equivalent to that of the ECHR, it is required that that legal order provides both substantive guarantees as to the observance of fundamental rights as well as judicial mechanisms that observe the application of the legal obligations derived from said rights.

In 2005, through the landmark case *Bosphorus,* the Strasbourg court further clarified its approach to EU human rights and established the current relationship between the ECtHR and the European Court of Justice.

3.3.2 Bosphorus: The current state of affairs

In 1992, Bosphorus Airlines, a Turkish airline charter company, signed a lease agreement for two Boeing 737-300 aircraft with Yugoslav Airlines, the national airline of former Yugoslavia.[175] In 1991, due to the armed conflict and human rights violations taking place in the Federal Republic of

[169] *M. & Co. v. Federal Republic of Germany*, European, App. No. 13258/87, 9 February 1990.
[170] *M. & Co. v. Federal Republic of Germany*, European, App. No. 13258/87, 9 February 1990.
[171] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 880.
[172] *Waite & Kennedy v. Germany*, App. No. 26083/94, 18 February 1999, para. 64ff.
[173] *Beer & Regan v. Germany*, App. No. 28934/95, 18 February 1999, para. 54ff.
[174] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 880.
[175] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 12.

Yugoslavia at the time, the UN had adopted, and the European Community implemented, a series of sanctions against the country.[176] When one of the leased Boeings landed in Dublin, the Irish Minister for Transport, following the obligations laid down in Article 8 of Regulation (EEC) no. 990/93, ordered the detainment of the leased aircraft and a denial of all service, including services that would enable it to fly.[177] After unsuccessfully trying to reverse the decision of the Irish government in the domestic courts of Ireland, including a preliminary reference to the CJEU, the Turkish airline company made a complaint to the ECtHR claiming that Ireland had failed its obligations under Article 1 of Protocol No. 1 of the Convention.[178] In its response, the ECtHR held that, while the Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign powers to an international organisation, a State cannot, on the other hand, fully escape its responsibilities under the Convention by such a transfer.[179] To reconcile these positions, the ECtHR went on to establish the famous *Bosphorus*-test; If a State has no more than implemented legal obligations flowing from its membership of an international organisation considered to provide protection equivalent to that of the Convention, there is a presumption that the State has not departed from the requirements of the Convention. However, that presumption is rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.[180] In *Bosphorus*, after briefly concluding that the protection of fundamental rights under the European Community were equivalent to that for which the Convention provides,[181] and that the protection of Convention rights, in the particular case of *Bosphorus*, could not be considered manifestly deficient,[182] the ECtHR held that the Irish governments impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention.[183]

Thus, pre accession, the state of affairs with regards to the ECtHR – EU relationship may be summarized somewhat as follows. First, the Strasbourg court will examine applications that implicitly claim that a violation of the ECHR has its basis in EU law. Second, the Court has an established "*standard to which the EU human rights regime is held to be equivalent to*

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[176] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 14.
[177] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 32-59.
[178] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 115-121.
[179] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 152-154; Lock, "The ECJ and the ECtHR: The Future relationship between the Two European Courts", *The Law and Practice of International Courts and Tribunals*, Vol. 8, 2009, p. 377f.
[180] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 156.
[181] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 159-165.
[182] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 166.
[183] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 167.

its ECHR counterpart" [184]. In line with *M & CO.* that standard requires both substantive guarantees as well as a system of control through which the observance of human rights is enforced. Third, as a consequence of the presumption of equivalence, not only are EU human rights law immunized from Strasbourg review, but also any act of a EU member state that *"does no more than implement legal obligations flowing from its membership in the organizaton"*[185].[186] These observations were indeed confirmed by the court in the more recent case *Michaud v. France*[187], in which the ECtHR distinguished the case from *Bosphorus* for two reasons. First, in *Michaud,* which concerned the implementation of an EU directive, the state "*had a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection".*[188] Second, the court noted that the *Conseil d'Etat* had refused to *"refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue"* and thus *"ruled without the full potential of the relevant international machinery for supervising fundamental rights"*[189].

Accordingly, the application of the doctrine of equivalent protection does not extend *ad infinitum*. Only areas of EU law that can be reviewed by the EU judicial mechanism as to its conformity with the human rights standards are presumed equivalent. As confirmed by the Strasbourg court in *Matthews*[190], the presumption of equivalence does not include EU primary law, i.e. the founding treaties of the Union, as those acts cannot be challenged before the European Court of Justice. EU primary law are not acts of the Union but rather international treaties entered *freely* by the Member States. It is also arguable, as applied in *Bosphorus*[191] and more recently reiterated in *M.S.S. v. Belgium and Greece*[192], that the application of the doctrine does not extend beyond the policy areas within the limits of what, before the entering into force of the Lisbon treaty, was considered as the "law of "first pillar" of the European Union". [193]

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[184] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal,* Vol. 13, No. 07, 2012, p. 881f.

[185] Speech of Luzius Wildhaber, "*The Coordination of the Protection of Fundamental Rights in Europe",* 3rd Convention of European Lawyers, 8 September 2005, Geneva; referenced in De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal,* Vol. 13, No. 07, 2012, p. 881f.

[186] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal,* Vol. 13, No. 07, 2012, p. 881f.

[187] *Michaud v. France,* App. No. 12323/11, December 6 2012.

[188] *Michaud v. France,* App. No. 12323/11, December 6 2012, para. 113.

[189] *Michaud v. France,* App. No. 12323/11, December 6 2012, para. 115.

[190] *Matthews v. United Kingdom,* App. No. 24833/94, ECtHR 18 February 1999.

[191] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98, 30 June 2005, para. 72.

[192] *M.S.S. v. Belgium and Greece, App. No. 30696/09, 21 January 2011,* para. 338.

[193] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal,* Vol. 13, No. 07, 2012, p. 882f.

3.3.2.1 A controversial ruling

It is clear that, in *Bosphorus*, the ECtHR showed a great degree of deference towards the CJEU.[194] Generally, as partially seen through the case law of the Strasbourg court, the relationship between the two European courts has been characterized by such mutual respect, yet not without a certain degree of "mandate demarcation" from both courts.[195] The *Bosphorus* decision was not an uncontroversial one and six of the seventeen ECtHR Judges in the case, while concurring with the findings of the majority, thought the amount of deference shown to the Union went too far, as it would let the Union apply a less stringent standard of protection. Additionally, it was argued that such degree of deference posed the risk of creating a double standard of review between High Contracting Parties that had acceded to international conventions and High Contracting Parties that had not.[196]

3.3.3 Continued application of Bosphorus doctrine?

The question now is if, post accession, this silent cooperation is still justifiable.[197] If it should continue to apply, should it be extended to include all measures adopted by the Union? Indeed, what is the point of accession if the threshold when scrutinizing EU law is so high that those cases are virtually excluded from a review by the ECtHR? Even if cases would be admissible *rationae parsonae*, a continuation of the application of the doctrine of equivalent protection, of its current design or in a new form, could in practice leave EU measures materially protected from ECtHR review. Such approach would arguably eliminate some of the substantive reasons on which EU accession to the ECHR is based, and leave it as an endeavour based primarily on political and symbolic reasons.[198] The draft accession agreement remains silent on the issue (although the issues related

[194] Lock, "The ECJ and the ECtHR: The Future relationship between the Two European Courts", *The Law and Practice of International Courts and Tribunals*, Vol. 8, 2009, p. 395.
[195] De Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 874f.
[196] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005 , Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki; See also Eckes, Christina, "Does the European Court of Human Rights Provide Protection from the European Community? – The Case of Bosphorus Airways", *European Public Law*, Vol. 13, Issue 1, 2007.
[197] Lock, "The ECJ and the ECtHR: The Future relationship between the Two European Courts", *The Law and Practice of International Courts and Tribunals*, Vol. 8, 2009, p. 395.
[198] Lock, "The ECJ and the ECtHR: The Future relationship between the Two European Courts", *The Law and Practice of International Courts and Tribunals*, Vol. 8, 2009, p. 891f; See also Francis, Jacobs, "Accession of the European Union to the European Convention on Human Rights", *Hearing organized by the Committee on Legal Affairs and Human Rights in Paris on 11 September, 2007*, available at: http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf, Accessed at: 2013-09-26.

to the prior involvement of the CJEU undeniably touches upon similar matters) and the opinions of commentators in legal doctrine are varied.[199]

3.3.3.1 A difficult question

While the most intuitive answer to the question whether the doctrine of equivalent protection should remain or not seem to be in the negative, Douglas Scott points out that any predictions are difficult. [200] The altered relationship between the two courts, where the ECtHR will always have the last word, arguably begs for a more thorough review[201] and there should no longer be a need for the comity that has defined the relationship between the two European courts for so long. A continuation of the "special treatment" given with regard to EU law would strike a false note in relation to the other State Parties and the principle that all parties of the convention should be treated equally.[202] In light of the considerable critique directed against the doctrine already in the era of pre accession, it would seem difficult to justify any continued application; yet even harder to extend its application to cases that directly concern the conduct of the EU rather than the actions of a state following its obligations under EU law. Such extension seems especially unmotivated considering that one of the main rationales behind the doctrine of equivalent protection is "the importance of international cooperation and of the consequent need to secure the proper functioning of international organizations"[203] – an objection that should not be feasible with regard to "unilateral" EU actions.

Yet, with regard to the EU, the doctrine of equivalent protection arguably holds an additional dimension; a concession to the unique character of the Union. If the *Bosphorous* doctrine is seen as a concession to the unique character of the Union and Union autonomy, the doctrine should remain intact as accession will not alter those premises.[204] In fact, the "specific legal

[199] Groussot, Xavier and Pech, Laurent, "Fundamental Rights Protection in the European Union post Lisbon Treaty", *Fondation Robert Schuman Policy Paper, European Issue no. 173*, 2010, p. 9; Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11, Issue 4, 2011, p. 666ff; Eckes, Christina, "EU Accession to the ECHR: Between Autonomy and Adaptation", *The Modern Law Review*, Vol. 76, Issue 2, 2013, p. 265; de Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012; Ritleng, Dominique, "The accession of the European Union to the European convention on Human Rights and Fundamental Freedoms: A Threat to the Specific Characteristics of the European Union and Union Law?", *Uppsala Faculty of Law Working Paper 2012:1*, 2012, p. 18f.

[200] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11, Issue 4, 2011, p. 668.

[201] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11, Issue 4, 2011, p. 668.

[202] Giorgio, Gaja, "Accession to the ECHR", in Biondi et. al. *EU law after Lisbon*, 2012, Oxford University Press, p. 188

[203] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 149ff.

[204] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, Vol. 11, Issue 4, 2011, p. 668.

order" of the EU is recognised in the preamble of the final draft accession agreement. A view that the doctrine of equivalent protection should remain would thus be based on arguments similar to those expressed by the European Commission in the *Bosphorus* proceedings:

> "[The doctrine of equivalent protection] was an approach which was especially important for the European Community given its distinctive features of supra-nationality and the nature of Community law: to require a State to review for Convention compliance an act of the European Community before implementing it (with the unilateral action and non-observance of Community law would potentially entail) would pose an incalculable threat to the very foundations of the Community, a result not envisaged by the drafters of the Convention, supportive as they were of European cooperation and integration."[205]

The argument goes that if the doctrine of equivalent protection were to be dismissed, it would potentially challenge the direct effect and primacy of EU law and its supranational characteristics.[206]

3.3.3.2 Implicit effects of the accession agreement?

As somewhat of a dark prophesy for the fears expressed by the NHRI:s during drafting negotiation that, following the process of prior involvement, "the two Courts could potentially show excessive deference to one another [...] which could be to the detriment of the applicants."[207], and also as a confirmation of the critique expressed by the fourteen non-EU Member States with regard to the process of prior involvement,[208] De Hert and Korenica argues that, within the framework of the draft accession agreement, "it is logical the Strasbourg Court will continue to uphold the Doctrine *substantively* even after the accession".[209] One of the reasons being that the co-respondent mechanism, coupled with the process of prior involvement, lends itself to putting the Union in a privileged position as to

[205] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, 30 June 2005, para. 124.
[206] de Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 892.
[207] NHRI Submission, Response of the European Group of National Human Rights Institutions: EU Accession to the ECHR for CDDH-UE meeting on March 15-18 2011, p. 3f.
[208] CDDH 47+1(2013)003, Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights.
[209] de Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 876.

making a "better pitch in convincing the Starbourg Court that its law and mechanisms offer equivalent protection to those of the ECHR".[210]

Similarly, Eckes points out that the prior involvement mechanism could be said to somewhat institutionalise the relationship of trust established through the *Bosphorus* doctrine,[211] but still is of the belief that the doctrine should be dropped as a "*general* presumption [of equivalent protection] cannot be applied to a *particular* opinion that the Court of Justice has given under the prior involvement procedure". The Strasbourg court can no longer hide behind general considerations and can only find the specific opinions of the CJEU to be either correct or incorrect.[212]

3.3.3.3 Is there still a need for deference?

Another aspect that perhaps should be considered is the recent developments on the internal EU application and interpretation of the CFEU, in particular the Luxembourg courts understanding of the "homogeneity clause"[213], Article 52(3) of the Charter, which regulates the scope and interpretation of Charter rights that correspond to rights also guaranteed by ECHR. One of the central questions being – does the Charter impose an obligation for the CJEU to strictly follow Strasbourg case-law when interpreting "corresponding rights"? Through its rulings in the Grand Chamber cases *Åkerberg*[214], in part related to the interpretation of the *ne bis in idem* principle, and *Melloni*[215], in part related to the interpretation of the standard of protection on judgments *in absentia*, the CJEU has arguably taken a rather strict approach to the interpretation of Article 52(3) CFEU. Most notably, the Luxemburg court in both cases neglect to make any reference to Article 52(3) CFEU and in *Åkerberg*, contrary to the well elaborated Opinion of AG Cruz Villalón[216], declined to make any reference to ECtHR case law at all, despite the obvious correspondence between Article 50 CFEU and Article 4 of Protocol 7 ECHR. Thus, it could be argued that the CJEU has developed an autonomous interpretation of the *ne bis in idem* principle that in many cases will diverge from that developed by the

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[210] de Hert, Paul and Korenica, Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", *German Law Journal*, Vol. 13, No. 07, 2012, p. 893.

[211] Giorgio, Gaja, "Accession to the ECHR", in Biondi et. al. *EU law after Lisbon*, 2012, Oxford University Press, p. 193f; Eckes, Christina, "EU External representation in context: Accession to the ECHR as the final step towards mutual recognition", in Blockmans, S. and Wessel, R. (eds.), *Principles and practices of EU external representation*, CLEER working papers 2012/5, 2012, p. 114f

[212] Eckes, Christina, "EU Accession to the ECHR: Between Autonomy and Adaptation", *The Modern Law Review*, Vol. 76, Issue 2, 2013, p. 279f.

[213] Groussot, X., Olsson, I., *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgements in Åkerberg and Melloni*, Lund Student EU Law Review, 2013, Autumn, Vol II, p. 13, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323409, accessed 2013-10-19.

[214] Case C-617/10 *Åkerberg* [2013] nyr.

[215] Case C-399/11 *Melloni* [2013] nyr.

[216] Opinion of Advocate General Cruz Villalón delivered on 12 June 2012 in Case C-617/10 *Åkerberg* [2013] nyr.

ECHR[217], In the light of *Åkerberg* and *Melloni*, it seems that the Luxembourg court has taken a minimalistic approach to Article 52(3) CFEU that reinforces the autonomous character of EU law towards the ECHR legal order, rather than creating coherence.[218]

This view should however be nuanced by the fact that not all Member States have ratified Protocol 7 to the ECHR and as expressed by Groussot and Olsson, it seems *"a distinction should be drawn between core corresponding rights (mandatory interpretation in light of the ECHR case-law) and peripheral corresponding rights (independent interpretation from the ECHR case law)"*.[219]

In light of the *Åkerberg*, however, there may arguably still be reasons for the ECtHR to continue to afford the CJEU the comity shown in years past, as the Luxembourg Court has indicated that it is prepared to give EU fundamental rights a meaning independent from the case law of the ECtHR even where Charter and Convention rights correspond. Should the Luxembourg court refuse to give full effect to a ECtHR decision where it considers that the Strasbourg court does not give proper respect to the constitutional identity of the Union, that would – contrary to the very purpose of accession – certainly call into question the coherence of the protection of fundamental rights within Europe.[220]

3.3.3.4 A remodeling of the doctrine?

While the *Bosphorus* doctrine may no longer be an option in its current shape and form[221], that does not preclude that the ECtHR will find other ways to approach the Union and the specifity of its legal system.

While the continued application of the *Bosphorus* doctrine in any form would, as mentioned earlier, arguably stand in conflict with the principle of equality of the Contracting States to the ECHR, it must be remembered that – in line with the old Aristotlelian principle that "equals should be treated equally and unequals unequally" – due respect should be given to the

[217] Devroe, W., "How General Should General Principles Be? Ne Bis in Idem in EU Competition Law", in Berniz, U., Groussot, X. and Schulyok, F., (eds.), *General Principles of EU Law and European Private Law*, Forthcoming 2013, Kluwer, paras 105-107.
[218] Groussot, X., Olsson, I., *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgements in Åkerberg and Melloni*, Lund Student EU Law Review, 2013, Autumn, Vol II, p. 17ff, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323409, accessed at 2013-10-19.
[219] Groussot, X., Olsson, I., *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgements in Åkerberg and Melloni*, Lund Student EU Law Review, 2013, Autumn, Vol II, p. 18, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323409, accessed at 2013-10-19.
[220] Ritleng, Dominique, "The accession of the European Union to the European convention on Human Rights and Fundamental Freedoms: A Threat to the Specific Characteristics of the European Union and Union Law?", *Uppsala Faculty of Law Working Paper 2012:1*, 2012, p. 19.
[221] Except for perhaps, as expressed by Jaques, the rights contained in protocols to which the Union has not acceded, but which is binding on that Member State. See Jacque, Jean Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *Common Market Law Review*, Vol. 48, 2011, p. 1004f.

Unions special status as a non-state actor. This could offer some justification for the special treatment of the Union next to the other Contracting Parties – the EU should only be treated equally to the other Contracting Parties as long their situations are comparable. Thus, with regard to applications where the EU is involved as a supranational organization – a situation that would be distinguished from a case where the application directly concerns the actions of the EU institutions – i.e. where it has acted as the legislative body rather than the executive one (and where the EU would be involved as a co-respondent), a treatment different to that of other Contracting Parties could arguably be justified and perhaps even necessary.

It is however argued that the level of deference shown by the ECtHR with regard the Union legal order should not remain at the same level as that shown through the *Bosphorus*-doctrine and the presumption of equivalent protection. To give such *carte blanche* to the Union fundamental rights protection system when the Union has acceded to the Convention seems both unjustified and would indeed run counter to the purpose of accession as the only difference between the *Bosphorus* type of cases pre- and post-accession would be a longer and more cumbersome procedures for an individual applicant but with equally poor chances of a successful claim. An example of a more appropriate approach would be, as suggested by Ritleng, for the ECtHRto afford the EU a certain margin of appreciation when striking a fair balance between fundamental rights and the general interests of the EU.[222]

[222] Ritleng, Dominique, "The accession of the European Union to the European convention on Human Rights and Fundamental Freedoms: A Threat to the Specific Characteristics of the European Union and Union Law?", *Uppsala Faculty of Law Working Paper 2012:1*, 2012, p. 19.

4 Conclusion

While the finalization of the draft accession agreement in April 2013 was indeed a milestone in the accession process, there is still a lot of work to be done before the EU actually accedes as a party to the Convention. First, the CJEU will be asked to give its opinion on this international agreement to be concluded between the Union and other parties. Following that, a complete accession still requires not only a unanimous vote in the Council of Europe and a two-thirds majority in the European Parliament, but also ratification of the draft agreement by all the EU and Council of Europe Member States.[223] A number of internal rules and procedures to the EU also have to be adopted, such as the procedure for the prior involvement of the CJEU and a procedure to determine who of the EU and the Member States that will ultimately have to pay where they have been found jointly liable.[224]

Despite the considerable efforts by the drafting group to respect Union autonomy, it seems difficult to predict the outcome of the assessment the CJEU will make of the agreement in its forthcoming opinion. There is obviously room for doubts with regard to how some of the mechanisms in the draft agreement comply with the golden standard required to respect the Union autonomy that the Luxembourg court guards so vehemently. Especially with regard to the co-respondent mechanism, there are still question marks as to whether the solution stays within the boundaries of Union autonomy. For example, does merely giving to the ECtHR the possibility to decline the Union to join as a co-respondent where it seeks to do so infringe on the CJEU exclusive jurisdiction to rule on the distribution of competences between the Union and the Member States? It is hard, however, to imagine a less autonomy-intrusive mechanism that does not compromise, to such a degree that it will not work politically, either the interests of the ECtHR, the interests of the other non-EU state parties to the Convention and/or the interests of individuals seeking to avail their rights before the Strasbourg court. For example, solutions like that of a system of declaration of competence, similar to the one used under the UNCLOS, does not seem to lend itself practical where the subject of litigation concerns alleged fundamental rights infringements relating to individuals rather than conflicts between states.

As for the political process and the remaining negotiations, it seems likely that we will not see a ratified accession agreement for some time considering the prolonged process of working out the now presented draft accession agreement. Especially the prior involvement mechanism and the presented system of joint liability still seem to be contentious. As late as 21 January 2013, fourteen non-EU Member States to the Convention expressed

[223] Douglas-Scott, Sionaidh, "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review,* Vol. 11, Issue 4, 2011, p. 660.

[224] Lock, Tobias, "Shared responsibility after EU accession to the ECHR revisited", http://www.sharesproject.nl/shared-responsibility-after-eu-accession-to-the-echr-revisited/, Accessed at: 2013-09-26

"major concerns" with regard to, among others, these two specific points - something that does not seem to have been entirely addressed in the final draft. These concerns are mainly founded on the guiding principles of accession: The adaptations of the ECHR system as a whole should be limited to what is strictly necessary for the purpose of accession; and that accession should, to the largest possible extent, be based on the principle of equal footing between the EU and the 47 high contracting parties. This seems to be at the pinnacle of accession problems, and perhaps the main reason why the accession process is taking such a long time: to reconcile these two fundamental interests - how equal may the footing be when Union autonomy has to be respected?

On the other side of accession lies another aspect of the equality/autonomy dilemma - the question of the continued application of the doctrine of equivalent protection. While the future of the doctrine truly lies in the hands of the ECtHR rather than with the accession agreement, it could be argued that the finalised draft agreement sets a framework that institutionalises and incentivises a continuation of the doctrine of equivalent protection, or rather the deference and comity that permeates it, although perhaps in a less outspoken and less deferent shape and form. Such application seems most likely and perhaps even necessary in cases where the EU has acted as a supranational entity and is involved in proceedings as co-respondent. Recent case law of the CJEU indicates that the Luxembourg court is prepared to give EU fundamental rights a meaning independent from the case law of the ECtHR and to reinforce the autonomous character of EU law towards the ECHR legal order.

On that note, another problematic aspect relating to the specific structure of the Union and its judicial system should be mentioned. It is evident that the proposed mechanisms and procedures in the draft accession agreement will take their toll on the process before the Strasbourg court. What may already be considered a long procedure will with the current draft, in cases where either the EU or the Member States are involved as co-respondents, not only become even longer but likely also more cumbersome for the individual applicant. In this regard, it would be especially unfortunate if the ECtHR were to maintain *status quo* with regard to the doctrine of equivalent protection as, in such cases, the accession of the Union would likely be more to the detriment of the individuals whose rights the Convention protects, rather than to their benefit.

Going back to where it all began, looking to the rationale behind Union accession to the ECtHR, it must be acknowledged that, in the long term, accession will be a significant step forward for fundamental rights within Europe. No doubt will the accession represent an advancement of the European integration process and be a *"further step towards political Union"* and accession will likely increase the legitimacy and credibility of the Union in the eyes of third countries and the Member States in questions of fundamental rights. Importantly, the gap in fundamental rights protection where the acts of the institutions of the European Union previously did not fall within the scope of the ECtHRs jurisdiction will be closed. It remains to

be seen whether the accession will lead to a more coherent human rights regime within Europe as this is still contingent upon the attitude and relationship between the two European Courts. Considering the direction of development of fundamental rights protection within Europe the last few decades however, a better formulation of that question might instead be whether accession will noticeably "speed up" the coherence of rights between the two European fundamental rights regimes.

With that said, there is no denying that the process of accession seems to have been almost as smooth as trying to fit a square peg into a round hole. To chime in with some other commentators[225], it seems fair to question whether EU accession to the ECHR has been the best hole to sink time and resources for the benefits of fundamental rights within Europe considering the current workload of the ECtHR. While it is too late to look back, hopefully it won't be too long until the European citizens can reap the fruits of all the work put into accession.

[225] Groussot, Xavier, Lock, Tobias and Pech, Laurant, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", *Fondation Robert Schuman Policy Paper, European Issue no. 218*, 2011, p. 17.

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