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Should the European Union Ratify the European Convention for Human Rights?

*Some Remarks on the Relations between the European Court of Human Rights and the European Court of Justice*¹

1. JUXTAPOSED HUMAN RIGHTS ORDERS AND A TWIN PEAK SYSTEM

This chapter focuses on the relationship between the European Court of Human Rights and the European Union in light of the commitment of the European Union to accede to the European Convention on Human Rights.² It assesses what point there is or should be for the EU to accede.

As the process of accession is still underway at the time of writing (June 2012), it is appropriate to look at what this process and the complications it has run into so far, tell us on the importance of accession. In this context, it also highlights the role which both the ECtHR case-law and the ECtHR as an independent actor in the process of accession have played until now.

In order to be able to assess what we are heading for, we first need to outline the existent relations between EU and its European Court of Justice on the one hand and ECHR and its ECtHR on the other, before the accession. In this regard we need to distinguish between the legal terms of the institutional relationship and as they more factual institutional relationship as it takes shape in the contacts between the two courts.

One might think that prior to the accession of the EU to the ECHR the relationship between the ECtHR and the ECJ has been one of mere juxtaposition. This is formally true but only trivially so. In fact, the relationship has been asymmetrical. This merits clarification.

Prior to accession, the ECtHR has had no official *legal* relationship with the European Union in the sense that there are mutually obligatory arrangements which create specific institutional relations with the ECJ on a mutually agreed legal basis such as a treaty or other bi- or multilateral treaty. Formally, the ECtHR has no official legal relation to the EU. It cannot, therefore, scrutinize its actions as it can scrutinize that of the states which are a party to the ECHR. But from the perspective of the EU the relationship is not so in the same manner.

1.1. Asymmetric legal relations

In its case law the ECJ unilaterally adopted a standard of fundamental rights protection based on two pillars: the rights of the constitutional traditions common to the member states and the rights of the human rights treaties to which the member states are party, in particular – but not exclusively – the European Convention of Human Rights. The rights found in these two pillars could neither be protected *qua* national constitutional rights nor *qua* treaty rights. The

¹ This contribution has been written whilst the author was holder of the chair of European Constitutional Law at the University of Utrecht and Fellow of the Netherlands Institute for Advanced Studies (NIAS), Wassenaar, Netherlands, which have supported him with a generous grant.

² Article 6(2) Treaty on European Union (TEU): '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.'

EU is not legally bound by national constitutions, nor is the EU legally bound by human rights treaties.³ The power of the ECJ is limited to the interpretation of EU law. As it is neither bound by national law, nor to human rights treaties to which only member states are bound, it has no formal legal role in guaranteeing those rights. In order nevertheless to achieve such protection, these rights had to be transformed into EU law. This was done by declaring them part of the general principles of Community law, now Union law. Resorting to this somewhat roundabout approach was necessitated by the combination of three things: firstly, the absence of a bill containing classic human rights in the European founding treaties, secondly, the EC/EU not being a party to the ECHR, and thirdly the repeated warnings by German courts referring cases to the ECJ. These warnings were made in these national courts' explanations of the questions these courts posed in preliminary reference proceedings: if in the cases referred the ECJ were to refrain from taking a constructive approach to the protection of the rights in a manner equivalent to how they are protected under the German *Grundgesetz*, this would be reason for those German courts no longer to grant direct effect to the disputed European law of which the compatibility with fundamental rights was in doubt.

Thus, via the convoluted route of the general principles of Union law, the ECHR rights became unilaterally incorporated into EU law, first in the ECJ case law only, and subsequently in the EU Treaty concluded in Maastricht in 1992 in a formula which we still find now in article 6(3) EU:

'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

1.2. From fundamental rights rejection to full scrutiny

It should be emphasized from the outset, that the ECJ has gradually improved the standard of scrutiny it upholds when confronted with a claim that an act under EU law is contrary to fundamental rights guarantees. In its early case law, the Court simply refused to consider such a complaint. It could do so the more easily since plaintiffs relied on fundamental rights as contained in national bills of rights, in particular German plaintiffs by relying on the *Grundgesetz*.⁴ As the Court is competent only to adjudicate on the basis of European law, not national law, the standard rejection was plausible. The turning point came in a series of German cases, of which the first one is the case of man called *Erich Stauder*, who wanted to remain anonymous and therefore did not want his name on the tickets for cheap butter for poor Germans to be handed in in shops – a European subsidized manner to reduce the quantity of overproduced butter stocked by the EC to keep prices up at the time. The Court, incidentally, had the insensitivity of not only mentioning his name, making the man who sought anonymity famous among lawyers, but also of giving the precise details of his home address in Ulm.⁵ This and the subsequent line of case law confirmed the ECJ's power to protect such rights as general principles of Community law, but indeed, the scrutiny was lax. Mostly, the Court found that a matter came within the scope of the right adduced, but that the measure which interfered with that right was taken in the interest of the Community and did

³ A recent exception is the Convention on the Rights of Persons with Disabilities (13 December 2006) 2515 UNTS 3, entered into force 3 May 2008, which the EU signed on 30 March 2007 and ratified on 23 December 2010.

⁴ Case 1/58, 4 February 1959, *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community*; Joined Cases 36, 37, 38/59 and 40/59, 15 July 1960. *Präsident Ruhrkohlen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v. High Authority of the European Coal and Steel Community*.

⁵ Case 29/69, *Erich Stauder v. City of Ulm – Sozialamt* [1969] ECR 419.

not fully take away the core essence of the right, so was justified.⁶ In the course of time, this approach was criticized as not ‘taking rights seriously’.⁷

A quite definitive change in the intensity of scrutiny came in the *Connolly* judgment, an appeal against a judgment of the Court of First Instance on disciplinary measures against a Commission official, who had written a book during a study leave on the many flaws of the making of the monetary union.⁸ In the book he used what is conceived of on the continent as Europhobic invective, but which presumably might just as well be qualified as colourful hyperbole in a longstanding tradition of English writing on anything ‘European’.⁹ He did not only write but also publish the book without the prior consent of his superiors in the Commission,¹⁰ under the title ‘The Rotten Heart of Europe’, with on the cover *Manneken Pis* (Petit Julien) weeing over the map of Europe. The fact that not everything in the book was kind, flattering or polite had -no doubt- added fuel to the conflict he had with his Commission superiors, who imposed disciplinary sanctions, including his withdrawal from his post. The Court of First Instance in essence found the disciplinary measures justified, finding ‘that the book at issue contains numerous aggressive, derogatory and frequently insulting statements, which are detrimental to the honour of the persons and institutions to which they refer’ (para. 125 of its judgment). The Court of First Instance had rejected Connolly’s reliance on article 10 ECHR. At the outset of doing so, it stated that the right contained in this provision is part of the general principles of Community law protected by the European Courts, but instead of referring to and using the strict criterion of ‘necessity in a democratic society’ in the text of article 10, second paragraph, ECHR, translated the strict language of article 10 into the quite different standard developed in the ECJ case law. Compare the two texts:

ARTICLE 10(2) ECHR:

ECJ STANDARD FOR RESTRICTIONS AS
USED IN *CONNOLLY* AT COURT OF FIRST
INSTANCE:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary in a democratic society, in the interests of* national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of

[F]undamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general public interest pursued by the Community and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon

⁶ E.g. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* [1974] ECR 491; Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* [1979] ECR 03727.

⁷ J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’, *Common Market Law Review* 29:4 (1992), 669-692, at page?; and the riposte by N.J.S. Lockhart and J.H.H. Weiler, ‘Taking Rights seriously’ seriously: The European Court and its fundamental rights jurisprudence’ *Common Market Law Review* 32:1 (1995) 51-94 (Part I), and 579-627 (Part II).

⁸ Case C-273/99 P, *Bernard Connolly v. Commission of the European Communities*, ECR 2001 p. I-1575.

⁹ See M. Spiering, *Englishness: foreigners and images of national identity in postwar literature. Studia imagologica: comparative literature and European diversity* (Amsterdam: Rodopi, 1992).

¹⁰ Article 17 of the Staff Regulations, Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968, OJ 56, 4.3.1968, p. 1–7, as it then read: ‘An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority, any matter dealing with the work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.’ This provision has been amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004, OJ L 124/1, replacing prior consent with prior notification.

others, for preventing the disclosure of information the very substance of the rights protected'. received in confidence, or for maintaining the authority and impartiality of the judiciary.

Against this standard, the Court of First Instance quickly concluded that its loose criteria for restricting freedom of expression were fulfilled. On appeal, the ECJ, quite to the contrary and for the very first time construed the possibilities for restricting freedom of expression under article 10 ECHR strictly and totally in line with the quite strict case law of the ECtHR when it concerns prior restraints on expression. This, I would submit, constituted a revolution in the role of the ECJ as authentic fundamental rights umpire in the Union. Since then, the ECJ has overall lived up to the task of interpreting and applying the ECHR in line with the Strasbourg case law.

1.3. Factual relations between the two Courts¹¹

The legal story on the state of affairs prior to the accession of the EU to the ECHR is not sufficient to sketch relations between the two courts. There is also the more factual aspect of relations between the two courts. This concerns the judicial dialogue which takes the form of regular meetings between the members of the two Courts, which enable them to discuss matters of common interest in a round table meeting, usually on the basis of two or three presentations of members of each court.¹² These exchanges take place usually during the late autumn or winter. The courts take it in turn to host the other court. As one former judge of the ECtHR once remarked, the judges from Luxembourg travel each with their individual car and driver provided by the ECJ; the judges from Strasbourg go by bus.

It is hard to find out when these periodic meetings began exactly, but presumably they take place since the 1990s, and they may have their origin in the establishment of more direct contacts between the two courts after a little accident in 1989. This occurred in the judgment of 21 September 1989 of the ECJ in *Hoechst*, which is a very interesting case also from the substantive point of view.¹³ In order to collect evidence of unlawful practices restricting competition in the relevant market of PVC and polyethylene products, the business premises of the company in several countries were searched by Commission officials under a warrant which ultimately had its basis in a piece of European legislation concerning such unlawful practices, and a fine was eventually imposed.¹⁴ In a case against the imposition of the fine by the Commission, the company held that the search was an unlawful infringement of the right to the privacy of the relevant business premises, a fundamental right which forms an integral part of the general principles of Community law. In order to assess this claim, the Court had to establish whether such form of privacy is part of the constitutional traditions common to the member states or is protected under article 8 of the ECHR (privacy and family life). The Court, however, held

¹¹ There is a *hausse* in literature and conferences on both the judicial and the non-judicial 'dialogue among judges'. Instead of many others I mention the 'Special Issue on Highest Courts and Transnational Interaction' of the *Utrecht Law Review*, Volume 8, Issue 2, May 2012; especially the contributions by M. Claes and M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', at pp. 100-114.

¹² ¹³ Joined Cases 46/87 and 227/88, *Hoechst AG v. Commission of the European Communities* [1989] ECR I-2859.

¹⁴ Article 14 of EEC Council Regulation No 17: First Regulation implementing articles 85 and 86 of the Treaty (as amended).

‘that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the member states in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the member states in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities...

No other inference is to be drawn from Article 8(1) of the European Convention on Human Rights. ...The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, *it should be noted that there is no case-law of the European Court of Human Rights on that subject.*¹⁵

Well, the very last statement was not altogether true: there had been a judgment of the European Court of Human Rights, handed down on 30 March 1989, in which the Court had considered business premises on the second floor of an entrepreneur's private home to be protected by article 8 ECHR (a position confirmed by the ECtHR in 1992).¹⁶ This judgment came after the Reports for the hearing and further to the hearing (8 December 1988), and after the Opinion of the Advocate General, which was delivered at the sitting on 21 February 1989. We should be aware that in those days neither of the courts was connected to the World Wide Web and the judgments of the courts were made available digitally to the outside world only years later. At any rate, this little accident has been understood to be a reason for establishing closer and direct contacts between the two courts, of which the mutual visits have come to form part, on a regular basis since at the latest 1998.

The meetings did not yield members of the public much more than a press communique which mentions the visit. In 2007, the papers presented by the courts were for once published on-line on the ECtHR website, but this has been the only time so far.¹⁷ A novelty was the Joint Communication by the Presidents of the two courts, Skouris and Costa, of 17 January 2011, shortly before the negotiating group on the accession was to deal with the matter.¹⁸ We return to that document below, when discussing the role of the Courts in the accession negotiations.

2. THE ROLE OF THE BOSPHORUS DOCTRINE

The asymmetry as regards the ECHR between the ECJ and ECtHR we mentioned above, has a further aspect. Under the case law of the ECtHR, the starting point has been that of EU member state responsibility and EU immunity. For the ECtHR the immunity of EU action under the ECHR as a consequence of it not being a contracting party extends in some cases to

¹⁵ Hoechst AG v. Commission of the European Communities, *supra* note 13, para. 17-18 (emphasis added).

¹⁶ *Chappell v. UK* (Appl. No. 10461/83) Judgment (Chamber), 30 March 1989, Series A, Vol.159. ; *Niemietz v. Germany* (Appl. No. 13710/88) Judgment (Chamber), 16 December 1992, Series A, Vol. 251-B.

¹⁷ See the links to the papers on the following page under the heading 'Visit of delegation from the Court of Justice of the European Communities' 09/11/2007:

www.echr.coe.int/ECHR/EN/Header/The+Court/The+President/Events/The_President_Events_2007.htm.

¹⁸ See http://curia.europa.eu/jcms/jcms/P_64268/

EU member states according to the doctrine coined by the ECtHR in the *Bosphorus* judgment.¹⁹ In it, the ECtHR developed the following approach.

Public authorities of member states of the EU are responsible on account of their being a party to the ECHR whenever they act outside the scope of EU law. When they act within the scope of EU law, there is an exception to their responsibility: when they have acted in a manner dictated by EU law and had no discretion under EU law not to apply its law in a different manner, they are immune from ECHR responsibility. In this judgment, the ECtHR made this immunity – which implies that an application at the ECtHR in such a case is not admissible – dependent on the rebuttable assumption that the ECJ provides a protection of ECHR rights that is equivalent to that provided by the ECtHR. The ECtHR based this assumption on a twofold assessment of the standards applied by and procedural protection available at the ECJ.

The first led the ECtHR to establish equivalence of the fundamental rights standard as contained in the general principles of Union law and the Charter. The Charter was, as was noted by the ECtHR ‘not fully binding’ at the time; the ECtHR *Bosphorus* judgment dates from June 2005, the Charter became binding only with the entry into force of the Lisbon Treaty in December 2009. So we may now say that since the entry into force of this Treaty the Charter has become fully binding and the standard is therefore in principle raised further.

The second assessment concerned the judicial protection available in the EU to ensure observance of that standard. In this regard, the ECtHR judged that the system of judicial protection pre-Lisbon, notwithstanding the limitations on the *locus standi* of individuals at the ECJ, based as it is on the possibilities of legal protection through national courts, in combination with the preliminary reference procedures, as well as the possibility of state action and actions being brought by the institutions at the ECJ, warrants the conclusion ‘that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, “equivalent” to that of the Convention system’, and hence justifies presumption of compliance with the ECHR. As we said, this presumption can be rebutted, which according to the ECtHR is the case if and when in the circumstances of a particular case the protection of ECHR rights is ‘manifestly deficient’. Obviously, it is uniquely for the ECtHR to decide on attempts at rebuttal of the presumed equivalence of protection.

The *Bosphorus* judgment addresses in the context of a conflict of treaty obligations (the EU Treaties versus the ECHR) the dilemma of on the one hand effective protection of the rights of citizens under the ECHR, and the legitimate compliance with EU law of the state against which a complaint is directed on the other. Also, however, it effectively shields governments acting within the EU framework from scrutiny by the ECtHR. This effect of shielding is even stronger if it is not only the ECtHR that presumes EU compliance with the ECHR, but also national courts refrain from scrutinising acts under EU law from compatibility with the ECHR on such a presumption.²⁰ As we remarked, it is for the ECtHR to decide on the equivalence of protection which the ECJ provides under EU law. In other words, the whole construct of the *Bosphorus* doctrine concerns the relations between the ECtHR and ECJ at the European level.

¹⁹ *Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (Application no 45036/98) Judgment (Grand Chamber), 30 June 2005, ECHR 2005-VI, para. 149-158. This doctrine was confirmed and applied in *Coöperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. the Netherlands* (Appl. No. 13645/05) Judgment (Third Section), 29 January 2009, ECtHR 2009, concerning the right to respond to Advocate Generals' opinions, which has been a point of controversy in the literature (and ECJ case law).

²⁰ This author is acquainted only with examples from the Netherlands case law in this respect, notably *College van Beroep voor het bedrijfsleven* [Industrial Appeals Court (a highest instance administrative court)] 23 April 2008, LJN BD0646, AB 2008, 233 (*Socopa*); *President Rechtbank* [District Court] Den Haag 23 June 2009, LJN BJ0893.

And still, there are national courts who have concluded from *Bosphorus* that member state action is shielded also from review against the ECHR by national courts – a not altogether illogical conclusion when looking exclusively at the result of *Bosphorus* (i.e. immunity of the EU from scrutiny), but one which is totally illogical if we realize that the ECtHR never intended it as a task for national courts to assess whether the ECJ provides ‘equivalent protection’ as compared to the ECtHR. This national case law clearly illustrates how the extension of comity between courts at European level into the legal construct of immunity on the basis of ‘equivalence’ has pernicious effects when viewed from the ‘multilevel’ perspective as regards its consequences of fundamental rights protection at national level: what at the European level may be courtesy leads to the denial of fundamental rights protection at national level.

As we presently explain, the accession may mean that some of the arguments which led the ECtHR to formulate the *Bosphorus* doctrine will no longer exist. So it is a major question whether this *Bosphorus* doctrine is tenable after accession.²¹ During the accession negotiations the question whether the doctrine should be retained or abandoned was consciously not raised. On the part of the EU, this was based on an early agreement between member states and the Commission not to request a codification of the *Bosphorus* doctrine in the accession agreement, despite some early calls to that effect.²² This means that the negotiators left this important matter to the ECtHR to decide.

We briefly recapitulate some of the arguments for retaining and abandoning the *Bosphorus* approach.

2.1. Retaining the *Bosphorus* doctrine²³

An argument in favour of retaining the doctrine is, firstly, that the rationale of the transfer of sovereignty from member states to the European Union still exists after accession. It is this transfer which can entail that a member state authority is compelled to act in a manner which causes an (alleged) violation of the ECHR. So it is this transfer, then, that causes the member state not to be held responsible for that violation, since this is exclusively caused by EU law compelling the member state authority to act the way it did. The member state was literally merely ‘agent’ for the EU. The fact that the EU, which holds the powers transferred by the member states, itself has submitted to the ECHR after accession adds an extra reason to refrain from scrutiny of the member states actions. The so-called co-respondent mechanism – which we discuss below – ensures that retaining the *Bosphorus* doctrine does not lead to a void in cases where an applicant mistakenly directs his application to a member state, while it is the EU which should be the object of its application at the ECtHR.

A further reason which can justify retaining the *Bosphorus* doctrine is the very accession of the EU to the ECHR. This reinforces the argument that protection offered within the EU is ‘equivalent’ to that required by the ECHR. After all, it imposes on the ECJ the duty in its case

²¹ On this matter, see L.F.M. Besselink, ‘The European Union and The European Convention on Human Rights: From Sovereign Immunity in *Bosphorus* to Full Scrutiny under the Reform Treaty?’, I. Boerefijn and J. E. Goldschmidt (ed.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Antwerpen: Intersentia, 2008) 295-309.

²² See Clemens Ladenburger, FIDE 2012 – Session on ‘Protection of Fundamental Rights post-Lisbon’. Institutional Report, section 5.1, p. 45, available at www.fide2012.eu/index.php?doc_id=88; the author is a member of the Legal Service of the EU Commission, and closely involved in the accession process, and wrote this institutional report on a personal title.

²³ For a number of politico-strategic reasons for retaining the *Bosphorus* approach concerning the relationship between ECtHR and ECJ, see L. Scheeck, ‘Diplomatic intrusions, dialogues, and Fragile Equilibria: the European Court as a Constitutional Actor of the European Union’, J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights Between Law and Politics*, (Oxford University Press, 2011), 164-180.

law to apply the ECHR directly, without the detour of the general principles under article 6(3) EU. Moreover, the EU fundamental rights protection ‘post-Lisbon’ has been strengthened: the EU Charter on Fundamental Rights has become legally binding; the Court of Justice will have jurisdiction with regard to what was previously called ‘third pillar’ law; and even the right of standing of individuals has been extended under article 263(4) TFEU.

In short, if before Lisbon and accession to the ECHR, EU protection was equivalent to the protection offered under the ECHR, it must certainly meet the requirement of being equivalent even more easily after accession. This being the case, the ECtHR may have reason to maintain the immunity from scrutiny granted in *Bosphorus* than at the time.

2.2 Abandoning the *Bosphorus* doctrine

The most important argument in favour of abandoning the *Bosphorus* doctrine is that it seems to obviate major reasons for accession to the ECHR.²⁴ Exposure to ECtHR scrutiny is the very purpose of accession, and shielding from such scrutiny undermines that objective.

Moreover, it can be argued that, from the start, the *Bosphorus* doctrine was an inappropriate transplant of what was probably an appropriate construction for the *Bundesverfassungsgericht*, in the form of the ‘*solange*-doctrine. It may be appropriate in the context of a domestic order to take a jurisdictional step back in favour of a European court. But it would seem inappropriate for a centralized special European court, whose very task it is to scrutinize compliance by domestic authorities and courts, to step back in favour of such domestic authorities. Whereas the former aims to avoid a double standard and divergences in establishing contradictory judgments, the latter allows for the possibility of divergent judgments concerning compliance with the ECHR and creates a ‘double standard’. On the latter point: after all, the ECtHR, as a Court with the exclusive and ultimate power to adjudicate compliance with the ECHR, should not be able ever to step back for, let us say, the German *Bundesverfassungsgericht* because overall the protection provided is equivalent. Accession would therefore seem to be the moment to set things right again, by abolishing the *Bosphorus* immunity. Whether the ECtHR will do so, is of course uncertain.

3. THE ROLE OF THE EUROPEAN COURTS IN ACCESSION NEGOTIATIONS

It may seem trite to make the observation that Courts as institutions and their component members depend on each other, but certainly cannot be equated.²⁵ In this section, however, we shall see how the accession to the ECHR has changed from a matter for individual members of the ECJ representing the Court in a non-committal manner, as used to be the approach, to one in which the ECJ as an institution in its own right takes views in such a highly normative manner, that the other actors in the negotiating process cannot ignore it without legal consequences.

In this context, there is of course already the procedure under Article 218(11) TEU according to which a member state, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an international agreement envisaged by the EU is compatible with the Treaties. Where the opinion of the Court is adverse, the

²⁴ See e.g., T. Lock, ‘EU accession to the ECHR: implications for the judicial review in Strasbourg’, *European Law Review* 35:6 (2010), 777-798, at 797-8; *ibid.*, ‘The ECJ and the ECtHR: The Future Relationship between the Two European Courts’, *Journal Law and Practice of International Courts and Tribunals* 8:3 (2009) 375-398, at 395-396.

²⁵ On this see L. Scheeck, ‘The Relationship between the European Courts and Integration through Human Rights’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 65 (2005), 837-885.

agreement envisaged may not enter into force unless it is amended or the Treaties are revised. A ruling under this provision makes the Court a powerful actor in the context of the conclusion treaties. This is a role which in the system of the EU Treaty the Court plays *after* the treaty has been concluded by the political branches but before it is ratified. The Commission had already announced that it would seek an opinion of the Court under Article 218 on the ECHR accession agreement. This makes the involvement by the Court in the negotiations all the more significant.

This involvement did not limit itself to the EU actors as addressees, but also those of the Council of Europe, by implicating the ECtHR through a Joint Communiqué of the Courts' Presidents into the assertion of the ECJ's views on the desirability of mechanisms protecting ~~the~~ its prerogatives. This centres around one particular issue that the ECJ began to consider crucial to its powers and its pivotal position within the EU legal order: the so-called 'prior involvement mechanism'. This is a procedural instrument by which a case brought to Strasbourg is suspended in order for the Court of Justice to give its judgment on the compatibility of an EU act with the ECHR rights involved, if the ECJ has not previously had the opportunity to adjudicate this matter.

There is a 'pre-history' to this. In the late 1970s, the Commission had opted for accession to the ECHR as a manner to solve the issue of fundamental rights protection within the European Communities. A memorandum was drawn up which provided the legal background, listed the legal and technical problems of accession and the ways to solve them.²⁶ In this Memorandum also the issue was raised of 'how to proceed in cases in which national courts have failed to fulfil their obligations to make a reference to the Court of Justice of the European Communities'. In this context the first ideas for reference of the case from Strasbourg to Luxembourg were launched.²⁷ That in the late 1970s this was thought necessary in order to preserve the role of the ECJ is understandable; it was the period of consolidating the constitutionalization of the EC. Ever since, the idea of preserving that role through prior involvement before Strasbourg would be allowed to judge, has remained. In the course of the accession negotiations, the ECJ took the following steps.

A first intervention in the direction of the negotiating actors was an intervention of the then Dutch ECJ judge, Timmermans, during a hearing of the competent European Parliament Committee in March 2010.²⁸ Judge Timmermans emphasized that he was a member of the Court, but that he spoke exclusively on a personal title:

²⁶ Bulletin of the European Communities, Supplement 2/79, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted by the Commission on 4 April 1979), COM (79) 210 final, 2 May 1979. Cover title: Accession of the Communities to the European Convention on Human Rights. Commission Memorandum. Available digitally at <http://aei.pitt.edu/6356>.

²⁷ The quotation is at p. 20 left column. The next section of the Memorandum which addresses the question has all the symptoms of a text which was later inserted. In particular, considering the style of the rest of the document, a separate section number should have been provided. The relevant section reads as follows: 'Since it can hardly be envisaged that the Strasbourg organs would themselves refer questions to the Court of Justice, it would appear appropriate to introduce a procedure whereby the Community is obliged, in cases where the compatibility of a Community act with the ECHR is in question, to ask the Court of Justice for an opinion before it submits its own conclusions and to transmit this opinion together with its observations to the Strasbourg organs. This procedure should be employed both in the case of clear failure by national courts of last instance to comply with the third paragraph of Article 177 of the EEC Treaty and in the case of applications by non-member countries, which, for their part, where they are in doubt as to the conformity of a Community act with fundamental rights do not have the opportunity to make a reference to the Court of Justice.'

²⁸ See Annex to European Parliament 2009 – 2014, Committee Constitutional Affairs, AFCO PV (2010) 0317 1, Minutes Meeting of 17 and 18 March 2010 Brussels; L'adhésion de l'Union Européenne à la Convention européenne des Droits de l'homme. Audition organisée par la Commission des affaires constitutionnelles, Bruxelles, 18 mars 2010, Christiaan Timmermans, Juge à la Cour de justice de l'UE,

‘La Cour n’a pas de position officielle sur la question qui nous occupe aujourd’hui.’²⁹

That question concerned the position of the ECJ after the ECtHR would have become competent to adjudicate whether an act prescribed by EU law is compatible with the ECHR. The concern he expressed regarded particularly the cases in which the ECJ had not had the opportunity itself to adjudicate the relevant case. This is possible because individuals cannot usually directly go to the ECJ with a complaint of violation of European constitutional rights – in the language of national constitutional law: the EU does not have a system of *recurso de amparo*, or *Verfassungsbeschwerde* – nor can an individual party force a national court by which the matter is to be decided, to refer a case to Luxembourg even if that would be appropriate or even compulsory under EU law. Judge Timmermans deemed it objectionable were the ECtHR to judge an act under EU law an infringement of the ECHR before the ECJ itself has been able to adjudicate the matter.³⁰ Hence the proposal is in such a case to adjourn the matter in Strasbourg, which would give the ECJ the chance to judge on the validity of the relevant EU act.

This was the personal opinion of a judge of the Court of Justice. On 5 May 2010, there appeared on the website of the ECJ a ‘Discussion Document’ of the Court of Justice on the matter.³¹ The Document carries a date but no signature or indication of its purpose. The title of the document, however, provides some indication. It is a ‘Discussion Document’, a ‘document de réflexion de la Cour’, a ‘Reflexionspapier des Gerichtshofs’. Apparently, it contains the opinion of the Court and is destined for discussion and reflection on the modalities of accession to the ECHR. Nothing in the document suggests that it is intended for internal discussions within the Court. So we may conclude that it concerns the opinion of the Court which is given to others to reflect upon. The timing – a month before the Council established the definitive negotiating mandate for the accession negotiations (4 June 2010) – suggests that those others are the institutions negotiating the accession, the Council and Commission in particular (the Commission’s Legal Service had not been in favour of the prior involvement mechanism, as we will have occasion to notice below).

In the Document, the Court explains once again that ‘the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.’³² This is not a gratuitous preference of the Court.

The Court explains that the principle of subsidiarity on which the ECHR is based, makes it imperative that first within the internal order of the EU the issue whether an act infringes on the ECHR rights must be reviewed before an external review takes place.³³ This is, one can say, a matter of ECHR law. The Court uses, however, also an argument from internal EU law. This concerns the unique and sole power of the ECJ within the system of EU law:

‘To maintain uniformity in the application of European Union law and to guarantee the necessary coherence of the Union’s system of judicial protection, it is therefore for the

www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71235/20100324ATT71235EN.pdf.

²⁹ Statement Timmermans, *ibid.*, at 1.

³⁰ It has been disputed whether this is actually correct; see *infra* note 48.

³¹ 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, http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf (last consulted 13 June 2012).

³² *Ibid.* at 4, para. 9.

³³ *Ibid.* at 5, para. 11.

Court of Justice alone, in an appropriate case, to declare an act of the Union invalid. That *prerogative* is an integral part of the competence of the Court of Justice, and hence of the ‘powers’ of the institutions of the Union, which, in accordance with Protocol No 8, must not be affected by accession.’³⁴

It is precisely to achieve this that the ECJ finds its prior involvement, before the ECtHR adjudicates an act under EU law, indispensable. In other words, absent ‘prior involvement’ by the ECJ, the accession would be incompatible with the special characteristics and nature of the EU legal order, and would consequently infringe the conditions set out in Protocol No 8 of the Lisbon Treaty. The ‘prior involvement mechanism’ for the Court is a matter which affects the lawfulness of the accession. Note that this is not a private opinion of a member of the Court, it is the Court itself which pronounces on this point of law in its ‘Discussion Document’. It also merits attention that Judge Timmermans had not explicitly spoken of ‘prior ECJ involvement’ as a strict legal requirement under Protocol 8.

The Discussion Document proved effective. From the little that has been made public on the negotiating mandate that the EU Council gave the Commission, it is clear that the ECJ desire of a ‘prior involvement mechanism’ was honoured.³⁵

As if this was not enough – evidently the Court found the matter of prime importance and feared omission – the matter was raised again shortly before the negotiating group was to deal with the ‘prior involvement’ mechanism at its 5th meeting, which took place on 25-28 January 2011.³⁶ The Presidents of the ECtHR and ECJ issued a Joint Communication after the periodic meeting of members of the two Courts.³⁷ The timing and substance of the Joint Communication was such that the matter was no longer one of the ECJ exercising its influence within the EU towards its own institutions, but a matter for all parties at the negotiating table.

³⁴ Ibid. at 4-5, para. 8.

³⁵ This can be found in a public Council document of 22 December 2010, which quotes from the otherwise strictly secret negotiating mandate; Council of the European Union, Brussels, 22 December 2010, DS 1930/10, Working Document from the Commission, [for the] FREMP meeting [in] Brussels, 10 January 2011, at 3: ‘- paragraph 11 of the negotiation directives of 4 June 2010 provides that the negotiations should ensure “that the prior internal control by the Court of Justice of the European Union, in accordance with primary law, is applicable also in cases where the conformity with the [ECHR] of an act of an institution, body, office or agency of the Union is at stake in a case brought before the [ECtHR] but [where] the Court of Justice of the European Union has not had the opportunity to rule on the compatibility of that act with fundamental rights defined at the level of the Union. Any such procedural means, allowing the Court of Justice of the European Union to assess the compatibility of such act with fundamental rights, should be meant to safeguard the subsidiary nature of the procedure before the [ECtHR] and should not result in causing unreasonable delays in such procedure”; in this connection the Council declaration annexed to the Council decision authorising the negotiation of the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Annex III) states that before the conclusion of the Accession Agreement “the Council will unanimously adopt legally binding rules to the extent permitted by the Treaties, on the prior involvement of the Court of Justice of the European Union in assessing the compatibility of an act of an institution, body, office or agency of the Union with fundamental rights as defined at the level of the Union, as set out in paragraph 11 of the negotiation directives” (italics in original).

³⁶ CDDH-UE(2011)03 Appendix II, 5th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission. Agenda, item 3: ‘Elaboration of the accession instrument(s) : a. Procedural means guaranteeing the prior involvement of the Court of Justice in cases in which it has not been able to pronounce on compatibility of an EU act with fundamental rights (item C.5 of the provisional list of issues).’ The Agendas and Reports of the meetings are published on the website of the Council of Europe. See www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp

³⁷ Only available in the working languages of the ECtHR, see http://curia.europa.eu/jcms/jcms/P_64268/.

The Joint Communication, after a brief remark on the desirability of ‘parallel interpretation’ of the EU Charter on Fundamental Rights and the ECHR, is entirely devoted to the ‘prior involvement mechanism’. Unlike the Discussion Document, it does not address the lawfulness of dispensing with such a mechanism, but instead focusses on the desired procedural details to be observed in the introduction of the mechanism:

“In order that the principle of subsidiarity may be respected ... a procedure should be put in place [...] which] would ensure that the CJEU may carry out an internal review before the ECHR carries out external review. The implementation of such a procedure, which does not require an amendment to the Convention, should take account of the characteristics of the judicial review which are specific to the two courts. In that regard, it is important that the types of cases which may be brought before the CJEU are clearly defined. Similarly, the examination of the consistency of the act at issue with the Convention should not resume before the interested parties have had the opportunity properly to assess the possible consequences of the position adopted by the CJEU and, where appropriate, to submit observations in that regard to the ECHR, within a time limit to be prescribed for that purpose in accordance with the provisions governing procedure before the ECHR. In order to prevent proceedings before the ECHR being postponed unreasonably, the CJEU might be led to give a ruling under an accelerated procedure.”³⁸

Finally, I draw attention to the fact that the ECJ formed part of the Council working group establishing the negotiating mandate as an observer (FREMP). This was not really intended as a ‘silent’ observer, as is apparent from the invitation of the Swedish Council Presidency extended to the Court already in December 2009.³⁹ It is unclear whether the Court was supposed to be a ‘silent witness’ when its membership of the Council Committee in charge of supervising the negotiations and outcome thereof was extended beyond the period of preparing the negotiating mandate.⁴⁰ Nor is there any information on the role of the Court representative in that committee.

The ECJ was not the only court that participated in the negotiations. So did the ECtHR, whose participation was not limited to the Joint Communication of the two Presidents, but was also member of the negotiating group in the person of its Registrar and Deputy Registrar.

³⁸ Section 2, last paragraph of the Communication.

³⁹ See Council Document , Brussels, 5 January 2010, 17807/09, JAI 948, INST 255; this contains a memo of the presidency to COREPER, which was an ‘I’ item, that is to say a document which is not object for deliberations in COREPER, from which it appears that the member states were consulted on the admission of a representative of the Court to ‘the discussions regarding a draft recommendation for the opening of the negotiations with a view to the accession of the European Union to the European Convention on Human Rights, as from their preparatory phase. [...] Given the technicalities of the accession of the European Union to that Convention, and in particular considering its procedural and jurisdictional aspects and the effect that such accession could produce in relations between the Court of Justice of the European Union and the ECHR, the delegations agreed that an involvement of the Court of Justice in these discussions would be of paramount importance [...] throughout the duration of the discussions on a draft recommendation for the opening of negotiations for the accession of the European Union to the European Convention on Human Rights.’

⁴⁰ The committee is the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, alias FREMP. Its task was defined in article 3 of the partially declassified negotiation mandate (declassification decision of September 2010) Council Document 10817/10 EXT 2. The invitation to the ECJ to participate in FREMP is in Council Document of 17 September 2010, 13714/10, at 2, and was this time more restricted ‘to the extent that the issues for discussion on the FREMP agenda require such an expertise and the Court of Justice of the European Union agrees on such a participation’. Enquiries at the ECJ show that a representative indeed acted as observer, but no further details have been communicated on his activities.

4. THE EXPECTED OUTCOME OF ACCESSION NEGOTIATIONS

At the time this essay is written (May 2012), the accession negotiations have not yet reached a definitive result. As a consequence of intra-EU disagreement between member state governments over the Draft Accession Agreement, multilateral negotiations have been suspended since July 2011.⁴¹

It had looked so promising. The negotiations had started in July 2010 and much progress was made in the negotiating group, composed of a select group of equal numbers of EU and non-EU Council of Europe members on an expert basis together with the EU Commission negotiators. The agenda flowed naturally from the inventory of all the mainly quite technical issues as they had been assembled since the Commission proposed accession in 1979. They were contained in a set of equally technical documents, proposing solutions to the various points. They were deftly dealt with. In June 2011 agreement was reached and in July the negotiated text of the Draft Accession Agreement with a Draft Explanatory Report to the Agreement and two other draft legal instruments were published in a definitive form.⁴²

A solemn session in October had been planned to adopt the results formally, if possible plan the Agreement's signature and to celebrate. All this fell through. The UK and France had too many objections. The UK had a long list of what can be considered pretty cosmetic and editorial issues, France on the scope of ECtHR jurisdiction in particular as regards cases concerning the European Foreign and Security Policy (on which the ECJ has quite limited jurisdiction). On some issues there were more member states venting second thoughts. These concerned the exercise of voting rights in the Council of Europe's Committee of Ministers, when supervising the compliance of states with ECtHR judgments, the unaffectedness of the member states' competences as a result of the accession, and the extent of application of the co-respondent mechanism.⁴³

At least in part the objections concerned issues which in a sense are quite technical, but in part they concerned matters of high diplomacy. In particular the voting rights issue is sensitive as it is viewed as at least a potential precedent for similar issues in other international organizations, which could work out to the detriment of the member states. The issue basically concerns the fact of EU states forming a majority in the Committee of Ministers which could under normal voting rules always block an unfavourable view of the non-EU member states as to the compliance of the EU or an EU member state with an ECtHR judgment. Depriving EU member state governments from the right to cast their individual vote turned out to be equally problematic.

Another issue touching on 'sovereignty' sensitivities is the Foreign and Security Policy. The overall negative attitude of the UK – more or less tacitly supported by some other ECtHR sceptic countries – can be explained by the prevailing anti-European and especially the more than traditionally anti-ECtHR political climate in the British Parliament.

⁴¹ See Steering Committee for Human Rights (CDDH), 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. Strasbourg, 14 October 2011 CDDH(2011)009; Council of the European Union, Brussels, 6 December 2011, Council Document 18117/11, Fremp 112/Jai 918/ Cohom 284/ Cosce 22.

⁴² CDDH-UE(2011)16, Final Version. 8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission. Draft legal instruments on the accession of the European Union to the European Convention on Human Rights, Strasbourg, 20–24 June 2011.

⁴³ See e.g. the document published on Statewatch <www.statewatch.org/news/2011/nov/eu-council-echr-accession-1638-11.pdf>: Council of the European Union, Brussels, 8 November 2011, Document 16385/11 LIMITE, FREMP 100, JAI 795, COHOM 257, COSCE 20.

At the moment, unofficial reports from Brussels circles have it that a set of compromise texts which were designed and negotiated after the *déconfiture* in the autumn of 2011 have been agreed in the course of April in the relevant Council Working Group (FREMP) and was in general terms adopted in the JHA Council Meeting of the same month, calling for early resumption of negotiations in the framework of the Council of Europe.⁴⁴

4.1. Prior ECJ involvement

Although unconfirmed rumours suggest that something in the text of the Draft Agreement on the ‘prior involvement mechanism’ may still have been amended, it is certain that there will be such a mechanism included.⁴⁵ An area of uncertainty is the scope of the cases which can be referred from Strasbourg to Luxembourg. Initially, one seemed to be thinking of cases which raise issues of the ‘validity’ of EU acts (cf. the statement by Timmermans and the Discussion Document). In this option, the mechanism could not be invoked for issues of ‘interpretation’ of EU law; if issues concerning the ‘interpretation of EU law’ are included, this would concern a considerably larger category of cases than cases which concern the ‘validity’ of EU acts.⁴⁶ The outcome of this matter will have to be awaited. Suffice to remark that the text of the Draft Accession Agreement of July 2011 is not very explicit as to whether it limits the matter to a judgment on the ‘validity’ of EU acts only.

Another important point is that nothing is so far known about the internal EU rules under which the mechanism is to function. It has been suggested that ‘accelerated proceedings’ will be used, for which existent procedural rules under the ‘urgent preliminary ruling’ proceedings may serve as inspiration. Unclear is what the standing of the appellant in Strasbourg is under this procedure in Luxembourg, nor is it clear on what basis what kind of rulings can be handed down by the ECJ, and what the consequences are for *res judicata* in the case brought to Strasbourg by plaintiffs, to mention just a few important outstanding issues which must be dealt with within the EU. Initially, the Commission found it unnecessary to introduce the prior involvement procedure, while the Legal Service of the Commission held that an amendment

⁴⁴ Council of the European Union, ‘Press Release, 3162nd Council meeting (Justice and Home Affairs)’ (April 27, 2012) 16 http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/129870.pdf. What form these negotiations were to take, was still unclear in June 2012, when this manuscript was finalized, as it was said to be unlikely that it would again take place in the working group of experts. Uncertainty as to the forum may explain the delay in resuming the negotiations.

⁴⁵ The text of the Draft Agreement of July 2011 reads in article 3: ‘6. In proceedings to which the European Union is co-respondent, if 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 as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.’

⁴⁶ The French delegation in the Council Working Group has proposed such a wide ranging formulation in November 2011, for article 3(6) of the Accession Agreement to read as follows:

‘In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with **or interpretation with regard to** the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court **in matters relating to the interpretation of the Convention**’ (bold text is in the original). This proposal can be found in Council document DS 1675/11, at 7, para. 19, available at www.statewatch.org/news/2011/nov/eu-council-echr-accession-fop-ds-1675-11.pdf.

of the Treaty on the Functioning of the European Union was necessary,⁴⁷ but it seems that that position has been abandoned by the Commission.

4.2 The merits of the prior involvement mechanism: institutional prerogative or access to justice through the backdoor

It is, nevertheless, possible to give a preliminary assessment of the proposal for having such a mechanism at all. In this regard, it is striking that the ECJ has formulated the necessity for its introduction in terms of keeping its judicial ‘prerogative’ within the EU untouched.⁴⁸ This reveals an unexpected sensitivity which echoes quasi ‘sovereigntist’ sentiments among the states which did not want a European Court of Human Rights at the time of the negotiation of the ECHR.⁴⁹ It was feared that such a Court would be a court of fourth instance of appeal which would upset the national system of judicial protection. It would rule on what as a net result would be the validity of national law, a power which was the monopoly of national legislatures, or if it had to be courts, constitutional courts. This has clear analogies in the arguments propounded by and on behalf of the ECJ. In reality, of course, the ECJ is in these respects no different from national courts and the response to such fears is identical. The ECtHR does not rule on the validity of internal law of states party to the ECHR. It can only adjudicate concrete allegations of infringements of ECHR rights and can do little more than order compensation in case an infringement is established.

Nor is the argument correct that it is unique to the EU that a case might arise that has not been adjudicated by a competent domestic court. As we already indicated, such a case can arise for failure of a national court to refer EU law questions for preliminary rulings to the ECJ, which individual parties in a case cannot force national courts to do, while individuals do not have standing at the ECJ for alleged infringements of EU fundamental rights alone – there is no EU equivalent of a *recurso de amparo*, or *Verfassungsbeschwerde*. When we look at national systems of judicial protection, often the situation is no different. In truth there are many cases in which the national court competent to protect constitutional rights and competent to adjudicate the constitutional validity of acts of public authorities, especially legislatures, is not brought to such a court, precisely because a recourse like *amparo* or *Verfassungsbeschwerde* does not exist in all states. So it can and indeed does happen that the ECtHR rules in cases which might not have been dealt with nationally: in fact, it is established case law that the national judicial remedies should be exhausted only on the assumption that there is an effective domestic remedy available in respect of the alleged violation; the only remedies which the Convention requires to be exhausted are those that relate to the breaches alleged and are at the same time available and sufficient.⁵⁰ The point is that in a range of cases (in particular the preliminary proceedings) there is no such procedure available in EU law. It would seem that now the ECJ tries to repair the gap in judicial protection through the backdoor: a form of *Verfassungsbeschwerde* via the route of Strasbourg.

⁴⁷ See Council Document Brussels, 2 June 2010, 10568/10, at 3-4 (footnotes 1), and at 6 (footnote 1 which refers to document Doc. 9693/10 of Council containing the Legal Service’s views, which document is partially released for publication in February 2012, not containing anything on the substance of that opinion, however.

⁴⁸ See the ECJ’s Discussion Document, para. 8, *supra* note 31.

⁴⁹ For the various positions of the governments at the origins of the ECHR, see Ed Bates, ‘The Birth of the European Convention of Human Rights and the European Court of Human Rights’, J. Christoffersen and M. R. Madsen (eds.), *The European Court of Human Rights Between Law and Politics*, (Oxford University Press, 2011), 17-42 at 25-27 and *passim*; for the British position, A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001), 330, 612-16, 654-656, 678-680.

⁵⁰ Recently e.g. *Scoppola v. Italy* (Appl. No.10249/03), Judgment (Grand Chamber), 17 September 2009, not reported, para. 68-70.

Was the introduction of the prior involvement mechanism inevitable, given the make-up of judicial protection in the EU? Ultimately it is simply the architect who determines the constitutional design. There is very little inevitable in the choice of the design. The Court could, for instance, have solved the matter by pleading for the creation of a *ius standi* in a special appeal concerning an infringement of EU fundamental rights. This was pleaded for regularly in the literature, in particular the German literature at the time of the Constitutional Convention.⁵¹ This, however, was not the route the ECJ propounded: not EU law but ECHR law needed to cater for a special recourse to Luxembourg in relevant cases. There may be political arguments for this position, prominently the fact that EU treaty amendments of an architectural nature are more and more complicated to achieve. It is hard to see, however, why it should be more feasible to have this matter resolved by putting it through a procedure which does not only require the ratification of the 27 EU member states but also that of the twenty non-EU state parties to the ECHR.

Not only is the prior involvement proceedings not something inevitable, there is a body of scholarly views and views within the institutions which thinks it unnecessary anyway, which, as we mentioned, included initially also those of the Legal Service of the Commission. The prior involvement procedure is premised on a situation which is unlawful. Both under EU law, ECtHR case law and also the case law of the national constitutional courts like the *Bundesverfassungsgericht*, a failure to refer a case for a preliminary ruling to the ECJ is an unlawful infringement of article 267 TFEU, article 6 ECHR,⁵² and article 101 *Grundgesetz* respectively. This means that at any rate access to these respective courts is given as a consequence, which seems to obviate the necessity of introducing a special prior ECJ involvement mechanism.⁵³

The prior involvement mechanism may be considered a more controversial instrument than the co-respondent mechanism, which we shall describe presently, since its inspiration seems not primarily to be the interest of the applicant, but is motivated by defending what the Court itself terms the institutional prerogative of the ECJ. However, a second thought is possible. If the applicant has standing at the ECJ under this procedure, he has acquired access to the Luxembourg court which he would otherwise not have had. In fact, the prior involvement procedure has opened access to justice through the backdoor.

4.3. The miraculous multiplication of respondents

One other aspect which deserves mention in this context is the equally complicated mechanism of co-respondents, to which the prior involvement procedure is linked. It amounts to the following. On a decision of the ECtHR and at its own request, the EU becomes a co-

⁵¹ E.g. N. Reich, 'Zur Notwendigkeit einer Europäischen Grundrechtsbeschwerde', *Zeitschrift für Rechtspolitik* (2000) 6, 375-378; H.-W. Rengeling, 'Brauchen wir die Verfassungsbeschwerde auf Gemeinschaftsebene?', *Festschrift für Ulrich Everling* (Baden-Baden: Nomos, 1995), 1187 ff.; Th. Giegeirch, 'Die Verfassungsbeschwerde an der Schittstelle von deutschem, internationalem und supranationalem Recht', C. Grabenwarter, S. Hammer (eds.) *Allgemeinheit der Grundrechte und Vielfalt der Gesellschaft*, (Stuttgart: Richard Boorberg Verlag, 1994), 101 ff.; for a critical discussion of this and other proposals to strengthen individual judicial protection, B.Hansel, 'Effektiver Rechtsschutz in Grundrechtsfragen durch Vorlagepflicht oberster Bundesgerichte oder europäische Verfassungsbeschwerde', Walter Hallstein-Institut, WHI Paper 6/03, 2003.

⁵² See e.g. *Schweighofer and others v. Austria* (Appl. Nos. 35673/97; 35674/97; 36082/97; 37579/97) Judgment (Third Section), 24 August 1999, not reported; *John v. Germany* (Appl. No. 15073/03) Judgment (Fifth Section), 13 February 2007, not reported; and for a refinement *Ullens De Schooten and Rezabek v. Belgium* (Appl. Nos. 3989/07 and 38353/07) Judgment (Second Section), 20 September 2011, not reported.

⁵³ For the Commission's initial views see *supra* note 42; in the academic literature for instance N. Reich, 'Wer hat Angst vor Straßburg?' *Europäische Zeitschrift für Wirtschaftsrecht* 10(2011), 379.

respondent in proceedings instituted against an EU member state, or vice versa: a member state can become co-respondent in a case brought against the EU. The EU, or a member state, can become a co-respondent only following its own request.

The co-respondent mechanism is triggered if it appears that an alleged violation of the ECHR calls into question the compatibility of 'a provision of EU law' (if the EU is respondent and a member state co-respondent this should be 'a provision of primary EU law') with the Convention, 'notably where that violation could have been avoided only by disregarding an obligation under European law'. Whether the latter is the case, is a matter which is, given the insertion of the word 'notably', not a matter which needs to be established with full certainty by the ECtHR; the Strasbourg court thus does not need to be drawn into an interpretation of EU law in order to decide whether a party can rightly become co-respondent.⁵⁴

Different from the existent 'third party intervention' under article 36 ECHR, a co-respondent is a party to the case. This means that a judgment becomes binding on it. This is in principle positive for the applicant *if* the ECtHR finds in his favour; this is no doubt the greatest advantage of the co-respondent procedure for applicants. But we should not exaggerate this clear advantage any further than it goes. One thing is that this is an advantage *only* if the ECtHR finds in favour of the applicant. The chances of finding in favour of an applicant may diminish with the number of opponents of the applicant. This co-respondent mechanism implies after all that an applicant is faced with more parties at the other end of the table in Strasbourg than he had reason to expect. In most cases this will, moreover, be at a stage at which the application is not considered manifestly ill-founded (although of course the co-respondent mechanism can also be triggered in admissibility proceedings).⁵⁵ Another weakness is that a party becomes co-respondent only at its own request. So it is definitely a weakness that a party which qualifies to be both co-respondent and share in responsibility for the infringement of an ECHR right can withdraw from the bindingness of an adverse judgment by choosing not to become co-respondent. So the aim of binding responsible parties is not always guaranteed by the co-respondent mechanism, and actually undermines the objective which it is supposed to serve.⁵⁶

⁵⁴ The relevant text of article 3 of the Draft Accession Agreement of July 2011 reads as follows:

'2. Where an application is directed against one or more member States of the European Union, 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, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European 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 Treaty on European Union, the Treaty on the Functioning of the European Union 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.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this Article are met.

5. A High Contracting Party shall become a co-respondent only at its own request and by decision of the Court. The Court shall seek the views of all parties to the proceedings. When determining a request of this nature the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this Article are met.'

⁵⁵ The Draft Accession Agreement proposes, in article 3(1), to amend article 36(4) ECHR, of which the last sentence is to read: 'The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.' This merely means that the wrong choice of respondent will not affect the judgment on admissibility; it does not mean that the co-respondent mechanism cannot be triggered at the admissibility stage of proceedings.

⁵⁶ See N. O'Meara, '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* 12, (2011), 1813-1832, at 1821.

A further reason not to exaggerate the advantages of the mechanism is that a co-respondent may not actually have caused the alleged violation, and is not going to be a party against which a judgment is to be executed.⁵⁷ In this case it makes no difference whether the co-respondent was a party to the proceedings or merely an intervening third party as it can already be under the present article 36 ECHR.

4.4. An example

The various complications can perhaps best be illustrated by a concrete example. We take the case of *Šneersone and Kampanella v. Italy*⁵⁸ and see what could have happened under the co-respondent mechanism. The case concerned a Latvian mother, Šneersone, who brought her son, Kampanella, from Italy to Latvia without the father's permission ('child abduction'). There is a piece of EU legislation which makes sure that in such cases a national court ruling in (in this case) Italy is to be executed without further ado by the Latvian courts and authorities.⁵⁹ This case concerned an Italian court order to send the child back to its father in Italy, who had had minimal participation in his upbringing, never had the child in his care, and had not had contact with the child for several years without any attempt to establish such contact. In the ECtHR judgment as it was handed down, it established that the Italian court's order in this case constituted an interference with the family life between the mother and the son (article 8(1) ECHR), for which it had to determine whether it could be justified as 'necessary in a democratic society' (see article 8(2) ECHR). It concluded that the interference with the applicants' right to respect for their family life was not 'necessary in a democratic society' within the meaning of article 8(2) of the Convention; there had been a violation of article 8 of the Convention on account of the Italian courts' order for the child's return to Italy.

If the text of the draft Accession Agreement would enter into force, this creates the possibility for the EU to intervene against Ms Šneersone. Arguably the case concerned the application of a Regulation which calls into question the Regulation's compatibility with an ECHR right; the alleged infringement of article 8 ECHR could only have been avoided by disregarding the obligation under the Regulation to apply the Italian court order in Latvia without making this dependent on an assessment of an infringement of an ECHR right by the Latvian authorities and courts.

If this reading of the conditions under which the co-respondent mechanism is triggered, is correct, Ms Šneersone will be confronted with the EU as her opponent, and possibly any of the other EU member states, who after all may be presumed to have a stake in compliance with the Regulation.

Probably, the EU – whomever would represent it⁶⁰ – and other member states would explain that the whole point of the Regulation is one of mutual trust on which the mechanism of

⁵⁷ See the Explanatory report to the Draft Accession Agreement, para. 37: '[T]he mechanism would also be applied if the EU or its member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission.'

⁵⁸ *Šneersone and Kampanella v. Italy* (Appl. No. 14737/09) Judgment (Second Section), 12 July 2011, not reported.

⁵⁹ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (furthermore "the Regulation").

⁶⁰ During the FIDE conference of 31 May - 2 June 2012 in Tallinn, a discussant from one of the institutions found it not self-evident that the EU would be represented in all cases only by the Commission, but could also have an agent representing the Council, although this would not be in line with the current state of the law and practice. The matter needs to be clarified in the internal EU rules, which are at the time of writing being drafted. Council Document 10744/12 of 1 June 2012 on 'Draft

mutual recognition of national court judgments on matters of matrimony and parental responsibility is based. Introducing a further requirement in the country of execution of a foreign judgment to review compatibility with the ECHR would undermine that system.

Note that it would not have been possible for the Republic of Latvia to intervene as respondent on the side of Ms Šneersone, because Latvia is then not a 'respondent'. It remains possible, nevertheless, that the ECtHR would allow Latvia to take part as third-party intervener (article 36 ECHR in its present form).

Note also again that in this case the conditions for co-respondent status for the EU and any other member state wishing to oppose Ms Šneersone have been fulfilled, but neither of these co-respondents have necessarily a share in the liability, since they have not acted themselves in this case; they only have provided a legal basis for the act which Šneersone complained of, or not even that. This shows that Ms Šneersone will not need to execute the judgment against these co-respondents. Co-respondents may have made it harder for Ms Šneersone to plead her case, but there is nothing in return for her, even in case the ECtHR rules in her favour.

An interesting further question is whether the 'prior involvement mechanism' can be triggered in a scenario of co-respondents in a case like *Šneersone*. The Draft Accession Agreement links this mechanism to the co-respondent mechanism: only when the EU is co-respondent and the ECJ has not been able to pronounce on the compatibility of the EU law provision with the ECHR, the case may be suspended to give the ECJ the chance to adjudicate this matter. This may occur since neither the Italian nor the Latvian national courts involved in *Šneersone*, found it necessary to refer a question to the ECJ as to how to interpret and apply the Regulation at stake. So ultimately, the effect of the co-respondent mechanism may be that the matter can be settled in a different court from where the case was brought – or at least this is what one would expect the prior involvement mechanism to deliver if the judgment is in favour of the applicant. Whether it will, depends of course on the status of judgment at the ECJ under this procedure, which is still unclear. If the outcome is unfavourable for the applicant, the case will be resumed in Strasbourg which will independently assess the case. If the *Bosphorus* doctrine is maintained, Strasbourg may however in cases in which the relevant MS authority had no discretion in applying EU law, refrain from proceeding to an independent assessment of conformity with the ECHR. Arguably this is the case in the example we are dealing with. The ECJ will probably (it will again depend on the nature and effect of its judgment under the prior involvement procedure) then have settled the matter by rejecting the claim of Ms Šneersone. That it would actually judge unfavourably for Ms Šneersone, is of course uncertain. But the ECJ judgment in *Aguirre Zarraga* does not augur well. In this judgment the ECJ held that in the execution of a court order in cases of child abduction it is not for the courts in the country where the order is to be executed to review the compatibility of the order with fundamental rights.⁶¹ This case was, however, not entirely identical to *Šneersone*.

4.5. Was there an alternative? Binding the EU to ECtHR rulings

Alternatives to the co-respondent mechanism can always be thought of, but it is uncertain whether and to what extent these could secure the applicant its benefits in a significantly less complicated manner, and would avoid him being confronted with a potential multitude of opponents. Thus one might think, for instance, of adopting a provision in article 36 ECHR stating that in proceedings involving European Union law in which the EU and member state

internal rules to be adopted in the context of the EU's accession to the European Convention on Human Rights (ECHR) - Representation of the Union before the European Court of Human Rights (ECtHR)' is not accessible to the public.

⁶¹ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz* [2010] ERC 2010.

are not both respondents, the ECtHR adjudicates the case without regard to the question whether responsibility for a violation devolves on a member state or the Union or both. It could be left to the ECtHR to allow the relevant other contracting party (EU or member state according to what is the case) to act with some flexibility in such cases as third party intervener, while it is left to an internal EU instrument to divide responsibility and mutual indemnification in cases the ECtHR held there was of a violation and awarded damages. This would leave the matter as an internal EU matter, which it is anyway, without the applicant being burdened with the complexities of the division of powers and responsibilities under EU law. It would not necessarily mean he is faced with fewer opponents when it comes to it, except that in Strasbourg some of them would then act not as co-respondent, but as third party interveners.

To come to a normative assessment of the co-respondent mechanism, one needs to balance the disadvantage of the number of opponents in the co-respondent proceedings against the advantage of binding the co-respondent to the outcome of the proceedings. In light of the availability of alternative courses to achieve a result which guarantees successful appellants in Strasbourg the execution of its judgments, the assessment might be negative should one still have the opportunity to do away with what is now in the Draft Accession Agreement. Given the state of negotiations, the option for alternatives is illusory. So one might as well make the best of it, and hope for a practice and internal EU implementation rules which are indeed less burdensome for applicants and bring something positive.⁶²

5. WHAT'S THE POINT OF **ACCESSION**?

All of the above suggests that the record for accession is quite mixed when looked at from the perspective of the relations between the ECtHR and the ECJ. Since the *Connolly* judgment, the ECJ has brought its standard of fundamental rights protection up to the level of the ECtHR. It has extended the scope of protection beyond doubt to primary level since its judgements in *Schmidberger* and *Kadi I*. It was precisely this increased level of scrutiny which could allow for the exception of ECtHR scrutiny in the latter's *Bosphorus* judgment, which acknowledged the overall presumption of equivalent protection. This would have seemed to make the issue of who is the prime court in Europe redundant. At least part of the literature on 'comity' between the courts seemed to be premised on a form of jealousy. But the two courts seemed to have moved far beyond this, not just due to the friendly relations established by their mutual visits and exchanges, but even more importantly by concentrating on the substance of their core tasks: providing protection of the rights of litigants.

Accession to the ECHR, however, seems to have triggered a very different dynamics. The accession negotiations sometimes seemed to have lost out of sight the objective of improving the judicial protection of the fundamental rights, and instead acquired the appearance of the diplomacy of high politics, far removed from anything which might have to do with the rights of ordinary citizens. The ECJ has found it necessary to protect its autonomy, perceived uniqueness and the fear for upsetting its prerogatives inherent in the system of judicial protection of the EU; and doing so in a manner which can in fact merit the qualification of 'jealously' protecting its position. In this, the ECJ has echoed the quasi sovereigntist

Comment [BP1]: It would be great if you supplemented your findings here with some of the subsidiarity, individual justice considerations highlighted above. You already refer to the discussion about the roles of the ECtHR and the ECJ and the question of which of the two should be the ultimate arbitrator of fundamental rights in Europe.

⁶² In this regard, the disagreement about voting rights in the Council of Europe Committee of Ministers when it is supervising the compliance with ECtHR judgments may be reason for cautiousness: if the EU member states retain the right to vote, they will easily outvote non-EU members of the Committee, which might not be to the advantage of successful applicants. Also in this respect we have to await the definitive outcomes of the compromises on amending the Draft Accession Agreement.

objections of some states against the introduction of a European Court of Human Rights with competence to adjudicate complaints from individuals at the time of the negotiation of the ECHR— and as we noted above, also some of the EU member states themselves are acting within a political climate in which the ECtHR has become the object of strong semi-sovereignist criticism. In that climate, arguments concerning ‘subsidiarity’ of the fundamental rights protection at the domestic level of the parties to the Convention lose their innocence. Warnings to respect this subsidiarity imply that otherwise the internal constitutional order is upset, in member states the division of powers between courts and legislatures and the particular role of the national constitutional courts, in the EU the prerogatives of the ECJ within a balance of powers between EU and member states.

These counter-dynamics have inspired much of the introduction of the co-respondent mechanism and, more clearly, the ‘prior ECJ involvement’ mechanism. Each of these and the two combined, are uniquely complex mechanisms of which the actual functioning in practice must be awaited. Hopefully, the internal EU rules implementing these mechanisms will more clearly serve the interests of ordinary citizens seeking protection of their fundamental rights than has been the case so far.

If this is the state of affairs, the question must arise: what is the point of accession? Is it really improving the rights of individuals, and does it still serve any further constitutional interest as well? The answer to these questions is clearly a matter of normative and political assessment and allows for different answers.

It may seem paradoxical after all that was written above, but this author would strongly defend accession to the ECHR on the following grounds.

Firstly, the accession does indeed increase the opportunities for protection of individual rights. Acts of the institutions are now screened off from ECtHR supervision; accession no doubt creates further access to justice than is available now. This is intended to be regular scrutiny by the ECtHR after exhaustion of domestic remedies, including remedies under EU law at the ECJ to the extent that they are available. Moreover, we noted above that the ‘prior involvement’ procedure may open access to justice at the ECJ through the backdoor. This may diminish the access to justice deficit which has been noticed in the literature on the ECJ and the right of standing of individuals in the Luxembourg court.

Secondly, there is a constitutional aspect to the accession; accession of the Union to the ECHR is, to use the words of the ECJ in Opinion 2/94, of ‘constitutional importance’, *d’envergure constitutionnelle*. So far, the two courts have had provided an asymmetric form of fundamental rights protection, as we explained above. This will be redressed by opening scrutiny by the ECtHR. Of course, this redress will only be truly effective if the ECtHR abandons the so-called *Bosphorus* doctrine – whether this will indeed occur is something which only the future will tell. Formally redressing the somewhat lopsided formal legal relations between the two courts is of importance because of what the ECtHR can bring to the EU.

In this regard, it is often said that the accession will not change much, since the EU overall lives up to the standards set by the ECHR. This makes one think of what the governments of the first generation told their parliaments on ratification to the ECHR (and they may have genuinely believed it): it is a document of the values we not only believe in but which we believe we are already living up to. The history and case law of the ECtHR tell a different story. So it may be after the accession of the EU to the ECHR.

An area in which the ECtHR may gradually be deploying a scrutiny which is more intense than is the case within the EU comprises data protection, privacy, and ICT related issues like ‘digital identities’. Another area is that of ‘transnational’ integration in the EU context. With

this expression I refer to the areas of the law which are based on more or less ‘automatic’ forms of mutual recognition in the fields of criminal law and procedure (think of the European Arrest Warrant), as well as civil law and procedure (we mentioned the child abduction cases), and asylum law (think of the so-called ‘Dublin Regulation’ concerning the country which is responsible for the processing of asylum applications).⁶³ Mutual recognition in all of these fields is based on the assumption of mutual trust in each other’s systems of judicial protection of fundamental rights. However, the ECtHR has consistently held that this cannot go so far as obviating responsibility under the ECHR for the states automatically giving effect to administrative and judicial decisions of other member states.⁶⁴ For from ‘undermining’ the system of mutual recognition, the ECtHR has a useful role to play in reminding the EU and member state authorities when they act within the scope of EU law, that mutual recognition may be good for European integration, but that it should not undermine core values on which it is founded: respect for the minimal rights contained in the ECHR. Respect of these is a pre-condition of EU membership, and should be a pre-condition to which the EU itself must also live up. Making the EU do this is the particular contribution which the ECtHR has to make within a mature mutual relationship with the EU and its Court of Justice.

⁶³ For relevant issues concerning the Schengen Information System, see E. Brouwer, *Digital borders and real rights: effective remedies for third-country nationals in the Schengen Information System* (Leiden: Nijhoff, 2008).

⁶⁴ See, recently in the field of the Dublin Regulation, *M.S.S. v. Belgium and Greece* (Appl. No. 30696/09) Judgment (Grand Chamber), 21 January 2011, Reports 2011, which has now been followed by the ECJ in Case C-411/10, *N.S. v. Secretary of State for the Home Department and other* [2011] ECR 2011.; See also the case of *Sneersone and Campanella*, *supra* note 58, in the field of mutual recognition of civil judgments in the field of matrimony and parenthood, which can be contrasted with, Case C-491/10 PPU, *supra* note 61.