



CENTRAL EUROPEAN UNIVERSITY

**THE RELATIONS BETWEEN THE CJEU AND THE ECtHR WHEN THE ACCESSION OF
THE EU TO ECHR OCCURS**

BY KATSIARYNA ANOSHKVA

LL.M. SHORT THESIS

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PROFESSOR: PETRA DÓRA BÁRD

CENTRAL EUROPEAN UNIVERSITY

1051 BUDAPEST, NADOR UTCA 9

HUNGARY

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
INTRODUCTION.....	1
CHAPTER I. THE WAY TOWARDS ACCESSION.....	3
SECTION 1. HUMAN RIGHTS PROTECTION WITHIN THE EU: GENERAL OVERVIEW.....	3
SECTION 2. DEVELOPMENT OF THE LEGAL BASIS FOR THE EU ACCESSION TO THE ECHR.....	9
CHAPTER II. THE PROSPECTIVE RELATIONS BETWEEN THE CJEU AND THE ECtHR	16
CONCLUSION	33
BIBLIOGRAPHY	35
TABLE OF CASES.....	39

INTRODUCTION

The relationship between the Court of Justice of European Union (CJEU or ECJ, if referring to pre-Lisbon period) and the European Court of Human Rights (ECtHR) has been elaborated throughout the years. At the moment, the EU is not a party to the European Convention on Human Rights (ECHR) and thus not directly bound by it. At the same time the CJEU uses the ECtHR's case law and the Convention itself while dealing with the human rights matters, underlining that the latter is considered as the main source of inspiration. The Strasbourg court, however, also regularly refers to the CJEU's practice.

This mutual beneficial use of practice has predetermined the nature of the relations between the two major European courts, which could be characterized as cooperation and mutual exercise of comity in that both courts respect the work of the other. Thus, the famous *Bosphorus* presumption, that the membership in an international organization can be justified as long as the organization protects human rights equivalent to that of the Convention, has only reaffirmed the content of such nexus.¹ However, in the nearest future these relations would undergo significant changes.

According to Article 6 (2) of the Lisbon Treaty, the EU is obliged to accede to the ECHR.² On the other hand, a new Article 59 (2), introduced by Protocol 14 to the ECHR, provides for the possibility of the EU becoming the part to the Convention.³ So the very EU accession to the ECHR is a matter of the time. Thus, it leads to another tangible issue and the main objective of my research – scenario of future relations between the ECtHR and the CJEU.

¹ C-84/95, *Bosphorus v. Minister for Transport, Communications et al.*, [1996] ECR I-3953.

² Treaty on the European Union, 13 December 2007, Article 6 (2).

³ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 13 May 2004, Art. 17.

The research begins with the general overview on development of the human rights protection within the EU, which of crucial importance in respect to the reasons of the EU accession to the ECHR, and on the formation of the basis for the accession. The major concerns upon the relations between two European courts and the central issues of my research cover the autonomy of the EU legal order, the exclusive jurisdictions of the Courts, the future of the *Bosphorus* presumption, the Member States responsibility for the acts arising from the fulfillment of the EU obligations and some others.

There are several researches and publications, regarding very accession.⁴ As for the relations between the CJEU and the ECtHR, typically the issue has been discussed in the light of the accession's analysis without due diligence. There are still couple of researches focusing solely on the relations between two European courts after the accession.⁵ However, my research represents a new view on this problem, as the analysis of the prospective relations between the CJEU and ECtHR is based among the others on the newly adopted Draft Accession Agreement.⁶

⁴ See J. P. Jacque, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, *Common Market Law Review*, Vol. 48, No. 4 (2011); L. Saltinyte, European Union Accession to the European Convention on Human Rights: Stronger Protection of Fundamental Rights in Europe? *Jurisprudence*, No. 2(120), 2010.

⁵ T. Lock, The ECJ and the ECtHR: The Future Relationship between two European Courts, *The Law and Practice of International Courts and Tribunals*, Vol. 8, No. 3 (2009), p. 380.

⁶ See Draft Accession Agreement in the 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, CDDH (2011) 009, 14 October 2011.

CHAPTER I. THE WAY TOWARDS ACCESSION

The Chapter will first focus on the elaboration of the protection of the human rights within the EU: from the timid ECJ's steps toward a separate bill of fundamental rights. The human rights standard adopted within the EU met the international standards, however, had not managed to overcome all the problems arising in this particular area and even had caused some new problems. The way out was found in the EU accession to the ECtHR. Thus, further, I will follow the transformation and the development of the pure notion into reality.

SECTION 1. HUMAN RIGHTS PROTECTION WITHIN THE EU: GENERAL OVERVIEW

The primary aim of the founder's fathers of the EU in 1957 was an establishment of the economic cooperation, while the human rights matters were not even in their minds. There were some ideas of the foundation of more general European Political Community, which might have had some human rights issues at stake; nevertheless the initiative was buried in 1954.⁷ However, the Treaty establishing the European Economic Community (EEC) had included a social chapter that actually provided a reference to human rights, however, it was focused on improving working conditions, rather than on safeguarding fundamental rights.⁸ The creation of the Council of Europe in 1949 also predetermined the reluctance to incorporate human rights provisions into the Treaty. Thus, the notion of the establishment solely an economic integration is reflected in Article 2 of the Treaty of Rome, stating that the Community's objective is "to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth

⁷ M. Kuijer, ECHR: a Gift for the ECHR's 60th Anniversary of an Unwelcome at the Party, *Amsterdam Law Forum*, Vol. 3, No. 4 (2011), p. 17.

⁸ Treaty Establishing the European Economic Community, 25 March 1957, Part three, Title VIII, Chapter 1.

respecting the environment”⁹ and so forth. The early European Court of Justice practice has also emphasized the unwillingness to protect human rights standards.¹⁰

The situation had changed during the times, as the whole doctrine of the EU law primacy was endangered. It was German Constitutional Court, who first encroached the doctrine. German judges expressed the idea that the EC law could not prevail over the Basic Law, which protected fundamental rights.¹¹ They “reserved the right to declare Community law inapplicable if they deemed it incompatible with domestic constitutional provisions”.¹² In order to safeguard doctrine created throughout the years, the ECJ in 1969 for the first time declared that “fundamental human rights enshrined in the general principles of Community law and protected by the Court”.¹³

The ECJ went further and one year later proclaimed that fundamental rights “inspired by the constitutional traditions common to the Member States”¹⁴ were also the subject to the Community protection. As it was still doubtful what constituted to “general principles” and “constitutional traditions”, the scope of fundamental rights safeguarded by the Community was also unclear. Later, the ECJ tried to define the scope by admitting that international treaties “on which the Member States have collaborated or of which they are signatories”¹⁵ should be considered as guidelines in determining the scope of human rights protection. Though the ECJ declared international treaties as a source of inspiration, it did not make any direct reference to the ECHR.

⁹ *Ibid*, Part one, Article 2.

¹⁰ See, C-1/58, *Stork v. High Authority*, [1959] ECR 17; C-40/64, *Sgarlata v. Commission*, [1965] ECR 215, where ECJ refused to deal with the issues, concerning human rights, as there were no supporting articles in Treaty.

¹¹ See, BVerfGE 37, 271 - *Solange I* (English translation at [1974] 2 CMRL 540); 73, 339 – *Solange II* (English translation at [1987] 3 CMLR 225).

¹² M. Kuijer, *supra* note 7, p. 18.

¹³ C-29/69, *Stauder v. City of Ulm*, [1969] ECR 419.

¹⁴ C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁵ C-4/73, *Nold v. Commission*, [1974] ECR 491, para. 12

The situation changed as France had ratified the Convention in 1974. Precisely in this year the ECJ recognized the ECHR as a source.¹⁶ Such steps could be considered as *de facto* the accession to the ECHR. Moreover, the Commission also underlined that “The Human Rights Convention sets out, as far as the ‘classic’ fundamental rights are concerned, that is, certain of the fundamental rights to be protected in the Community, a catalogue of principles of law recognized as binding in all the Member States. It therefore also has binding effect on the activities of the Community institutions”.¹⁷ Thereby, the Commission concluded that it was unnecessary for the EC to access the Convention.¹⁸

Nevertheless, the human rights standard created by the ECJ case law was far from the ideal instrument, which could encompass all the fundamental rights. The question at stake was the present need of the European Union Bill of rights.

As it was stated above there was no any mentioning of fundamental rights in the Treaty establishing the EEC. The first saying appeared in 1986 in the Preamble of the Single Act, while the first treaty reference emerged only in 1992 in the Maastricht Treaty.¹⁹ However, the notion of establishment of the EU Bill of rights came to existence much later in the form of Charter of Fundamental Rights of the European Union.

It is not surprising that it was the German EU Presidency who put an issue on creating a separate EU catalogue of human rights on the agenda for the European Council of Cologne. There could be found several reasons for the decision to adopt the Charter, such as “extending the protection *rationae materiae* to a group of fundamental rights not listed in the

¹⁶ C-36/75, *Rutili v. Ministre de l’intérieur*, [1975] ECR 1219.

¹⁷ The protection of fundamental rights as Community law is created and developed. Report of the Commission submitted to the European Parliament and the Council, COM (76) 37 final, 4 February 1976, Bulletin of the European Community, supp. 5/76, point 28.

¹⁸ *Ibid*, para. 28.

¹⁹ Article F (2) states that “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

EC Treaty or in the EU Treaty nor belonging to the constitutional traditions common to Member States” or to give “the judicial enforcement of fundamental rights in the EU a legally more stable foundation”.²⁰ Though, the European Council explicitly declared that “There appears to be a need [...] to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens”.²¹ Thus, the Charter articulated primarily a political value.

The Convention, set up during the Cologne European Council, drew up the text on 2 October and on 7 December 2000 the Charter of Fundamental Rights of the European Union was finally proclaimed. The Charter had not acquired any legal effect, though the ECJ mentioned it in a number of judgements.²² The question was solved by the Lisbon Treaty granting the Charter with the legally binding status: “The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] which shall have the same legal value as the Treaties”.²³

By that particular moment we could assume that the EU has enhanced its “internal” human rights basis. The Charter is adopted, the EU Treaty has included the provision on fundamental rights, the CJEU is extensively dealing with the human rights issues. Nevertheless, there is still a range of problems, which remain unsolved.

The EU competences have grown greatly since the very establishment of the EEC, so the threat that the EU bodies by themselves could become the potential human rights violators has grown as well. Nevertheless, the EU does not have any instrument, which could provide an “internal” judicial control over the human rights violation conducted by the EU

²⁰ K. Lenaerts and E. De Smijter, A Bill of Rights for the European Union, *Common Market Law Review*, Vol. 38, No. 5 (2001), p. 278-279.

²¹ Conclusions of the presidency at the occasion of the European Council of Cologne (3 and 4 June 1999) on the drawing up of a Charter of Fundamental Rights of the European Union.

²² See C-491/01, *R v. SoS ex parte BAT*, [2002] ECR I-11543, para. 144; T-177/01, *Jego-Quere et Cie v. Commission*, [2002] ECR II-2365, para. 42.

²³ Treaty on the European Union, *supra* note 2, Art. 6 (1).

institutions. And while the ECtHR is authorized to control and deal with any human rights violation in all EU Member States (as all of them are at the same time members of the Council of Europe), it is not empowered to provide any “external” judicial control to the EU. Any act, which emanates from EU institutions, falls outside the ECtHR concerns.

Furthermore, the use of the ECHR by the CJEU judges can be described as selective and merely beneficial. In 1989 the ECJ emphasized a “particular significance”²⁴ of the ECHR – this early step could give a hint of the whole CJEU’s strategy. The CJEU has never referred directly to ECHR, as such a reference would denote an acknowledgement of the pre-eminence of the Strasbourg court, while an indirect use would keep the ECtHR outside the EU legal order. The indirect references by the CJEU judges reduced to analogy of the Strasbourg’s case law for the purpose of clarification. As a consequence, the Luxembourg interpretations of the Convention and the Strasbourg court’s case law are more than flexible. It turns to a situation when two major European courts perceive same issues in different context without possessing any formal instruments for coordination. Thus, in the *Hoechst* case, the ECJ ruled that Articles 8 and 9 of the ECHR is not applicable to business companies, while the ECtHR in the *Niemietz* case decided that it is.²⁵

The divergences of the CJEU and ECtHR could also cause problems in the Member States’ courts. As the legal orders of two European courts superior to domestic law, discrepant practice may lead to the situation when national judges deal with different interpretations on similar texts. Therefore, the judges may be uncertain which case law to follow.

²⁴ C- 46/87 & 227/88, *Hoechst AG v Commission of the European Communities*, [1989] ECR 2859, para. 13.

²⁵ See *Hoechst*, *supra* note 24 and *Niemietz v. Germany*, App. No. 13710/88, [1992] 16 EHRR 97.

However, the Luxembourg court has demonstrated a desire to keep out of the divergences in several cases.²⁶ *De facto* the CJEU applies the Strasbourg court's case law, but borrowing the ECtHR practice only its favor, absolutely avoiding any control from the former. The CJEU "is torn between its obligation to protect fundamental rights and its aspiration for institutional independence".²⁷ Thus, the Luxembourg court has developed its own fundamental rights standard by instrumentalising the Convention and at the same time has not gone too far, so not to endanger the EU institutional autonomy. Nevertheless, the CJEU still does not feel bound by the Convention and does not hold any single obligation before the ECtHR, which could undermine the work of the latter and cause more serious problems in future.

Another problematic issue, arisen from the Charter, is a threat to legal certainty. In the compliance with Article 51 (1) "the provisions of this Charter are addressed [...] to the Member States only when they are implementing Union law".²⁸ Hence, while implementing the EU law Member States should follow the human rights standard established by the Charter. On the other hand, all the EU Member States are bound by the human rights standard laid down in the ECHR. And even though, Articles 52 (3) and 53 of the Charter provides with some "attempts" to exclude the threat of diverging interpretations of two courts, the divergences still occur.²⁹

Hence, even though the EU was quit successful in adopting its own fundamental rights standard and the mechanism of protecting it, a lot of questions still stay unsolved. The way

²⁶ See Case C-13/94, *P v. S and Cornwall County Council*, [1996] IRLR 347, para. 16; C-185/95 *P, Baustahlgewebe GmbH v Commission of the European Communities*, [1998] All ER (D) 758, para. 29; C-94/00, *Roquette Frères v. Council*, [2002] ECR I-9011, para. 25.

²⁷ L. Scheeck, Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a Parameter of European Governance, *Research in question*, No. 15, October 2005, p. 23, available online: <http://www.ceri-sciences-po.org/publica/question/qdr15.pdf> [visited on 15/03/2012].

²⁸ Charter of Fundamental Rights of the European Union (2000/C 364/01).

²⁹ M. Kuijer, *supra* note 7, p. 19.

out could be found in the accession of the EU to the ECHR, which would be both, symbolic and helpful in solving legal problems.

SECTION 2. DEVELOPMENT OF THE LEGAL BASIS FOR THE EU ACCESSION TO THE ECHR

The first affirmative attitude towards accession of the EU to ECHR was laid down in 1979 when the European Commission proposed the idea in the Commission Memorandum.³⁰ The Memorandum emphasized the importance and the necessity of very the accession.³¹ The Commission also underlined the significance of adopting the EU catalogue of human rights, but as the “chances of agreeing, within reasonable period of time, [...] remain slight. The Community therefore should adhere to the Convention”.³²

Even though, the general approach towards the accession was positive a number of problems were also mentioned in case of such a step. The main concerns were focused on “the institutions of the Convention and the fulfillment of obligations arising from the ECHR”.³³ First of all, the accession would call the Community to recognize the “individual right of petition provided for in Article 25 of the ECHR”.³⁴ On the hand, the Treaty clauses “forbid the Members States to settle disputes concerning the application and interpretation of Community law in different manner from that laid down in the Treaties”.³⁵ The second one dealt with the problem that according to the constitutional structure of the Community it would be impossible for the latter to execute number of “obligations arising form the ECHR,

³⁰ While in the Report of 4 February 1976, see *supra* note 13, point 28, the Commission underlined that there were no need to become the party of the ECHR, as “The fundamental rights laid down as norms in the Convention are recognized as generally binding in the context of Community law”.

³¹ Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210 final, 2 May 1979, Bulletin of the European Communities, sup. 2/79, point 15.

³² *Ibid*, point 17.

³³ K. G. Margaritis, European Union accession to the European Convention on Human Rights: an institutional “marriage”, *Human rights & human welfare*, Working paper No. 65, available online: <http://www.du.edu/korbel/hrhw/workingpapers/2011/65-margaritis-2011.pdf> > [visited on 17/03/2012].

³⁴ Memorandum of 2 May 1979, *supra* note 31, point 27.

³⁵ *Ibid*.

for example, the effective remedy requirements of Article 13”.³⁶ Moreover, it practically unmanageable to fulfill the condition to hold free elections within a “State”, as the elections to the Community Council were indirect.³⁷ And the third one concerned the participation of the Community representatives in the organs of the Convention, to be more precise, the obstacles of such participation.³⁸

The Memorandum of 2 May 1979 should be considered of great significance, as it is the first instrument within the Community, which proposed the accession to the ECHR as a solution to human rights concerns. Nevertheless, the Commission did not touch upon the technical details of the accession in relation to legal personality and competence of the Community.

For a long period of time, the issue of the accession stayed unnoticed. The situation had slightly changed in 1993 under the Belgian Presidency, when the ad hoc working group was created to consider the question. The problems at stake were “the competence of the Union to accede, maintaining the autonomy of Community law and the exclusive jurisdiction of the Court of Justice, and the Community law participation in the Strasbourg”.³⁹ In this concern the Council requested an opinion from the Luxembourg court regarding the legitimacy of the Community accession to the Convention. The ECJ concluded in Opinion 2/94 that there was no such a competence.⁴⁰

The Court’s declared the absence of any legal basis within the Treaty that empowered the Community institutions to enact rules on human rights or to conclude international

³⁶ *Ibid*, point 22.

³⁷ *Ibid*, point 22.

³⁸ *Ibid*, point 30-33.

³⁹ J. P. Jacque, *supra* note 4, p. 1002.

⁴⁰ Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] ECR 1759.

conventions in this field, thus there was seen a room for Article 235.⁴¹ Nevertheless, the accession to the ECHR was considered as “a modification of the system for the protection of human rights in the Community, [...] of constitutional significance”⁴², hence, it went beyond the scope of Article 235. So, to make the accession legally possible the amendment to the Treaty was needed.

The dialogues over possible accession of the EU to the ECHR could not pass unmentioned by the ECHR institutions. In 2000 the European Ministerial Conference on Human Rights issued a Declaration, stating that a certain level of the human rights protection within the EU had been already achieved. However, it was emphasized a major role of the Council of Europe in this achievement and a central role of the Convention as a “constitutional instrument of European public order on which the democratic stability of the Continent depends”.⁴³ Generally speaking, the Council of Europe welcomed the improvement of the human rights protection in the EU, but saw the implementation of the ECHR as the main instrument in completing the protection of the highest level.

Later on, the Steering Committee for Human Rights (CDDH) was involved in process in order to analyze the technical and legal aspects on the possible accession. In 2002 the CDDH adopted an extensive report clarifying the steps to be done by the Council of Europe prior the idea of accession would come true. The most essential outcome of the study was the acknowledgment of the modifications needed to be brought to the ECHR and that those

⁴¹ *Ibid*, point 27-28.

⁴² *Ibid*, point 35.

⁴³ Declaration “The European Convention on Human Rights at 50: What future for the Protection of Human Rights in Europe: what Future for the Protection of Human Rights in Europe?” European Ministerial Conference on Human Rights, Rome, 3-4 November 2000.

modifications could be accomplished by an amending protocol to the ECHR or an accession treaty, concluded between the EU and the States parties to the Convention.⁴⁴

The CDDH report greatly contributed into removing the obstacles of the EU accession to the ECHR. In fact the report could be considered as an “answer” to the Commission Memorandum of 1979. So it was clear that both institutions were eager to overcome the difficulties on the way to the accession.

In May 2004 the Committee of Ministers of the Council of Europe made another major step in order to mature the accession with help of declaration “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”, where the “Member States recognized the urgency of the reform, and committed themselves to ratifying Protocol No. 14 within two years [...] The text of the amending protocol was opened for signature on 13 May 2004”.⁴⁵ The main scope of Protocol 14 was the introduction of major changes in control system of the Convention in order to “improve the efficiency of the ECtHR and to reduce its workload as well as that of the Committee of Ministers of the Council of Europe, which supervises the execution of the judgments. The ultimate aim is to enable the Court to concentrate on those cases that raise important human rights issues”.⁴⁶

Protocol 14 also envisaged a crucial provision regarding the EU accession to the ECHR. In the compliance with the amending protocol a new paragraph shall be inserted into article 59 of the ECHR declaring that “The European Union may accede to this

⁴⁴ CDDH, Legal and technical issues of possible EC/EU accession to the European Convention on Human Rights, doc. DG-II (2002) 006, 28 June 2002.

⁴⁵ Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, 4 October 2005, para. 32-33.

⁴⁶ “Protocol 14. The reform of the European Court of Human Rights”, Factsheet, p. 1, available online: <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf> [visited on 11/03/12].

Convention”.⁴⁷ Thereby, changes envisaged by Protocol 14 had to be a legal basis for the very accession. As mentioned above the blueprint was to ratify the Protocol in two years.

After the adoption of Protocol 14 the Council of Europe still was stressing the indispensability of the accession. Its positive approach was reaffirmed in Action Plan adopted in 2005 during Summit in Warsaw.⁴⁸ The positive spirit was underpinned by the perspective of the enactment of the Treaty establishing a Constitution for Europe where accession was explicitly included for the first time.⁴⁹ However, a few days after the Warsaw Summit, the European Constitution was buried by the French and Dutch referenda.⁵⁰ But not only the EU blocked the accession for the indefinite period of time, the plan of ratifying Protocol 14 within two years after the adoption also failed. By the end of 2006 practically all the Member States of the Council of Europe ratified the Protocol, however, there was one country denying doing this – Russia.⁵¹ Thus, the possibility of the accession went a few steps back.

The failure of the European Constitution had not, however, buried the notion of the EU accession to the ECHR. According to the ECJ *opinion 2/94* there was still a way to grant the EU with the necessary competence – the amendment to the Treaty. Thus, four years after the first attempt to authorize EU to the accession, a crucial provision was included in Article 6 of the Treaty of Lisbon, which came into force 1 December 2009. In the compliance with a new article “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.⁵² The manner in which it was formulated made the

⁴⁷ Protocol No. 14, *supra* note 4.

⁴⁸ Council of Europe, Action Plan, Ministers’ Deputies, CM (2005) 80 final, 17 May 2005, Appendix 1, point.4.

⁴⁹ In compliance with Title III, Article I-9, para. 2 “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 competence as defined in the Constitution”.

⁵⁰ The French people voted against the European Constitution by a margin of 55% to 45%, while the Dutch citizens by a margin of 61% to 39%.

⁵¹ All the information regarding dates of Protocol 14’s ratification by the Member States of the Council of Europe could be found here: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=2&DF=19/02/2010&CL=ENG> [visited on 13/03/12].

⁵² Treaty on European Union, *supra* note 2, Art. 6 (2).

accession obligatory for the EU. Hence, the EU filled a missing piece in a puzzle. The next steps were awaited from the Council of Europe.

As mentioned above the blueprint of the Council of Europe to provide the EU with the possibility to become a party of the ECHR by 2006 failed due Russia's unwillingness to ratify Protocol 14. Thus, by boycotting the ratification mainly due to concerns about work of the judiciary, Russia also blocked the possibility of the EU accession to the Convention.

There was found a solution in the form of temporary additional Protocol 14bis, which was opened for signature in 2009. The Protocol was adopted to avoid be leading by Russia and to continue the ECtHR's functioning. As the temporary measure the Protocol did not affect "the overall legal structure of the Strasburg judiciary"⁵³, the unanimity was not needed. However, Protocol 14bis did not have a long life, since in February 2010 Russia ratified Protocol 14, thus Protocol 14bis lost its *raison d'être*. Finally, Protocol 14 came into force on 1 June 2010; hence, the ECHR was "ready" to welcome the EU as a party.

Consequently, by summer 2010 the legal basis for the EU accession to the ECHR was already created: Article 6 (2) of the Lisbon Treaty, obliging the EU to accede the Convention, and Protocol 14, allowing the EU to be a party to that legal document. As the basis for the accession had been elaborated further steps to the desirable objective were made soon.

A month before the accession became legally possible the European Parliament adopted a resolution on the institutional aspects of the accession.⁵⁴ The Court of Justice also issued a document, revealing its concerns towards accession.⁵⁵ Already on 4 June 2010 the

⁵³ B. Petra, Challenges of EU accession to the ECHR, Conference Paper, CEU HPSA Conference.

⁵⁴ 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, 2009/2241 (INI), A7-0144/2010.

⁵⁵ 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, 5 May 2010.

Council authorized the European Commission to begin negotiations with the Council of Europe.⁵⁶ The very negotiations were started in July 2010. Since that particular period the CDDH Informal Working Group on the Accession of the European Union to the Convention (CDDH-UE) were meeting regularly in order to work on the Draft Accession Agreement.⁵⁷ In October 2011 a document was finalized at an extraordinary meeting of the CDDH.⁵⁸ Moreover, Judge Costa (the President of the ECtHR) and Judge Skouris (the President of the CJEU) introduced a Joint Communication giving some procedural guidelines regarding the accession.⁵⁹ Thus, the preparations for the EU accession to the Convention have already started, so the very the accession is a mere matter of a time, which will happen in the nearest future.

⁵⁶ See Document 9689/10 (classified RESTREINT UE) which is a note from the Presidency to delegations and contains the draft Council Decision authorizing the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms and Press Release of the 3018th Council meeting, Justice and Home Affairs, 10630/1/10 REV 1, 3-4 June 2010, available online: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114900.pdf > [visited 15/03/12].

⁵⁷ The CDDH-UE had eight working meetings and thus had issued four Drafts Legal Instruments on the Accession of the European Union to the European Convention on Human and Rights, which mainly focused on the Draft Accession Agreement (4 CDDH-UE (2011), 6 CDDH-UE (2011), 10 CDDH-UE (2011) and 16 CDDH-UE (2011)). The final version, consisting of 12 amending articles, was published alongside an explanatory report on 19 July 2011, available online: <http://www.statewatch.org/news/2011/jul/eu-coe-echr-final.pdf> > [visited on 15/03/12].

⁵⁸ See Draft Accession Agreement in the 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, CDDH (2011) 009, 14 October 2011, available online: http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf > [visited on 15/03/12].

⁵⁹ Joint communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011.

CHAPTER II. THE PROSPECTIVE RELATIONS BETWEEN THE CJEU AND THE ECTHR

The process of the EU accession to the ECHR has been already launched and the consequences of such a process are irreversible. The Chapter will focus on the consequences, which will fall under the relations between the CJEU and ECtHR. The relations of the two major European courts have been elaborated throughout the years and have come to a certain level of cooperation and comity. However, the EU accession to the Convention will bring significant modifications into the nexus of the Courts. I would indicate the problem areas of such modifications and try to find possible and the most appropriate solutions.

From the first glance one could ask the question, what essentially connects the CJEU and the ECtHR? The Luxembourg court's primary aim is to endorse a development of economic integration within the EU Member States, while the Strasbourg court's work is focused on the protection of human rights among the Member States of the Council of Europe. So, actually the only principal common element is that both courts are supranational. However, the operation of the European courts gradually overlaps due to two major reasons: first, both the EU and the Council of Europe were established pursuing European integration⁶⁰, the second and the most significant, the membership of the two institutions overlaps.⁶¹

As mentioned above the CJEU widely uses the ECtHR's case law and the Convention itself while dealing with cases on human rights matters.⁶² Vice versa the ECtHR also

⁶⁰ The Council of Europe was founded by the Treaty of London (or the Statue of the Council of Europe), the latter in Article 1(a) proclaimed European integration as the main aim of the establishment. In the Preamble of the 1957 Treaty Establishing the European Economic Community the founders also have emphasized that European integration is a key issue in the foundation of the Community.

⁶¹ At the moment all the 27 Member States of the EU are, at the same time, the Members of the Council of Europe (on the whole it incorporates 47 Member States).

⁶² See C-7/98, *Krombach v. Bamberski*, [2000] ECR I-1935; C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659; C-60/00, *Carpenter v. Secretary of State for the Home Department*, [2002] ECR I-6279.

regularly refers to the practice of the CJEU.⁶³ Thus, the present relations of the CJEU and the ECtHR could be characterized as mutual respect and comity based cooperation.⁶⁴ The major role in the formation of current communication between the EU and the ECHR on the whole and the CJEU and the ECtHR as such has played the *Bosphorus* case and its “equivalent protection” doctrine.⁶⁵

The doctrine of equivalent protection takes its roots already in 1958, when the ECtHR in the *X v. Germany* case declared that any later international agreement concluded by the Member States did not exclude their obligations under the Convention.⁶⁶ There were also some later cases, which paved the way for the doctrine.⁶⁷ However, the decision, which is directly connected to the *Bosphorus* case, has been adjudicated in *Matthews v. United Kingdom*.⁶⁸

The Strasbourg Court reaffirmed that a Member State could transfer its competences to the EU only if the obligations under the Convention were secured. However, the ECtHR also declared that in case such a transfer took place, a Member State was still responsible for any ECHR violation.⁶⁹ In the case the ECtHR was dealing with the violation enshrined in a “not normal act of the Community”⁷⁰, namely in a primary law of the Union – the EC Act on Direct Elections, which infringed the applicant’s right to participate at the elections to the European Parliament. Noting the lack of the ECJ jurisdiction to hear the case, the Strasbourg

⁶³ See *Pellegrin v. France*, Appl. No. 28541/95, ECHR 1999-VIII 207; *Goodwin v. United Kingdom*, Appl. No. 28957/95, ECHR 2002-VI; *Hornsby v. Greece*, Appl. No. 18357/91, ECHR 1997-II.

⁶⁴ The cooperation is purely comity based, rather than legally, as the EU is not a party to the ECHR, and thus not bound to any obligations.

⁶⁵ *Bosphorus v. Minister for Transport, Communications et al.*, supra note 4.

⁶⁶ *X. v. Germany*, Appl. No. 235/56, [1958] ECHR, Series A, p. 256.

⁶⁷ See *C. F. D. T. v. The European Communities*, Appl. No. 8030/77, [1978] ECHR, Series A, p. 231, *Tete v. France*, Appl. No. 11123/84, [1987] EHRR, Series IV, p. 67, *M. & Co. v. Germany*, Appl. No. 13258/87, [1990] ECHR, Series A, p. 138, *Cantoni v. France*, Appl. No. 45/1995/551/637, [1996] ECHR, Series V, p. 1614, *Waite & Kennedy v. Germany and Beer & Regan v. Germany*, Appl. No. 26083/94, [1999] ECHR, Series A, p. 13.

⁶⁸ *Matthews v. United Kingdom*, Appl. No. 24833/94, [1999] RHRR 361.

⁶⁹ *Ibid*, para 32.

⁷⁰ *Ibid*, para. 33.

Court decided that the applicant's right under the EC law was not guaranteed with the protection equivalent to the protection provided by the Convention.⁷¹ To my point of view, the crucial moment in the case is that the ECJ did not have jurisdiction to review the issues. The Strasbourg Court on the contrary treated the dispute as admissible, and for the first time explicitly reviewed the EC legal instrument.

Generally speaking we could claim that the ECtHR decision in the *Bosphorus* case is based on the *Matthews*, however, with significant modifications. The ECtHR was dealing with an airline company "Bosphorus Airways", registered in Turkey and whose aircraft, leased them by the airline company from Yugoslav Airlines, was seized by Ireland authorities under EC Council Regulation 990/93. The Regulation had implemented the UN sanctions imposed on Yugoslavia.⁷²

The ECtHR one more time restated the idea that Member States could transfer their sovereign powers to an international organization, but such a transfer did not allow them to escape from the obligation under the ECHR.⁷³ A Member State remains responsible "under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations".⁷⁴ Moreover, a Member State's action, following from the membership in an international organization could be justified only if the organization provides fundamental rights protection "in a manner which can be considered at least equivalent to that for which the Convention provides".⁷⁵ What is more important, here the Strasbourg Court gives the explanation of the term "equivalent", assimilating it with the term

⁷¹ *Ibid*, para. 27-33.

⁷² *Bosphorus*, *supra* note 1.

⁷³ *Ibid*, para. 152.

⁷⁴ *Ibid*, para. 153.

⁷⁵ *Ibid*, para. 155.

“comparable” and distinguishing from “identical”.⁷⁶ Thus, if an organization provides this “equivalent protection”, a presumption is that a Member State has complied with the requirements of the ECHR. The crucial point is that the Member State “does no more than implement legal obligations flowing from its membership of the organization”.⁷⁷ The ECtHR also pointed out that the presumption could be rebutted if “the protection of Convention rights was manifestly deficient”.⁷⁸

Thereby, the *Bosphorus* case has brought the relations between the two European courts to a new level. The Strasbourg court functions on the presumption that the EU provides human rights an equivalent to the ECHR protection. Thus, the ECtHR has decided that it is fair enough to provide a less extensive review for the EU and to apply “manifest deficiency” test with relatively low threshold. So, as it was truly mentioned by one of the concurring opinions⁷⁹, the test goes absolutely against the general practice of the Strasbourg court and thus arises a lot of criticism.⁸⁰

However, the main concern is the future of the *Bosphorus* presumption; will the ECtHR still apply the low standard of judicial review when the EU accedes the ECHR? If we refer to the latest Draft Accession Agreement, which was published on 14 October 2011, it does not contain any single word about the *Bosphorus* test.⁸¹ So, the Draft has left this issue particularly to the Strasbourg court. I assume, that the ECtHR would abandon the doctrine and would treat the EU as the other High Contracting Parties due to several reasons.

First of all, the *Bosphorus* presumption is relevant only when the Union law could be reviewed by the Luxembourg court, thus it privileges secondary law, as the CJEU’s

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*, para.156.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, see the Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlick, para. 4.

⁸⁰ L. Saltinyte, *supra* note 4, p. 191.

⁸¹ See Draft Accession Agreement, *supra* note 58.

jurisdiction does not cover primary law. Thus, in such cases as *Matthews*, where the compatibility of primary law with the Convention is at stake, the presumption is not applicable.

Secondly, the doctrine demands that a Member State does not exercise any discretion while implementing the Union law. Otherwise, the Member State would be treated as if a domestic law is under concerns.⁸² However, it could be really problematic to determine whether a Member States has exercised any level of discretion. I should agree with Costello who argues that in order to understand if discretion has taken place, it is not enough to denote the type of the EU act, the “textual specificity and [...] exhaustiveness”⁸³ should be analyzed as well. Even if a Member States deals with EU Regulation, “they ordinarily still exercise discretion as to how to give effect to those Regulations”.⁸⁴ For instance, the case with Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.⁸⁵

Thirdly, the presumption lays down a basis for double standards.⁸⁶ As it mentioned above the *Bosphorus* test provides much lower level of scrutiny in the comparison to other High Contracting Parties, and if it has a right to exist within a present situation, in case of the accession it is unacceptable. According to the Draft Accession Agreement, to be more precise to Paragraph 7 of the Draft Explanatory Report, “The current control mechanism of the

⁸² T. Lock, The ECJ and the ECtHR: The Future Relationship between two European Courts, *supra* note 5, p. 379.

⁸³ C. Costello, The Bosphorus ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe, *Human Rights Law Review*, Vol. 6, No. 1 (2006), p. 108.

⁸⁴ *Ibid*, p. 109.

⁸⁵ *Ibid*, Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national lays down principles so to define which Member State should review an asylum claim. Moreover, under Article 3 (2) “each Member State may examine an application for asylum [...] even if such examination is not its responsibility under the criteria laid down in this Regulation”. Thus, Member States are given certain level of discretion.

⁸⁶ See also Joint Concurring Opinion, *supra* note 79.

Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary”.⁸⁷ On the other hand, the preamble of the same document underlines that the adjustments to the Convention are needed due to “specific legal order of the European Union”.⁸⁸ So one could claim, that the *Bosphorus* presumption would play a role of a safeguard for the EU specific legal order.⁸⁹ However, such an assumption is more than questionable.

Despite the fact the Lisbon Treaty has greatly enhanced the institutional safeguards of human rights, and thus has reinforced the EU legal order as such, still one of the main aims of the EU accession to the Convention is a desire to acquire the possibility of external review upon this legal order.⁹⁰ The preamble of the Draft Accession Agreement also underlines that “the individual should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights”.⁹¹ However, the preservation of the *Bosphorus* presumption would generally undermine the operation of the ECtHR as an external supervisor, as it would have to apply the scrutiny, which is totally against its own practice. Thus, the *Bosphorus* test could encroach the goals pursued by the very accession. On the whole I think that such an external scrutiny should be considered as a supplementary measure in ensuring human right protection within the Union, rather than interference into its legal order.

⁸⁷ See Draft Accession Agreement, *supra* note 58.

⁸⁸ *Ibid.*

⁸⁹ See L. Saltinyte, *supra* note 4.

⁹⁰ The existence of “external touchstone” has been mentioned several times as one of the purposes of the accession. See M. Kuijer, *supra* note 1, p. 21; Kuijer underlines the importance of the existence of such an external scrutiny with help of *Winterwerp v. the Netherlands* case. For a long time in the Netherlands it was held rational that “the power to order someone’s committal to a psychiatric institution was vested in the local mayor”. However, after the ECtHR’s observations of the Dutch system, it was indicated that “it was actually very odd that the hospitalization of psychiatric patients was not ordered by the courts after medical advice had been sought”.

⁹¹ See Draft Accession Agreement, *supra* note 58.

Therefore, the Bosphorus test by itself is vague and far from versatility in its application. Moreover, the absence of any mentioning of the presumption in the Draft Accession Agreement gives us a hint that the doctrine is not of major importance in preserving the specific EU legal order. Thus, I do believe that the ECtHR would abandon the Bosphorus test after the EU accedes the Convention. As for the nature of the EU legal order, I assume that it would be guaranteed by other means (the issue would be examined below).

Another key problem regarding the relations between the CJEU and the ECtHR concerns the autonomy of the EU legal order. As it stated above the CJEU has been widely using the ECtHR practice, however, the Luxembourg court has been very careful in its actions, so not to infringe the autonomy of the EU legal order.⁹² The EU accession to the ECtHR might change the situation greatly, as “the acts of the EU will be subject [...] to the review exercised by the ECtHR in the light of the rights guaranteed under the Convention”.⁹³

Generally, the autonomy of the EU legal order has two dimensions: the first one, an internal, deals with the relations between the EU legal order and the Member State’s law, the second one, an external, concerns the relations between the former and international legal order.⁹⁴ The internal dimension appeared in the *Costa* case and was used in order to strengthen the idea of the primacy of the EU law over the domestic.⁹⁵ The ECJ emphasized that the EEC Treaty constituted “an independent source of law”.⁹⁶

As for the external dimension of autonomy of the EU legal order, it is of greater importance in respect to the problems, which may occur after the accession. In the famous *Opinion 1/91* the ECJ for the first time addressed the issue while considering the Draft

⁹² For more detailed information see Section 1.1.

⁹³ See Joint communication from Presidents Costa and Skouris, *supra* note 59.

⁹⁴ T. Lock, Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order, *Common Market Law Review*, Vol. 48, July/August (2011), p. 1029.

⁹⁵ C- 6/64, *Costa v. ENEL*, [1964] ECR 585.

⁹⁶ *Ibid.*

Agreement on the creation of the European Economic Area (EEA).⁹⁷ By recognizing three reasons, the ECJ declared the incompatibility of the first EEA Draft Agreement with the autonomy of the EU law. The first reason concerned the EEA court's jurisdiction to hear the cases between the parties of the EEA Treaty. The cornerstone was the absence of the definition to the term "party to the treaty", thus it could be a Member States, the EU, or both of them. The EEA court was actually empowered to interpret the Union Treaties, and thereby, the autonomy of the EU legal order was endangered. The second problem laid down in the EEA Treaty provisions, which were identically worded to the EU Treaties. And as the EEA court was authorized to interpret the EEA Treaty provisions, it would at the same time interpret the EU Treaty norms. Moreover, the EEA court was only obliged to follow the ECJ's practice existed on the day of signature of the agreement. The last issue dealt the possibility of the EFTA States to ask ECJ for the preliminary ruling on the interpretation of the EEA agreement. However, the rulings by themselves were not to be binding for the EFTA States, thus the nature of the preliminary references would be changed and the autonomy of the EU law would be encroached.

In 2002 the ECJ gave further clarification on the autonomy of the EU law in *Opinion 1/00*, emphasizing that "Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered".⁹⁸ Moreover, in the *Kadi* case the

⁹⁷ *Opinion 1/91* of 14 December 1991, delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area.

⁹⁸ *Opinion 1/00* of 18 April 2002, delivered pursuant to Article 300(6) EC - Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area, para. 12; the ECJ referred to the *Opinion 1/91*, underlining that the notion of para. 12 was taken from paragraphs 61 to 65 of the latter.

ECJ stated that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty”.⁹⁹

Therefore, the ECJ has given a great effort to denote the significance and determine the meaning of the autonomy of the EU legal order. The possible problems regarding the specific nature of the EU law in case of the Union accession to the ECtHR were expected, so along with Article 6 (2)¹⁰⁰ Protocol 8 was adopted. In the compliance with Article 1 of the latter the accession agreement “shall make provision for preserving the specific characteristics of the Union and Union law”.¹⁰¹

The first cornerstone of the autonomy of the EU legal order in regard to the accession concerns exclusive jurisdiction of the ECJ in deciding on the allocation of powers between the Member States and the EU. According to Article 344 of the TFEU the EU 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 for therein”.¹⁰² At the same time, in compliance with Article 55 of the ECHR The High Contracting Parties have agreed not bring a dispute “arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention”.¹⁰³ The explicit conflict between two provisions was solved by Article 5 of the Draft Accession Agreement, stating that proceedings before the ECJ do not constitute means of dispute settlement within the meaning of the ECHR.¹⁰⁴

Nevertheless, another issue, affecting the exclusive jurisdiction of the CJEU remains unsolved. Article 33 of the ECHR stipulates that “Any High Contracting Party may refer to

⁹⁹ C-402/05 P *Kadi v. Council and Commission*, [2008] ECR I-6351, para. 285.

¹⁰⁰ See Treaty on European Union, *supra* note 2.

¹⁰¹ See Protocol 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, Art. 1.

¹⁰² Treaty on the Functioning on the European Union, 13 December 2007, Art. 344.

¹⁰³ See European Convention on Human Rights, 4 November 1950, Art. 55.

¹⁰⁴ See Draft Accession Agreement, *supra* note 58, Art. 5

the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party”.¹⁰⁵ After the accession theoretically any EU Member States could invoke procedure before the ECtHR against another EU Member State, or against the EU. However, such actions would conflict with previously mentioned Article 344 of the TFEU. The Draft Accession Agreement has not provided any keys for such situation and only has underlined that it is for the EU law to determine, whether such applications of the EU Member States would be permitted.¹⁰⁶

In my opinion, there will not be any serious problems in this respect. The provision declaring the obligation of the EU to accede the ECHR¹⁰⁷ was enshrined in a newly created Lisbon Treaty. Thus, it could be foreseen that alongside with Article 344, Article 6 (2) could cause some serious problems, however both articles were preserved in the Treaty. One could claim that even though both articles were incorporated to Treaty, Protocol 8¹⁰⁸ was created so to safeguard the possible threat to the exclusive jurisdiction of the CJEU. Nevertheless, I do think that Protocol 8 in this regard was an extra guarantee, as the reference of the application to the ECtHR does not amount to the interpretation or application by the latter of the Treaty, rather of the Convention. The issue of the interpretative autonomy of the CJEU is another cornerstone in the relations between the latter and the ECtHR upon the accession, and thus is examined below.

On the one hand, the CJEU is the only institution authorized to make binding determinations about the interpretation or validity of the EU law.¹⁰⁹ On the other hand, upon the accession the ECtHR would have jurisdiction to review the EU acts. So the scope of such

¹⁰⁵ See European Convention on Human Rights, *supra* note 103, Art. 33.

¹⁰⁶ See Draft Accession Agreement, *supra* note 58, Draft Explanatory report, Art. 4, para. 64.

¹⁰⁷ See Treaty on European Union, *supra* note 2, Art. 6 (2).

¹⁰⁸ See Protocol 8, *supra* note 101.

¹⁰⁹ See *Opinion 1/91*, *supra* note 97, where the ECJ explicitly stated that the EU had no competence to enter into any international agreement which would permit any other court to interpret the EU law or to decide on the validity.

a jurisdiction should be carefully analyzed in order to determine whether the interpretative autonomy would be preserved untouched.

In the compliance with Article 32 of the Convention, the jurisdiction of the ECtHR extends “to all matters concerning the interpretation and application of the Convention and the protocols thereto”.¹¹⁰ Hence, the Strasbourg court does not rule on the validity of the domestic law, but issues declaratory judgments on the compatibility of the national law with the Convention. So practically the ECtHR could only declare an incompatibility of EU act with the ECHR. The provisions of the Draft Accession Agreement as well do not empower the Strasbourg court to rule on the invalidity of any of the EU acts.¹¹¹ The “declaration of the incompatibility” also seems to be unquestionable, as in the compliance to the ECtHR practice it leaves the interpretation of the domestic law to national courts, so by analogy the monopoly on the interpretation stays with the CJEU. Thus, I assume that the potential effect of the accession to the interpretative autonomy of the EU legal order is unreasonably exaggerated.

However, in a Discussion Document the CJEU underlined that it would be undesirable to allow the ECtHR to decide on the compatibility of a Union act with the ECHR in the absence of any prior ruling from the CJEU on the validity of the Union act.¹¹² The Luxembourg court bore in mind the situation when an applicant could challenge a national measure implementing EU law before domestic courts without the national court of last resort making a reference for a preliminary ruling under Article 267 TFEU.¹¹³ Thus, if a reference for a preliminary ruling were not made, the Strasbourg court would have to “adjudicate on an application calling into question provisions of EU law without the CJEU having the opportunity to review the consistency of that law with the fundamental rights guaranteed by

¹¹⁰ See European Convention on Human Rights, *supra* note 103, Art. 32.

¹¹¹ See Draft Accession Agreement, *supra* note 58.

¹¹² See Discussion Document of the CJEU, *supra* note 55.

¹¹³ See Joint communication from Presidents Costa and Skouris, *supra* note 59, point 2.

the Charter”.¹¹⁴ The crucial point is that under Article 267 TFEU, the domestic courts could actually make no reference for the preliminary ruling and thus it is impossible for the parties to set the procedure in motion.

Thus, the CJEU is not guaranteed to be a final arbiter in reviewing the validity of the EU acts. Moreover, it is difficult to consider this procedure as the “exhaustion of domestic remedies”.¹¹⁵ The president of the ECtHR and the CJEU also agreed that “the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter”¹¹⁶ to Strasbourg. On the contrary, the judicial proceedings brought directly before the EU courts would not constitute any procedural problem in case of accession. Any person willing to challenge the Union act must first lodge an application with the EU General Court. Thus, a prior intervention of the CJEU is guaranteed before any further scrutiny of the ECtHR.

In this respect Judges Costa and Skouris have underlined that “a procedure should be put in place [...] which is flexible and would ensure that the CJEU may carry out an internal review before the ECtHR carries out external review”.¹¹⁷ However, such a procedure should be accelerated so as not to prevent proceedings before the Strasbourg Court being unreasonably postponed.¹¹⁸ Hereby, the key question is what should be the best mechanism to ensure a “prior involvement” of the CJEU. However, before finding such a mechanism, we should first refer to another crucial procedural issue, which is directly connected to a “prior involvement”.

¹¹⁴ *Ibid.*

¹¹⁵ See European Convention on Human Rights, *supra* note 103, Art. 35 (1), which provides among the others the condition that the application is admissible after all domestic remedies have been exhausted.

¹¹⁶ See Joint communication from Presidents Costa and Skouris, *supra* note 59, point 2.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

After the EU accession to the ECHR the EU Member States would face a challenging situation as, on the one hand, they “undertake to abide by the final judgment of the Court in any case to which they are parties”¹¹⁹, and on the other hand, they are obliged “to take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union”.¹²⁰ So the EU Member State may be found in the breach of the Convention although it has adopted the measures implementing relevant EU law provisions. Thus, the problem is, who should be responsible for such a violation?

In order to prevent a tense determination of the division of competences between the EU and the EU Member States when it comes to the implementation of the EU law, the co-respondent mechanism has been adopted. Already in 2002 the Council of Europe stressed the necessity of the mechanism, which would provide the joint appearance of the Union and its Member State as “co-respondents” or “co-defendants” before the ECtHR.¹²¹ Moreover, Protocol 8 requires that the accession agreement must include the mechanism to guarantee that “proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate”.¹²² Unsurprisingly, the Draft Accession Agreement has enshrined the provision relating to co-respondent mechanism. The Draft distinguishes two situations when the mechanism is applicable: the EU is co-respondent and one or more EU Member States are main respondents and when the former is the main correspondent and the latter are co-respondents.

The situation when the EU is a co-respondent is at stake “if it appears that [the alleged violation of the ECHR] calls into question the compatibility with the Convention rights at

¹¹⁹ European Convention on Human Rights, *supra* note 103, Art. 46 (1).

¹²⁰ Treaty on the European Union, *supra* note 2, Art. 4 (3)

¹²¹ See CDDH, Legal and technical issues of possible EC/EU accession to the European Convention on Human Rights, *supra* note 44.

¹²² See Protocol 8, *supra* note 101, Art. 1 (b).

issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law”.¹²³ Even though there could be two possible sources of a violation (“the underlying provision of the EU law was faulty [...] or the legislation was compliant but was implemented in way which was not in accordance with the ECHR”¹²⁴), the Member State remains responsible in both situations.¹²⁵ However, the appearance of the EU in the proceeding would advantage the case for the applicant, as both, the EU and the Member State would be bound by the judgment. Moreover, if EU legislation is at issue, the mechanism is beneficial from the point that the EU would have a chance to defend the litigious provisions of the act, and as only the EU is authorized to change any violations in the law.

The situation when a Member State could become a co-respondent is narrowed to the case when a provision of the EU primary law is allegedly has violated the Convention.¹²⁶ One of the major reasons for the involvement of the EU Member States into the procedure, effecting primary law, is that in order to amend the Treaty the ratification of each EU Member States is required.¹²⁷ As for the procedure of being involved as the co-respondent, it is similar to both scenarios. The decision is taken by the ECtHR on the request of the High Contracting Party to be designated as a co-respondent.¹²⁸

The co-respondent mechanism is certainly a great step in avoiding any determination by the ECtHR of who should be held responsible for a breach under the EU law and, what else, it is significant for accommodation “the specific situation of the EU as a non-State entity

¹²³ Draft Accession Agreement, *supra* note 58, Art. 3 (2).

¹²⁴ X. Groussot, T. Lock, L. Pech, EU Accession to the European Convention on Human rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011, Policy Paper No. 218 of the Robert Schuman Foundation, 7 November 2011, p. 11.

¹²⁵ *Ibid.*

¹²⁶ Draft Accession Agreement, *supra* note 58, Art. 3 (3).

¹²⁷ Treaty on the European Union, *supra* note 2, Art. 48 (4).

¹²⁸ Draft Accession Agreement, *supra* note 58, Art. 3 (5).

with an autonomous legal system”.¹²⁹ Nevertheless, I believe, that the main weakness of the mechanism is a voluntary nature of the decision to be or not to be a co-respondent in the proceeding.¹³⁰ So, if a potential co-respondent decides not to join a proceeding he cannot enforce the judgment against such a co-respondent. Moreover, there could be a situation when the respondent will be responsible but cannot remove the violation. For instance, the case where the issue at stake is the EU act, and the EU is not willing to enter into the proceeding as a co-respondent. Hence, there is no guarantee that the EU institutions would remove the violation from the legislation, and the hope is their goodwill. In my opinion, the way out should be found in bringing a case against the EU and against the EU Member State at the same time.

Now we should go back to the mechanism, which would ensure a “prior involvement” of the CJEU and the problem of the exhaustion of the domestic remedies. As stated above, the main problems arise when an applicant seeks to challenge a national measure implementing EU law, and the national court has not made the preliminary reference. The Draft Accession Agreement has managed to provide some guarantees, however quit ambiguous.

The drafters of the agreement have considered it relevant to provide for a prior involvement of the CJEU in the cases where “the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law”.¹³¹ So it should be considered as the guarantee that the ECtHR does not rule on the compatibility of an EU act with the ECHR without the CJEU having had the opportunity to review the EU act on fundamental rights grounds. It is also emphasized that “The CJEU will not assess the act or omission complained of by the applicant, but the EU

¹²⁹ See Draft Accession Agreement, *supra* note 58, Draft Explanatory report, Art. 3, para. 35.

¹³⁰ See X. Groussot, T. Lock, L. Pech, *supra* note 124, where the problem was also emphasized.

¹³¹ Draft Accession Agreement, *supra* note 58, Art. 3 (6).

legal basis for it.”¹³² Furthermore, the Explanatory Report to the Draft has clarified that a preliminary ruling is not itself a domestic remedy as under EU law applicants cannot force national courts to request such a ruling.¹³³ The procedural issues discussed above are applicable only in the situation where the EU is a co-respondent in the proceeding, which seems to be logical, as if an applicant is challenging directly the EU legislation, it is presupposed that the CJEU has been involved before.¹³⁴ The contribution of the Draft Accession Agreement should be not underestimated, however, I suppose that some issues remain questionable.

First of all, how the ECtHR would assess the absence the CJEU’s prior review of the compatibility of the EU act with the Convention’s provisions? If the CJEU has already assessed the compatibility of the EU act, however, not with the ECHR, but with the Charter, would it be counted as the absence of such a review? Another concern, is the procedural aspects of the “prior involvement”, as the Draft Accession Agreements does not provide any guideline in how actually the CJEU should be involved, saying only that the Luxembourg t Court makes an “assessment is made quickly so that the proceedings before the Court are not unduly delayed”.¹³⁵ Nevertheless, I think that these issues would be elaborated in the course of the ECtHR practice after the EU becomes the party to the Convention, as the grounds for such elaboration are already enshrined into the Draft Accession Agreement.

Consequently speaking, the relations between the CJEU and the ECtHR would differ greatly from the pattern of the cooperation, which exists today. The former relations of comity would not exist any more, the CJEU finally will become legally bound by the Convention and by the ECtHR case law, the ECtHR would become a final arbiter in issues concerning

¹³² See Draft Accession Agreement, *supra* note 58, Draft Explanatory report, Art. 3, para. 59.

¹³³ *Ibid*, para. 57.

¹³⁴ See the analysis given above, in the part concerning prior involvement of the CJEU.

¹³⁵ Draft Accession Agreement, *supra* note 58, Art. 3 (6).

human rights protection and to this extend would acquire a number of the mandates that were not inherent to it before. The specific EU legal order, though, has made some reservations for the CJEU within these relations, which are reflected in the Draft Accession Agreement.

CONCLUSION

The EU accession to the ECHR would bring to an end the relations of cooperation, comity and mutual respect, which two major European courts have obtained through a long way of diverse difficulties. The EU accession to the Convention does not leave any room for the interaction, which the CJEU and the ECtHR have been following along the years; the Courts will have to adapt a new-relation-scenario.

First of all, I assume that the *Bosphorus* presumption, which used to be one of the core elements within present the CJEU's and the ECtHR's relations, will be abandoned. One of the main reasons is that the EU, even being a specific party to the Convention, should not be granted with a less extensive scrutiny by the Strasbourg court. As such a behavior of the ECtHR could undermine the achievement of the objectives pursuing by the very accession and the work of the Court as such.

The CJEU will become legally bound by the Convention and the ECtHR case law, thus the Strasbourg Court will be a final arbiter in issues concerning human rights protection. However, I suppose that the CJEU would preserve its interpretative autonomy, as the ECtHR would abstain from any declaration except those concerning compatibility of the EU acts with the Convention.

As for the both Courts' exclusive jurisdiction and the conflict between Article 344 of the TFEU and Article 55 of the ECHR, the Draft Accession Agreement has solved the problem in respect by stating that proceedings before the ECJ do not constitute means of dispute settlement within the meaning of the ECHR. However, the conflict upon Article 344 of the TFEU and Article 33 of the ECHR has been left for the EU. In my opinion, the

problem is exaggerated, as the reference of the application to the ECtHR does not amount to the interpretation or application by the latter of the Treaty, rather of the Convention.

Another problematic issue concerns the situations when an applicant seeks to challenge a national measure implementing EU law, and the national court has not made the preliminary reference. The case is problematic, as it does not comply with requirements of Article 35 of the ECHR and as it deprives the CJEU's right to be a final arbiter in reviewing the validity of the EU acts.

The difficulty is partly solved by the Draft Accession Agreement. First, the "preliminary ruling" is not considered as an "exhaustion of the domestic remedies". Secondly, the Draft provides with the possibility for a prior involvement of the CJEU in the cases where the Court "has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law". However, such questions as criteria of the assessment of the absence the CJEU's prior review of the compatibility of the EU act with the Convention's provisions; the case when the assessment was based on the Charter, rather than on the ECHR; the procedural concerns.

Thus, the contour of the relations between the CJEU and the ECtHR is already sketched, and of course not without the help of the Draft Accession Agreement, however, the essential substance would be established after the very accession.

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