

A Report on the Protection of Fundamental Rights in Europe:

A Reflection on the Relationship between the Court of Justice of the European Union and the European Court of Human Rights post Lisbon

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LIST OF ABBREVIATIONS

Below is a list of the main abbreviations that are used throughout the course of this Report.

- “CFSP” – Common Foreign Security Policy
- “Charter” – Charter of Fundamental Rights of the European Union
- “CJEU” – Court of Justice of the European Union
- “CoE” – Council of Europe
- “ECHR” – European Convention on Human Rights
- “ECSC” – European Coal and Steel Community
- “ECtHR” or “the Convention” – European Court of Human Rights
- “EEC” or “EC” – European Economic Community
- “EU” – European Union
- “MS[s]” – Member State[s]
- “TCN[s]” – Third county national[s]
- “TEU” – Treaty of the European Union

Executive Summary

The present Report collects findings gathered in the course of an internally and externally socio-legal study, which lasted three years, and was entitled '*Reflections on the Architecture of the European Union after the Treaty of Lisbon: The European Approach to Fundamental Rights*'.

The project focused on the relationship between the CJEU and the ECtHR following the ratification of the Lisbon Treaty and the future incorporation of the ECHR in the EU legal order. It employed theoretical, doctrinal legal scholarship and empirical methodologies.

This Report is divided into four parts: an Introduction (page 10 to 12), a methodological section (page 13 to 15), the main findings (page 16 to 93), and the concluding remarks and recommendations (page 94 to 106).

The legal framework for the protection of fundamental rights

The analysis starts with some considerations in relation to the main gaps and concerns raised in view of the presence of two overlapping bodies: the CoE and the EU dealing with human rights within the same geographical area.

Such a bizarre configuration can be justified by historical reasons, as at the beginning the two legal systems were charged with different tasks and agendas. The EU, formerly the EEC, had the goal to create a common market or internal market, whilst the CoE was deemed to guarantee the protection of human rights in Europe. From the initial limited competence of economic integration, the EEC evolved over the years into a Union based on the rule of law and protection of human rights and was charged with political, social and economic tasks. The expansion of the EU's competences has paradoxically made the European legal landscape *pluralistic* in that the two overlapping European legal systems with separate institutions and Courts, the ECtHR and the CJEU, coexisted within the same geographical area and had overlapping MSs.

Thus, the present fundamental rights' legal framework at EU level is complex presenting three, albeit inter-linked, human right instruments: the ECHR, the general principles of EU law and the Charter. These three layers did not always co-exist. The first layer to be created was the ECHR; then, taking inspiration from the ECHR and the constitutional traditions of the EU MSs, the CJEU introduced the second layer via the general principles; and finally the Charter was created, thus completing the trinity.

Adopting a theoretical and empirical approach, the Report has explored a number of issues:

- on the co-existence of these sources of law and their relationship;
- the tools that the European Courts (both in Luxembourg and Strasbourg) are employing and will adopt in the future to prevent and resolve conflicts between the different sources;
- the relevance of the Treaty of Lisbon and whether it has strengthened the protection of fundamental rights.

Together with this multi-layered system comes the risk of inconsistency in interpretation and conflicts in approaches. A number of possible ways to avoid such issues occurring, would be for the judges to take a practical angle of analysis looking at common sources of law and in case of conflict trying to establish a common ground providing, when possible, the highest level of human rights protection for the EU citizen. This will certainly require both Courts to be fully aware of each other, rather than simply co-existing. It is also likely that the Courts will need to have some form of acknowledged hierarchy between each other.

The relationship between the two Courts

Up to now, to avoid possible clashes, the two Courts have reached an implicit prior 'constitutional' consensus as regards the core norms of constitutional governance itself, i.e. the presence of a uniform minimum standard and this consensus has become more explicit as a result of the dialogue between them.

After accession, the relationship between them will be one of *monism* in a *federal quasi monistic* capacity, in that the final arbiter of human rights in Europe will be the ECtHR.

Even though the two Courts have a powerful dialogue amongst them, such a channel of communication appears limited if not accompanied by a complete EU system of protection of fundamental rights. The accession will make sure divergent conclusions by the two Courts, which happened in the past, will be avoided in the future.

Accession to the European Convention on Human Rights

Even though accession has been a topic in the EU agenda for many decades, during the early years, the EU focus was on the establishment of the internal market, whilst the CoE's mission was on human rights. Then, of course, things have changed and accession to the ECHR will complete the EU system of fundamental rights' protection. The Accession Treaty will be ready to be ratified, once the *compatibility opinion* of the CJEU is received.

The actual system is imperfect and creates inequalities and injustices. As the EU is not a party to the ECHR, the ECtHR cannot review the legality of the acts of the EU. However, all its MSs have ratified the Convention and thus are party to it. Consequently, if an EU law act is in violation of human rights, MSs and not the EU, will be subjected to the scrutiny of the ECtHR. Then, another anomaly is the presence of procedural mechanisms at EU's level, for example the Preliminary Ruling Procedure, which can potentially prevent the Union's Court from ruling on issues of fundamental rights, prior to the applicant taking the claim to Strasbourg.

Such anomalies are addressed in the Accession Treaty, via the introduction of specific mechanisms which will correct the system. It is now extremely important to ensure legal certainty, justice and the rule of law in Europe and guaranteeing European citizens of the same protection *vis-à-vis* acts of the EU as they presently enjoy from MSs. The EU is not a typical candidate and its special characteristics and competences need to be taken into account without breaching the *principle of equality* among the contracting parties and the commitment for accession on an *equal footing*.

Moreover, the Union through accession will show legitimacy internationally, escaping "external" control in relation to human rights.

The identification of problems and gaps in the system are a strong justification in favour of the accession, which however, presents some interesting challenges ahead. The Accession Agreement provides both regimes with the appropriate tools for building a bridge of convergence, cooperation and mutual respect. The role of the two Courts is of paramount importance in paving the way for the creation of common standards in the interpretation and application of the relevant human rights instruments.

Thus, the Accession to the ECHR, apart from opening new avenues for individuals to get protection against violations of their fundamental rights, elevates judicial cooperation to a different level. The EU and the CoE together with the two Courts are expected to develop a coherent and effective system of protection, compatible with the law of the EU, attuned with the special '*minimum-maximum standards*' relationship between the Charter and the Convention and carefully designed to balance the "autonomy" and "authority" of the Court in Luxembourg with the one in Strasbourg.

A Europe of Rights and effective protection of individuals are the main objectives of the accession and all parties involved must ensure their fulfilment.

The decision on the compatibility of the Accession Treaty with EU law stands with the CJEU. The internal and external review mechanisms will ensure a coherent and monolithic human rights protection leading to legal certainty for both the individuals and the national courts within the European sphere.

Conclusions and recommendations

The authors of this Report have presented the findings of their study and offered some conclusive remarks and recommendations based on empirical findings and scholarly elaborations.

In anticipation for the CJEU's Opinion, this Report will provide policy recommendations on five key areas identified during the course of this research project. These recommendations

are based on both empirical findings and academic reflections. The recommendations are as follows.

Recommendation 1: The authors' main recommendation is for the two Courts to maintain the same approach towards each other and continue to make steps in the same direction. [See page 101 of the Report]

Recommendation 2: The authors specifically recommend that the two Courts should continue to strengthen the existing judicial and informal dialogues and that upon the accession the two courts should develop an institutional dialogue. [See page 101 of the Report]

Recommendation 3: The authors further recommend that in instances of divergence between the approaches of the two Courts, the CJEU must remain the ultimate decider of EU law matters and the ECtHR of human rights issues. Where there is a divergence resulting from a missing "common ground" between the sources of human rights law, such a common ground must be found. If one cannot be found the approach of the ECtHR as an external human rights Court should prevail. [See page 101 of the Report]

Recommendation 4: The authors also recommend that the three inter-locking sources of human rights law (the general principles, the ECHR and the Charter) should continue to co-exist. Together these sources of law provide the bedrock for the realisation, protection and entrenchment of human rights protection in the EU legal arena. [See page 101 of the Report]

Recommendation 5: The authors recommend that a provision should be included within the internal rules of procedure in relation to Protocol 16 to the ECHR to avoid any risk of possible *forum shopping* between the two Courts. [See page 104 of the Report]

Recommendation 6: The authors of this Report recommend that in the post-Accession era, the *Bosphorus* presumption should be abolished. [See page 105 of the Report]

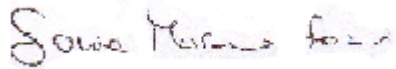
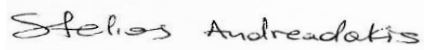
Recommendation 7: The authors of this Report recommend that in the post-Accession era, the CJEU should be afforded a margin of appreciation or discretion when implementing decision of the ECtHR. Nevertheless, the final say of the ECtHR and the demands of the ECHR must be respected. A margin of leeway for the CJEU, thus, is only advisable insofar as specificities of EU law considerably impact on the facts of a given case and insofar as their respect requires flexible approaches.

As a consequence of the monistic approach proposed here, the direct effect of the ECHR must be acknowledged as the ECHR becomes a comprehensive part of EU law after accession. [See page 106 of the Report]

Recommendation 8: The authors recommend that the EU, at the earliest convenience, should also extend full jurisdiction to the CFSP to avoid potential risks of external interference by Strasbourg in such a delicate area of EU law. [See page 107 of the Report]

A word from the authors

We wish that all interested parties have a fruitful reading of the Report.

Handwritten signature of Sofia Kourou in black ink.Handwritten signature of Stelios Andreiadakis in black ink.

Part I – INTRODUCTION TO THE RESEARCH PROJECT

A. Background to the study

The human rights domain across Europe is dominated by two overlapping systems and their overlapping MSs, namely the EU and the CoE. It was not, however, like this in the beginning. The two systems were once more separate and distinct. They were charged with different tasks and agendas, that of economic integration and human rights protection, respectively. The EU, formerly an economically integrated Community, has however expanded its competencies since its creation. The transition from an Economic Community to a Union took over 50 years, and over those years its agenda has changed. As this happened, the tectonic plates of the legal landscape in Europe also changed – the result is the two overlapping, co-existing systems that we see today.

The Union is based on the respect of the rule of law and human rights (art 6 TEU): ideology which is now cemented within the EU Charter which, after the entry into force of the Treaty of Lisbon in December 2009, received the same status as the Treaties as a primary source of EU law. The Charter is acclaimed to be the most comprehensive modern instrument of human rights and values of European citizens.¹ It is an enshrined combination of the rights protected by the ECHR, the European Social Charter, the EU and other international instruments, and MSs' constitutional traditions.² Watching over this legal order is the CJEU. The Court acts as a constitutional court for the Union, with its decisions being deemed to be supreme and as having direct effect in MSs and for individuals. As the focus of the EU has changed so has the direction of the CJEU - the Court now considering more than just matters relating to economic unity, it plays a role in the protection of a wider set of social and political rights.

Since its inception in 1950, the CoE has, as a response to the horrors of the Second World War, provided an independent international system for human rights protection of individuals against their home States. This was realised through the creation of the ECHR, an international but regional human rights treaty. The ECtHR has the sole role of verify compliance with the Convention. The ECtHR has been using the Convention as a constitution and acted as the guardian over human rights (specifically rights that encroached upon the life, liberty and property of the individual in the European sphere) well before the Union extended its competencies.

¹ See S. Peers, T. Hervey J. Kenner and A. Wards, *The EU Charter of Fundamental Rights The EU Charter of Fundamental Rights A Commentary* (London: Hart Publishing, 2004).

² This can be seen for example from Article 1 of the Charter ("human dignity is inviolable. It must be respected and protected."), which was taken verbatim from Article 1 para 1 of the German Constitution.

However, these once separate Courts are now set to become part of the same. The entry into force of the Lisbon Treaty has provided the EU with the legal basis to accede to the ECHR. Article 6(2) provides that the EU shall '*accede to the European Convention of Human Rights and Fundamental Freedoms*'.

There are, however, still voids and divergences between the two Courts that need to be fixed, specifically with regards to the accountability of the EU itself. It is perhaps the case that these will be solved by the accession of the Union to the Convention.

B. Objective of the study

The project, which is a three-year internally and externally funded socio-legal study,³ has considered, in the light of a theoretical framework and empirical evidence, whether judicial cooperation between the two European Courts and EU's accession to the ECtHR has strengthened the protection of human rights in Europe for European citizens and TCNs legally residing in Europe.

The wider aim of the research was to contribute generally to the academic debate about the role of human rights in Europe and produce an impact on policy makers and the European judiciary in providing reflections on the new architecture of Europe in the pre and post EU's accession eras.

This Report pulls together the outcomes of this social-legal study. It is made up of three substantive Parts, namely Part I (this Introduction), Part II, Part III and Part IV.

Part II sets out the methodology for the study and the research (both empirical and theoretical) that has been undertaken.

In Part III, the authors move to set out the key findings and results from the study. In doing so, the authors discuss the legal framework for the protection of fundamental rights within Europe, the relationship between the CJEU and ECtHR, and the accession of the EU to the ECHR. Throughout this Part the authors undertake a detailed examination and explanation of the research developed as part of this study.

Finally, in Part IV the authors reflect on the future of fundamental rights protection in Europe and conclude by making policy recommendations.

C. Acknowledgements

Undertaking a research project of this nature and scale requires a collaborative effort. The authors wish to thank all who have contributed to the work that has been undertaken; the

³ British Academy, Small Research Grants scheme, SG 2011 Round, Ref No: SG110947. Internal funding from Oxford Brookes University was also secured.

views received and expertise given have all added to the debate and have helped to shape the findings that are presented in this Report.

The authors would like to express particular thanks to the following persons: Professor Wolfgang Weiss for his valuable comments on earlier drafts of this Report; Ms Lucia Brieskova and Mr Luke Campbell for their excellent work as research assistants and for the organisation of events related to the project; Professor Dr Jörg Polakiewicz for his tremendous help with the organisation of the dissemination event at the CoE; Mr Ollie Hateley for assisting the authors with part of the literature review.

In addition, the authors would like to thank the organisations which have sponsored the project and hosted events as part of the project, namely: Oxford Brookes University, the British Academy and the CoE. The last organisation offered its patronage under the auspices of the Secretary General, Mr Thorbjørn Jagland, for the organisation of the dissemination conference entitled “Fundamental Rights In Europe: A Matter For Two Courts” held in Strasbourg on 13th June 2014.

We are particularly indebted to all the interviewees who have made the drafting of this Report possible with their interesting answers, valuable insights and their participation overall.

Part II – METHODOLOGY

This Report presents the findings of research undertaken during a three year study. The project has explored the fundamental rights area, evaluating the relationship between the CJEU and the ECtHR in the protection of fundamental rights. It has examined the nexus between the Charter, the ECHR, the general principles of EU law and the Courts’ case law on fundamental rights.

The study has then sought to gain an appreciation of the attitudes of the European judiciary and the EU and CoE’s officials towards the fundamental rights’ question on EU’s accession to the ECHR.

The project was structured into two overlapping phases: a theoretical and an empirical.

- The first phase approached the question of the co-existence of two overlapping legal regimes in the fundamental rights sphere: the EU and the CoE and their respective Courts;
- The second phase has intended to test the theoretical framework elaborated in the first stage of the research by exploring the main concerns in relation to the clash of authority between the EU and the CoE through the means of empirical investigations.

This stage has consisted of three rounds of interviews:

1. the first round was held with 19 Judges and Advocates General of the Court of Justice;
2. the second with 10 ECtHR’s Judges; and
3. the third round of interviews was conducted with the Commission, the Council and the CoE’s officials engaged in the drafting of the Accession Treaty to the ECHR. Key respondents from the European Parliament have also been involved in the research and have expressed their views on the accession process.

The interviews with the judiciary were held at the Court of Justice’s seat in Luxembourg and at the ECtHR’s seat in Strasbourg.

A list of those interviewed is set out in Table 1 and 2.

Table 1: Judges Interviewed in Luxembourg	
Judges of the CJEU	13
Advocates General	6

Table 2: Judges Interviewed in Strasbourg	
Judges of the ECtHR	10

The aim of the empirical work with the Judges was to appreciate their views in relation to the new post-Lisbon era’s developments, and also to gain an insight into the relationship between the two European Courts. The interview template (Appendix I) included questions on the future EU’s accession to the ECHR and the importance of the ECtHR’s external scrutiny after accession, when individuals will be able to challenge EU acts before the Strasbourg Court. Recent jurisprudential developments have shown how the ECtHR is already acting as an enforcer within the realm of EU Law.⁴

The interviews with policy makers from the EU and the CoE engaged in the drafting of the Accession Treaty to the ECHR were held in Brussels and Strasbourg. A list of those interviewed is set out in Table 3 and the interview template can be found in (Appendix II).

Table 3: Policy Makers in Brussels and Strasbourg	
Key informants at the Council of the EU	1
Key informants at the Commission	1
Key informants at the European Parliament	1
Key respondents at the Council of Europe	1

This was an essential stage of the study for gaining an overview of the practical effect of the accession on the EU legal system.

In the light of these interviews, this Report discusses the legal framework for the protection of fundamental rights in Europe and reflects on the relationship between the CJEU and the ECtHR after the entry into force of the Lisbon Treaty (1st December 2009). Significant changes were introduced in the area of fundamental rights within the EU. The Charter was conferred binding nature (ex art 6 para 1 of the TEU) and at para 2 of the TEU the legal basis for the EU’s accession to the ECHR was established.

Thus, the present study reflects on the innovations introduced by the Lisbon Treaty, which align the CJEU to the ECtHR’s interpretation and methods, triggering different processes of institutionalisation within a coherent European system. It offers a unique perspective to this broad area of law and reflects on the accession process from various angles: the European judiciary, respectively the CJEU and the ECtHR and, EU and CoE’s policy makers involved in the accession negotiations.

The Report also examines the current state of the accession of the EU to the ECHR and considers the legal implications of the accession for the protection of the fundamental

⁴ Appl. No. 17120/90, *Dhahbi v Italy* (8 April 2014), ECtHR 098 (2014).

rights of EU citizens and individuals legally residing in Europe. Developments in this field allow the enhancement of human rights protection in Europe triggering the external scrutiny of the ECtHR after the EU's accession to the ECHR.

Part III – KEY FINDINGS

A. The legal framework for the protection of fundamental rights

The EU fundamental rights' legal framework can be divided into two separate but related strands: the case law of the two Courts, including the general principles of EU law and the ECHR; and the Charter, which is a source of EU primary law.

This section, as a way of introduction, starts by exploring the historical background to the protection of fundamental rights, with reference to a number of key cases of the Courts. Thought is given to the extent to which the roles of the two Courts have changed over time. The section then turns into considering the main sources of law that protect fundamental rights in Europe. Building on the historical background, this section dives a little deeper. With reference to the empirical research that was undertaken as part of the project, it considers the nexus between those sources of law, potential and actual conflicts that might arise and how the framework have changed in the light of the Treaty of Lisbon.

a) Historical background to the protection of fundamental rights

At the end of the Second World War, Europe set about achieving sustainable peace. This required new structures, institutions and principles; thus the CoE (1949) and the ECSC (1951) were born. Each was charged with a different agenda, with a clear separation of the parts they had to play.

The CoE and the ECHR (1950) were the main ingredients in Europe's focus on human rights. Whilst the Council was entrusted with a fairly broad agenda, its role in achieving integration in Europe was limited.⁵ By contrast, the ECSC – later the EEC (1957) and now the EU – was concerned with integration, albeit just economic, of its MSs.

In these early years the case law of the CJEU reflected this clear divide in purpose. The Court limited itself to matters concerning its agenda; for instance in the *Stork, Geitling and Sgarlata* cases⁶ the CJEU refused to consider the application of human rights standards.

The basis of the reasoning being that the Court would only consider and apply Community Law; since there was no basis for fundamental rights' protection in the Treaty, the Court considered itself unable to examine infringements of fundamental rights:

⁵ A. Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts* in C. Baudenbacher et al (eds.), *The EFTA Court: Ten Years on* (Oxford: Hart Publishing, 2005), p. 163.

⁶ Case C-1/58, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] ECR 17; C-36, 37, 18 and 40/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v ECSC High Authority* [1960] ECR I-423; Case C-40/64 *Marcello Sgarlata and others v Commission of the EEC* [1965] ECR I-215.

*“Under Article 8 of the Treaty the High Authority is only required to apply community law. [...] Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the treaty, and of the rules laid down for implementation thereof, the law is observed.”*⁷

Similarly, the ECtHR did not initially concern itself with the compatibility of Community law or the case law of the CJEU; it was extremely careful when dealing with EC-related questions so not to interfere with the EC’s constitutional space.⁸

1. A change of approach at Luxembourg

With time the European legal order has shifted its approach towards fundamental rights; progressively the CJEU has – through its case law and the general principles - become a jurisdictional protector of the rights of European citizens.⁹ At the same time, there have been legislative developments that have put fundamental rights at the heart of EU principles and policies.

2. The CJEU- a shift in the case law

The history of the CJEU’s case law has been characterised by a shift from its initial position described above (see page 10), to the protection of fundamental rights through the construction of the general principles of Union law.

The shift began in the 1960s when the Luxembourg Judges developed the doctrine of direct effect and supremacy of Community [now Union] law.¹⁰ This opened up a discussion at a national doctrinal level of the possible conflict between Community law (declared supreme, but lacking in a system for protecting fundamental rights) and National Constitutional Bills of Rights. MSs – particularly those with constitutional tradition such as Germany and also Italy and France – took issue with this and declared it *“intolerable that such a powerful organisation [the EU] was not formally obliged to operate within certain policy limits.”*¹¹ The Luxembourg Court

⁷ Case C-1/58, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* [1959] ECR 17, para [26]. Also see Case C-36, 37, 18 and 40/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft and Others v ECSC High Authority* [1960] ECR I-423, para [438 to 439].

⁸ See S. Morano-Foadi and S. Andreadakis, ‘The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and the ECtHR Jurisprudence’ (2011) Vol. 22, No. 4, *The European Journal of International Law* 1071, 1074 and L. Scheeck, ‘The Relationship Between the European Courts and Intergration through Human Rights’, (2005) 65 *Zeitschrift für ausländisches öffentliches Recht and Völkerrecht* 837, 857-858.

⁹ G. Cohen-Jonathan, ‘Les Rapports Entre la Convention Européenne des Droits de l’homme et les Autres Traités Conclus par les Etats Parties’, in R. Lawson and M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe. Essays in Honour of Henry G. Schermers*, Volume III (Dordrecht: Martinus Nijhoff Publishers, 1994), 90 – 91.

¹⁰ See Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1. See also Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

¹¹ M. Kuijer, ‘The Accession of the European Union to the ECHR: A Gift for the ECHR’s 60th Anniversary or an Unwelcome Intruder at the Party?’, (2011) (Fall Issues) (2011) Vol. 3, No. 4, *Amsterdam Law Forum* 17, 18.

realised that if the doctrines were to hold ground the Court needed to recognise fundamental rights.¹²

In a progressive article published in 1968 by Pierre Pescatore¹³, one of the Judges of the then CEJU, questioned whether there was enough scope in the case law of the Court to protect fundamental rights. A year later, in the *Stauder* case the Court did elaborate the concept of general principles of Community Law: “[...] *the fundamental human rights are enshrined in the general principles of community law and protected by the Court*”.¹⁴

Then, in *International Handelsgesellschaft*¹⁵ and *Nold*¹⁶ the CJEU clarified its position further. It explained that the common traditions of MSs and the international treaties to which they are signatories formed sources of inspiration for the Court when considering fundamental right issues. This includes the ECHR, as one of the ECtHR Judges observed during interview: “*The ECHR can be seen as part of the general principles of EU law, as a source of interpretation, as an international treaty [of] minimum standards.*”¹⁷ Not only do these decisions mark a clear shift in the CJEU approach to fundamental rights, they also arguably point to a further extension of the material scope of Union law, thus implying a step forward in European integration.¹⁸

The period that follows was characterised by numerous references to individual articles of the ECHR. During this period more than 70 CJEU judgments and opinions referred to the ECHR.¹⁹ Finally, in 1998 in the *Baustahlgewebe* case the CJEU directly and expressly relied on “*Strasbourg’s jurisprudence*”, with the Judges in Luxembourg “*acting as genuine human rights Judges*”.²⁰

With the respect of fundamental rights firmly established within the case law of the CJEU and the general principles of Community [now Union] law, the Luxembourg Courts are increasingly being required to address fundamental rights issues. For instance, between March 2001 and March 2003, 37 Court of Justice’s judgments and 22 Court of First Instance (CFI, now General Court) judgments explicitly addressed fundamental rights.

¹² V. Skouris, ‘Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance’ (Sir Thomas More Lecture, Lincoln’s Inn, London 2005).

¹³ P. Pescatore, ‘Les Droits de l’homme et l’intégration Européenne’ (1968) 4 *Cahiers de Droit Européenne* 629–673, 657.

¹⁴ Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419, para [7].

¹⁵ [1970] ECR 1125.

¹⁶ Case C-4/73 *Nold KG v Commission of the European Communities* [1974] ECR 491.

¹⁷ Interview No VI (ECtHR, Strasbourg 20 June 2012).

¹⁸ See S. Morano-Foadi and S. Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’, (2011) Vol. 17, No. 5, *European Law Journal* 607–622, 610 and H. Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht: Martinus Nijhoff, 1986), p. 399. He argues that *Nold* overruled the previous Court’s judgments that only rights growing out of the Member States’ common constitutional traditions were protected by Community law.

¹⁹ See Morano-Foadi and Andreadakis, *supra* note 8, 1073.

²⁰ G. Cohen-Jonathan, *Aspects Européens des Droits Fondamentaux* (3rd ed., Paris: Montchrestien, 2002), p. 184.

3. The legislative developments

At the same time the legislative programme in Luxembourg moved in the same direction as the case law. Despite the absence of fundamental rights' protection in the founding Treaties, the Single European Act 1986 affirmed for the first time the Community's focus on fundamental rights:

'DETERMINED to work together to promote democracy on the basis of fundamental rights recognised in the constitutions and laws of MSs, in the ECHR and the Fundamental Freedoms and the European Social Charter, notable freedom, equality and social justice'.²¹

The TEU, known as the Maastricht Treaty (1992), and the Treaty of Amsterdam (1997) took another step forward. The former included the protection of fundamental rights in the main text of the Treaty,²² whilst the latter elevated the protection of fundamental rights to a founding principle of the EU.

Then, in 2002, at the European Council meeting in Nice, the European institutions unanimously adopted the Charter. The Charter reaffirms the recognition and protection of fundamental rights in the EU by detailing them in one single document; its purpose being to ensure visibility and consolidation of existing rights, not the creation of new rights. As such it aimed to pull together rights established in the case law of the CJEU, the rights and freedoms enshrined in the ECHR and other rights common to the constitutional traditions of MSs.

However, the legal status of the Charter was left unresolved until the Lisbon Treaty conferred it the same legal value as other Treaties by amending Article 6 of the TEU. During the intervening period the case law of the European Courts once again came into its own; the Advocates-General and the Court of First Instance referred to the Charter despite its lacking binding status.²³ *'The Charter prov[ed] to be a source of inspiration and a valuable point of reference for all the principal actors in the EU legislative, administrative process, thus transcending its partly declaratory nature'.²⁴*

²¹ The Single European Act 1986, preamble.

²² Treaty on the European Union, Article 6(3): "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."

²³ Together the Advocates-General and European Court have referred explicitly to the Charter in 24 cases since its adoption; this is 19 times by the Advocate General and five times by the Court of First Instance up to 2002. See J. Morijn, 'Judicial Reference to the EU Fundamental Rights Charter: First Experiences and Possible Prospects', (2002), Coimbra Human Rights Centre Working Paper, available at: http://www.fd.uc.pt/hrc/pdf/papers/john_morijn.pdf

²⁴ Skouris, supra note 12

On 19 January 2010, for the first time the CJEU, in *Kücükdeveci*²⁵, referred to the legal status of the Charter as set out in Article 6 TEU as amended in the Lisbon Treaty. The case law following *Kücükdeveci* has continued to refer to the Charter as a source of human rights rules.²⁶

4. Developments at Strasbourg

Until 2005, the Strasbourg Court did not make any reference to the case law of the CJEU. However, it would be wrong to assume that the change in approach was a one-way street. As the institutions in Luxembourg have focused on fundamental rights, and the Union's competencies have expanded into the traditional territory of the ECtHR, the Strasbourg Judges have had to become more active in considering Community law issues. Thus, through some very important cases, the ECtHR has gradually undertaken a more active role²⁷; it has started to monitor and scrutinise in much more detail issues relating to EU law.

However, Strasbourg has been cautious when taking these steps into the EU's legal sphere; it has tried to strike a safe balance between considering human rights issues in a Community context and respecting the separate jurisdiction of the CJEU. For instance, in *M & Co v Germany*²⁸ the Commission founded the "equal protection" principle. The principle provides that when State action is taken in compliance with a legal obligation following from that State's membership of an international organisation it will be justified provided that the organisation recognises and protects fundamental rights in an equivalent manner to that of the Convention. As Professor Douglas-Scott explains, through this judgment the Courts has '*...terminat[ed] many possible actions against the EC in Strasbourg, seeming to acknowledge the existence of a separate, autonomous EC human rights law*'.²⁹

But Community law compliance with fundamental rights became too pressing a matter. In *Matthews*³⁰ the ECtHR, therefore, began to turn its back on the "equal protection" principle; in fact it did not even mention it. Instead the Court was willing to consider the compatibility of EC Law (the European Communities on Direct Elections Act 1976, which has

²⁵ Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] IRLR 346. For a commentary see A. Wiesbrock, 'Case Note – Case C-555/07 *Kücükdeveci v Swedex*, Judgment of the Court (Grand Chamber) of 19 January 2010', (2010) 11 *German Law Journal* 539.

²⁶ See Case C-323/08 *Mayor Ovidio Rodríguez et others v Unclaimed estate of Rafael de las Heras Dávila and Sagrario de las Heras Dávila* [2009] ECR I-11621; Joined Cases C-175 – 179/08, *Abdulla and others v Bundesrepublik Deutschland* [2010] ECR I – 1493; Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I – 1839; Case C-407/08 P *Knauf Gips KG, formerly Gebrüder Knauf Westdeutsche Gipswerke KG v. European Commission* [2010] ECR I-6371; Case C-271/08 *Commission v Germany* [2011] 40 ILJ 222.

²⁷ Amongst others, Appl. No. 13258/87 *M & Co. v The Federal Republic of Germany* (1990) Decisions and Reports 64; Appl. No. 14570/89 *Procola v Luxembourg* [1995] ECHR 33, [1996] 22 EHRR; Appl. No. 17862/91 *Cantoni v France* [1996] ECHR 52; Appl. No. 24833/94 *Matthews v United Kingdom* [1999] BHRC 686.

²⁸ *M & Co. ibid.*

²⁹ S. Douglas-Scott, 'A Tale of Two Courts: Luxemburg, Strasbourg and the growing European Human Rights Acquis', (2006) 43 *Common Market Law Review*, 629–665, 636.

³⁰ *Matthews v United Kingdom* supra note 27.

treaty status) with that of ECHR; and found a point of incompatibility in the case in hand. Eventually, in *Bosphorus*,³¹ the Court made clear its intention to wait for the EU's formal adherence to the ECHR before treating that entity in the same way as the Convention's contracting parties. On that occasion, the Court also declared that the EU no longer enjoyed what has previously been qualified as a "total immunity" with regard to the ECHR by virtue of the "equivalent protection" principle.³²

Another interesting and recent example of the ECtHR's increasing attentiveness toward EU law can be seen in *Dhahbi v Italy*.³³ Mr Dhahbi, a Tunisian national, went to Italy on a residence and work permit. After obtaining work, Mr Dhahbi made an application for family allowance. His application was refused. Following this refusal Mr Dhahbi sought to have a preliminary question referred to the CJEU, which was refused by the national court. The ECtHR noted that the Italian courts had failed to comply with their obligation to give reasons for refusing to submit a preliminary question to the CJEU. The ECtHR is clearly showing that it is willing to act as an enforcer of EU Law.

b) Fundamental rights: the legal sources of protection in Europe

In the section above, we have mentioned the three main sources of EU law, namely the Charter, the ECHR and the general principles of EU law. Together these create three layers designed to permit the realisation – or even the entrenchment – of the fundamental rights of the EU citizen.

But as the discussion above indicates these three layers did not always co-exist. The first layer to be created was the ECHR; then, taking inspiration from the ECHR and the constitutional traditions of the EU MSs, the CJEU introduced the second layer via the general principles; and finally the Charter was created, thus completing the trinity.

As these sources of law gradually come into co-existence the following important questions have arisen: What is the relationship between the sources of law? How will the European Courts (both in Luxembourg and Strasbourg) prevent and resolve conflicts between the different sources? And since the Treaty of Lisbon: what is the impact of the Treaty on this

³¹ Appl. No. 45036/98, *Bosphorus Hava Yollari Turizm v Ireland*, ECtHR (30 June 2005).

³² L. Scheeck, *supra* note 8, at 862–863. See also F. Krenc, 'La décision Senator Lines ou l'ajournement d'une Question Délicate', (2005) 61 *Revue Trimestrielle des Droits de l'homme* 121, at 124. Also see Case C-127/02 *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A v the Netherlands* [2004] ECR I-7405. *Kokkelvisserij* raises concerns in relation to indirect Strasbourg reviews of the Convention compatibility when the ECtHR considers the CJEU procedures not providing 'equivalent protection'. Contracting parties, who are also individual EU Member States, might be invested with the responsibility for procedures and proceedings before the CJEU over which, as individual States have no direct control (see S. Morano – Foadi, 'Fundamental Rights in Europe: Constitutional dialogue between the Court of Justice of the EU and the European Court of Human Rights', (2013) *Sortus Oñati Journal of Socio-legal Studies* Vol. 5, No. 1, 64–88, 87).

³³ Appl. No. 17120/90, *supra* note 4.

legal framework? Has the Treaty strengthened the protection of fundamental rights? Will the Court's approach change?

Taking into account both theoretical and empirical research, the pages that follow will attempt to answer the above-mentioned questions.

1. The general principles and the Charter of Fundamental rights

When the Charter was created, its purpose was to reaffirm the fundamental rights recognised and protected in the EU by detailing them in one single document; thus ensuring visibility and consolidation of existing rights, and not the creation of new rights. As such, it aimed at pulling together rights established in the case law of the CJEU, rights and freedoms enshrined in the ECHR and other rights common to the constitutional traditions of MSs as recognised in the general principles of EU law.

Thus, a clear emerging issue is whether this means that the general principles no longer have a part to play in the protection of fundamental rights. The short answer to such a question is negative.

As one of the CJEU Judges explained upon interview:

*"The general principles are the starting point for a number of reasons. First, the UK, Poland and Czech have opted out of the Charter, but the reservations do not apply to Article 6 TEU. So, the Court's jurisdiction under the general principles of law is binding [on these States]. Second, there are many restrictions – within the Charter itself – as to the application of the Charter. It applies to MSs only when there is an act, which is transposing EU law; the old jurisdiction on the application of the general principles is wider."*³⁴

Another Judge adds "[...] if we speak about the general principles of Union law the list of rights is open; it gives the possibility for the introduction of new rights. For me it is also more flexible than the Charter. [This is because some] MSs have opted out of [the Charter]."³⁵

These are indeed valid points. Then, Article 51(1) of the Charter states:

'The provision of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity, this Article limits the application of the Charter to MSs when they are implementing Union law.'

A narrow, literal interpretation of the expression "implementing Union law" suggests that the Charter only applies when a MS is acting as an agent of the Union. This is narrower than the jurisdiction under the general principles, which may also be invoked when examining the

³⁴ Interview No 4 (CJEU, Luxembourg 14 December 2010) and noted in Interview No 13 (CJEU, Luxembourg 15 December 2010).

³⁵ Interview No 1 (CJEU, Luxembourg 13 December 2010).

validity of national measures derogating from EU requirements or when the application of a substantive EU rule is in question.

In the light of this, scholars have pondered an important question:

*'... It may be legitimate to ask whether the Charter serves to reduce the range of situations in which the EU legal order protects fundamental rights. Alternatively does this merely imply that the judicial protection of fundamental rights in the EU legal order will be subject to a dual regime according to which the Charter would apply to MSs when acting as agents of the Union, while the general principles of EU law could still be invoked in derogating situations and in relation to measures falling within the scope of EU law?'*³⁶

The answer must lay in the alternative. Such a conclusion is supported both in theory and in the findings of our empirical research.

From a theoretical perspective, the general principles perform three important functions, two of which are: to allow the CJEU to fill normative gaps left by the EU law legislators (whether treaties or legislation); and to serve as an aid of interpretation.³⁷

From an empirical angle, the CJEU Judges were able to visualise a dual regime, as one Judge noted, *"[...] maybe in 10 years, society will have evolved and there would be the need for the recognition of other rights...then the Court would say that the Charter has become obsolete; the general principles of EU law may then play a significant role in the future"*.³⁸

A Judge of the ECtHR also remarked the continued need for the general principles noting the freedom that they afford the CJEU, something that the Charter cannot achieve with its textual limitations.³⁹

It is on this basis that the relationship between the two sources of law can be understood. They sit alongside each other: the general principles continuing to plug gaps in the legal landscape and aiding interpretation of the Charter.

As Judge Lenaerts and Professor Gutiérrez-Fons note: *"the constitutional function of the general principles of EU law has been, and still is, to put the flesh on common European values of the basic constitutional Charters and Treaties [...]"*.⁴⁰

However, it is pertinent to note the reality of the legal landscape. As a primary source of law, the Charter provides a sound legal foundation for the general principles in rendering the rights and freedoms enshrined in the principles; the Charter brings clarity both for European citizens

³⁶ K. Lenaerts and J.A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principle of EU Law', (2010) 47 *Common Market Law Review*, 1629-1669, 1658.

³⁷ The principles can also provide a ground for judicial review of the European legal institutions.

³⁸ Interview No 5 (CJEU, Luxembourg 14 October 2010).

³⁹ Interview No III (ECtHR, Strasbourg 19 June 2012).

⁴⁰ K. Lenaerts and J. A. Gutiérrez-Fons, *supra* note 36 at 1667.

and MSs.⁴¹ It is therefore not surprising that a majority of the CJEU Judges saw the Charter as the “*principal starting point*” when considering fundamental rights in Europe.⁴²

2. The Charter of Fundamental Rights and the European Convention of Human Rights

As with the general principles, the Charter makes direct reference (in the form of incorporating) to the rights and freedoms enshrined in the ECHR. For example, the Charter includes: the right to life (art 2), a prohibition on torture and inhuman or degrading treatment (art 4) and the right to respect for a private and family life.

Whilst an element of common ground thus exists between the two instruments, the right and freedoms enshrined in the Charter are far more extensive; attention is given to a wave of social, economic and political rights and freedoms that are not present in the ECHR.⁴³ In this sense the protection afforded is wider. In addition, Article 53 of the Charter clarifies that the level of protection provided by this instrument must be at least as high as that of the Convention; often, it will go beyond.⁴⁴

When undertaking the empirical element of this project the research team asked the Judges of both the CJEU and ECtHR for their views on the relationship between the two instruments. Despite the existence of the Charter - and the Judges’ mission to place the Charter at the forefront of the fundamental rights discourse in Europe – the majority of the Judges continue to see the Convention as an essential source of fundamental rights protection. For instance, the comments of the Judges indicate that they view the Convention (and the associated case law) as the bedrock upon which the Charter is built.⁴⁵

As such some of the Judges thought it impossible to separate the two instruments when referring to an area of common ground.⁴⁶

Although one Judge did view the relationship as more secular: “*it could be compared as the Charter being the house and the Convention being the chamber in the house. I would prefer to refer to the Charter...*”⁴⁷

⁴¹ Ibid., at 1656.

⁴² Interview No 1 (CJEU, Luxembourg 13 December 2010); Interviews No 5, No 6, No 7 and No 8 (CJEU, Luxembourg 14 December 2010); Interviews No 11 and No 14 (CJEU, Luxembourg 14 December 2010); Interview No 18 (CJEU, Luxembourg 10 December 2010).

⁴³ For example, the so-called “third generation” fundamental rights, such as the protection of personal data (art 8), the freedom of arts and sciences (art 13) and freedom of business (art 16), guarantees on bioethics (art 3) and on good and transparent administration art (41) , to name but a few.

⁴⁴ V. Reding in ‘Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and beyond’ (2014) Council of Europe, p. 24, available at: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20ReformECHR2014_en.pdf.

⁴⁵ Interview No 10 (CJEU, Luxembourg 15 December 2010).

⁴⁶ Interview No 18 (CJEU, Luxembourg 10 December 2010).

⁴⁷ Interview No 3 (CJEU, Luxembourg 13 December 2010).

Whilst another noted the potential for the Charter to provide a higher level of protection than the Convention – particularly in areas where there is no common ground.⁴⁸

The responses of ECtHR Judges towards the significance of the Charter were somewhat different. Whilst willing to recognise the importance of the instrument, they were all together more reluctant to fully embrace it; to them the ECHR remains a central focus point. For example, one Judge noted *“we are here to decide cases on the Convention. Of course we will look to [the Charter], but in a selective manner [...] It is not the task of this Court to interpret the Charter”*.⁴⁹

Such statements are not at all surprising, after all, as Judges from both Courts have highlighted: *“the ECHR can be seen as part of the general principle of EU law, as a source of interpretation when reading the Charter [...] as a legally binding minimum standard”*.⁵⁰

However, some of the ECtHR Judges were more welcoming: *“I can easily see similar situations where areas of the EU constitutional law or case law of the CJEU are better developed than ours”*.⁵¹

Another Judge went as far as to say *“the CJEU gives more protection under the Charter than we give under the ECHR.”*⁵²

Taking into account the views of the Judges the following statement - from the CoE - summarises how the relationship between the two sources of law should be viewed:

*‘The wording of many of the Charter’s rights is based on the wording of corresponding rights contained in the ECHR and its Protocols. The meaning and scope of such rights will be determined by reference to the text of the ECHR and the case-law of the European Court of Human Rights. Conferring primary law status on the EU Charter of Fundamental Rights, as the Treaty of Lisbon did, and accession, are complementary steps ensuring full respect of fundamental rights within the EU legal order. In this regard, the EU merely follows the same logic as the MSs, most of which have their own written catalogue of fundamental rights and are also Parties to the ECHR. The relationship between the Charter and the ECHR is similar to that between the ECHR and a national constitutional Bill of rights of a State Party to the ECHR’.*⁵³

⁴⁸ Interview No 10 (CJEU, Luxembourg 15 December 2010).

⁴⁹ Interview No II (ECtHR, Strasbourg 18 June 2012).

⁵⁰ Interview No VI (ECtHR, Strasbourg 20 June 2012); also noted in Interview No 9 (CJEU 15 December 2010).

⁵¹ Interview No III (ECtHR, Strasbourg 19 June 2012).

⁵² Interview No VIII (ECtHR, Strasbourg 29 June 2012).

⁵³ Council of Europe, *Accession frequently asked questions* (30 April 2013), p 2, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/EU_accession-QA_updated_2013_E.pdf

3. Conflicts between sources and how to resolve them

With three co-existing, overlapping layers of legal protection, a real risk of conflict is foreseeable, and the obvious question is the extent to which the Courts can resolve that conflict.

One possible solution would be for the Courts to agree to recognise a hierarchy between the different sources of law. However, when interviewed, Judges of both Courts rightfully rejected the idea of a hierarchy between the general principles, the Charter and the ECHR.⁵⁴ As one Judge noted but mentioned by all: *“The three are on the same level there is no hierarchy between them...”*⁵⁵

Another way of solving possible conflicts between these instruments is to consider their status as sources of law. The Charter has a *“constitutional status and the CJEU is in the same position as the supreme constitutional Court of the Member States having a catalogue of rights. [In this sense] human rights are international law as are based on international conventions, and fundamental rights are constitutional rights.”*⁵⁶ This suggestion would however require the catalogue of rights contained in the Charter to take priority.

Perhaps the answer sits with how the Judges apply and work their way through the different sources; one of the Luxembourg Judges presented a very practical solution: *“overall, we should start with the Charter and if the right is recognised there, then the Convention becomes important if the right is the same. Then, to a certain extent, we can follow our earlier case law or other international conventions as a source of inspiration.”*⁵⁷ In working through the different layers in this very logical way it permits the Judges to take insight and inspiration from the different sources of law, thus allowing them to avoid conflict.

Ultimately, the duty to resolve and avoid conflicts between the sources will rest with the Judges of the two Courts. Whether they look to some form of hierarchy, the legal status of the source of law or approach the matter in a methodical manner, they must be sure to fulfil this duty. A failure to do so will risk legal certainty and thus, the protection of fundamental rights within the European legal order.

4. The Treaty of Lisbon: protection strengthened and approaches changed?

The introduction of the Lisbon Treaty and the binding effect of the Charter provided the EU with the much-desired human rights foundation, placing social and civil rights together with economic rights at its core. As discussed above, the legally binding status of the Charter allows fundamental rights to gain a new momentum in the case law of the Court and within the EU

⁵⁴ Although the Judges of the ECHR were willing to entertain the idea of a hierarchy (of sorts) between the rights contained in the three sources of law.

⁵⁵ Interview No 1 (CJEU, Luxembourg 13 December 2010).

⁵⁶ Interview No 13 (CJEU, Luxembourg 15 December 2010).

⁵⁷ Interview No 5 (CJEU, Luxembourg 14 December 2010).

legal order. It offers the prospect of a more comprehensive approach to fundamental rights within a complex, multi-level transnational system and, enables the Union to achieve its goals.⁵⁸

The CJEU's tendency towards activism is also so entrenched that it cannot be considered as incidental and, even if some of the Judges seemed cautious to openly admit it, they are paving the way for a new era in the EU. The Union's future accession to the ECHR will complete the EU system of protection of fundamental rights as *'the Lisbon Treaty makes it clear that accession is not only an option, it is the destination'*.⁵⁹

Thus, the impact of the Treaty of Lisbon is profound; it has strengthened protection and has been a driving force in realising a new approach to fundamental rights' protection in Europe. But do the Judges agree?

The research team asked the Luxembourg Judges for their views on whether their approach to fundamental rights has changed since the Treaty of Lisbon. One Judge emphasised that *"there is no need to differentiate the value of the sources,"*⁶⁰ and a substantial number of them advocated that there has been no considerable change in their methodology in dealing with the cases before them. There has, nevertheless, been an increase in the number of cases assessing the compatibility of national law with the Charter, even in the absence of an explicit reference by the national Judges. This was something the Judges accepted; as two of the Judges emphasised *"new legal questions are posed which....necessitate adaptation of the approach"*⁶¹ and *"more cases on fundamental rights in some sensitive areas such as immigration, civil and criminal procedure[bringing] of course evolution."*⁶²

As noted above, it is also confirmed by the interviews that the Judges' eyes first analyse the Charter, as the EU's high standard of protection, and then other sources such as the ECtHR jurisprudence and general principles of Union law, depending on the nature of the case and the wording of the questions raised by the national Judge. As highlighted by one judge but shared by all, *"the most significant change is the Charter of Fundamental Rights now having the same power as Treaties and the future EU's accession to the ECHR"*.⁶³

⁵⁸ G. Marks, 'A Third Lens: Comparing European Integration and State Building', in J. Klansen and L. Tilly (eds.), *European Integration in Social and Historical Perspective* (Lanham: Rowman and Littlefield, 1997), p. 27.

⁵⁹ V. Reding, 'The EU's Accession to the European Convention on Human Rights: Towards a Stronger and More Coherent Protection of Human Rights in Europe', Speech at the Hearing of the European Parliament's Constitutional Affairs Committee, Brussels, 18 March 2010, available at http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf.

⁶⁰ Interview No 16 (CJEU, Luxembourg 16 December 2010).

⁶¹ Interview No 18 (CJEU, Luxembourg 10 December 2010).

⁶² Interview No 1 (CJEU, Luxembourg 13 December 2010).

⁶³ Interview No 18 (CJEU, Luxembourg 16 December 2010).

Conclusion

Even in the post Lisbon era Europe boasts three, albeit inter-linked, sources of law that aim to protect the fundamental rights of its citizens.⁶⁴ With the introduction of each layer of legal protection the other's purpose has remained instead of becoming redundant; this has strengthened the protection afforded as each subsequent layer takes inspiration from those that pre-date it.⁶⁵ The situation, nevertheless, leaves Europe with a complex system for the protection of fundamental rights – as one Judge noted in jest when asked for his views on the impact of the Charter: *“I think more headaches for Judges, they now have several human right instruments to consider...”*.⁶⁶

But on a more serious note, with this multi-layered system comes the risk of inconsistency in interpretation and conflicts in approaches. This must not happen. As noted above, there are a number of possible ways to avoid such issues occurring, the best, however, is for the judges to take a practical angle of analysis. At first instance, the judges should look to each source of law for common ground. If a conflict then arises, they should take into account the position under all of the relevant sources of law and try to establish, when possible, a common ground that is based on which ever provision provides the highest level of human rights protection for the citizen. This will certainly require both Courts to be fully aware of each other, rather than simply co-existing. It also likely that the Courts will need to have some form of acknowledged hierarchy between each other, something we say more about below.

⁶⁴ The layers are not only linked by a shared end goal – the origins of inspiration are closely aligned, as are the rights and values that are enshrined within them.

⁶⁵ As noted during interview: “I would say that there are still three sources that exist and they overlap...” Interview No 16 (CJEU, Luxembourg 16 December 2010).

⁶⁶ Interview No 1 (CJEU, Luxembourg 13 December 2010).

B. THE RELATIONSHIP BETWEEN THE TWO COURTS

The European order has developed beyond the traditional state borders overcoming the Westphalian dimension of nation-state. As stated above, overlapping jurisdictions adjudicate over human rights issues in Europe. The EU, a hybrid entity employing a diversity of approaches in accordance with its areas of competence, engages with fundamental rights within its internal and external dimensions. By contrast, the CoE, an international organisation regulated by international law, has the mandate to promote human rights through international conventions, such as the ECHR. Thus, whilst the Union can be considered a form of integrated federal-state entity;⁶⁷ the CoE is an international/regional organisation.

The interplay between these two autonomous legal orders is shaped by the dialogue and mutual respect that the Courts of these two entities have for one and another. The CJEU is the EU Court, whose decisions are deemed to be supreme and directly effective for MSs and individuals⁶⁸. In its eyes, the Treaties are the constitutional skeleton of the EU legal system, and as such are capable of directly creating individual rights.⁶⁹ Consequently the Court acts as the constitutional court of the EU system. By contrast, the ECtHR is not part of a “self-sufficient” legal order. It is an international/regional tribunal that, in the context of the CoE has the sole role of verifying compliance with the Convention. However, commentators argue that this Court, which started as an international tribunal, now resembles ‘*a supranational constitutional court, with an ever stronger anchoring in the domestic legal orders of MSs and general acceptance of its authority as the ultimate arbiter of human rights disputes in Europe*’⁷⁰. As also reinforced by the ECtHR in its jurisprudence, the Convention has become a constitutional instrument. Despite some isolated incidents of non-compliance with the Court judgements, its story is generally successful and can be seen as part of the “constitutionalisation” of Europe.⁷¹

In its judgements the CJEU pronounces the autonomy of the EU legal order, stating that the EU legal order is a self-referential system, which means that its Court deals with questions of interpretation and application of its legal rules.⁷² The autonomy of the EU legal order is crucial for its future development and MSs’ further integration within the EU.⁷³ Based on these assumptions, in an attempt to avoid interferences with the ECtHR jurisdiction and stressing the

⁶⁷ B. De Witte, ‘The European Union as an International Legal Experiment’, in G. De Burca and J.H.H. Weiler (eds.) *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011).

⁶⁸ Case C-6/64 *Costa v Enel* [1964] ECR 585 and Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

⁶⁹ R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), p. 311.

⁷⁰ N. Krisch ‘The Open Architecture of European Human Rights Law’, (2008) 71 *Modern Law Review* 184.

⁷¹ *Ibid.*

⁷² R. Barents, *The Autonomy of Community Law* (The Hague: Kluwer Law, 2004), p. 171.

⁷³ P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (London: Hart Publishing, 2013), p. 11.

autonomy between the two legal orders, the CJEU in a recent case⁷⁴ has concluded that Article 6(3) TEU⁷⁵ does not govern the relationship between ECHR and legal systems of MSs.

Despite their nature, the two Courts differ in their relationship with the national level. Whereas the ECtHR juxtaposes individual state variables of protection with the more general principles of the ECHR, the CJEU accommodates a whole range of fundamental rights' conflicts and relates them to additional competing demands of the EU internal market and free movement rules.

The independence of the two Courts is challenged by the EU's accession to the ECHR, as the Strasbourg Court will be called to exercise an external scrutiny over EU legislation, expressing a final view on the compliance of EU law with the Convention. In preparation of the formal accession, the Strasbourg Court is already acting as an EU law enforcer.⁷⁶

a) The “theoretical framework” of the project

In this part of the Report, we turn to reflect on the theories that form the basis of the project. This is done in an attempt to answer questions related to human rights mechanisms and overlapping actors within the continent. Particular consideration is made to respond to whether the “constitutional pluralism” theory used to describe the relationship between the EU and the national courts of the MSs could be adopted to regulate the relationship between the EU and the CoE in the field of human rights. It is appropriate to briefly refer to the word “constitution” and the expressions of “legal pluralism” and “constitutional pluralism”.

The term “**constitution**” has been noted to have a plethora of meanings. The prevailing conception of a constitution has been understood to be where a legal act constitutes a new entity with the necessary framework for its efficient operation. This paradigm generally allows for supranational entities to be classified as constitutional entities.⁷⁷

This supranational narrative is only reinforced by observations of both the CJEU and the ECtHR behaving as constitutional courts in the sense that they:

- (i) through their regime adapt to changing circumstances and authoritative challenges via case law and precedent;
- (ii) adjudicate disputes of a particular structure i.e. human rights and EU law;
- (iii) possess a doctrinal framework for dealing with disputes i.e. teleological and margin of appreciation in the light of their core values/objectives; and

⁷⁴ Case C-571/10 *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano*, CJEU (Judgement of 24 April 2012).

⁷⁵ Treaty on European Union, Article 6 (3): “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”.

⁷⁶ See recent case Appl. No. 17120/90 *Dhahbi v Italy* supra note 4.

⁷⁷ P. Craig, ‘Constitution, Constitutionalism and the European Union’, (2001) Vol. 7, No. 2, *European Law Journal*, 127.

(iv) are implicated in an ongoing process of coordinating treaty law with national law to make the former more effective within the latter.⁷⁸

“**Legal pluralism**” is largely defined as a concept which refers to legal systems that co-exist in the same geographical space.⁷⁹ This conception illustrates the present situation of Europe consisting of two supranational legal orders; (i) the EU, and (ii) the CoE, as well as 28 national legal systems all operating within one sphere. Thereby legal norms overlap and span across hierarchies to the extent that they are overarching and shared. As there are multiple courts within the shared sphere that assert final jurisdiction over these norms, the wider system is pluralistic.

The expression “**Constitutional pluralism**” was adopted to define the way the law of the EU and the law of the MS interacts creating a new arrangement between national and international sources of law, redrawing the traditional boundaries. The inception of this scheme was born out to shape an alternative way of explaining the EU and its relationship with national courts. It was particularly adopted to define the dialogue between the German Constitutional Court and the CJEU in regards to fundamental rights, known as the *Solange Cases*, which led to an informal cooperative relationship, deemed to be a non-hierarchical conception between norms and courts.⁸⁰

This form of pluralism was in contrast with the school of thought known as *monism*. This doctrine provides that all national legal systems are governed or shaped in a hierarchical structure with a final arbiter and supreme norm, which prevails and subsumes norms emanating from one legal order of the world, specifically, being subordinate to international law.

As there is no consensus on one specific model of “constitutional pluralisms”, there are many approaches that have been elaborated by different scholars and each of them shows some merits as shown in the following table:

(i) **Epistemic meta-constitutionalism**, championed by Neil Walker⁸¹
Walker held that the legal systems, being distinct constitutional sites, within a shared sphere could each claim ultimate legal authority. Such a pluralistic dimension, would increase legal conflicts and leave an open ended dynamic with no Archimedean point from which claims emanating from one legal order could be assessed against, in term of strength

⁷⁸ See R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), 47ff.

⁷⁹ W. Twining, *Globalization and Legal Theory* (London: Butterworths, 2000), p. 83; B. Tamanaha ‘A Non-essentialist Version of Legal Pluralism’ (2000) 27 *Journal of Law and Society* 296; J. Griffiths ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1.

⁸⁰ See S. Morano – Foadi, supra note 32.

⁸¹ N. Walker, ‘The Idea of Constitutional Pluralism’, (2002) 65(3) *MLR* 317 at 338-339; H. Lindahl and B. van Roermund, ‘Law. Without a State? On Representing the Common Market’ in Bankowski and Scott (eds.), *The European Union and Its Order: The Legal Theory of European Integration* (Oxford: Blackwell, 2000).

and validity, in comparison with other contending claims. Such a model would potentially encourage a process of mutual learning, negotiation and cross-fertilisation between the epistemic units because of such overarching insolubility. This could be done by emulating strategic rivalry and regulatory competition.

(ii) **Liberal pluralism** or “**best fit**” elaborated by Matthias Kumm⁸²

The aims of this is to create a framework where an equilibrium can be found that “best” fits the ideals underlying legal practice in Europe as a whole. This can be achieved by creating a relationship between the legal orders within the shared sphere where the shared principles underlying them are both structured in a uniform and universal manner. This is accomplished when a conflict-norm-clash occurs by answering two questions: (i) what is the best understanding of the relationship between the two systems, given the normative commitments underlying legal practice in Europe? And (ii) what is the interpretation of the relationship between the legal actors that best fits and justifies legal practices in Europe? A conclusion to these questions can be deduced when using the three guiding principles of: (i) substantive protection; (ii) jurisdiction; and (iii) democratic legitimacy, which must be taken into account and balanced against one another.

(iii) **Harmonic discursive constitutionalism**, Maduro’s creation⁸³

Maduro used musical imagery to illustrate how different legal systems can co-exist in the same environment with relative harmony and coherence, and not have a hierarchical or conflicting relationship. This could be achieved by observing the counterpoint, which is a musical method of harmonising different melodies that can be heard at the same time and try to construct a pluralistic legal order in a similar way.

(iv) **Reductionist Constitutionalism adopted by Sabel and Gerstenberg**⁸⁴

It is a novel coordinate constitutionalism and it is reliant upon two fundamentals: (i) equivalent protection; and (ii) mutual monitoring. With regards to the former this has its origins in the relationship between the German national court and the CJEU, when the question of supremacy of EU law and the lack of fundamental rights protection within the EU law system were at stake; and was also adopted by the ECHR when dealing with a State’s breach of human rights that was caused because of that State’s implementation of EU law.

“Mutual monitoring” provides a peer review system by which both legal orders commit to monitor the jurisprudential output of the other and to make acceptance of their deviations provided it maintains an equivalent protection by deferring to each other’s’ decisions. This model leads to a relationship of a polyarchy and not a hierarchy because there is no ultimate arbiter but rather a globalisation or overlapping consensus where each order requires the other to respect the condition of its own deference to their decisions.

We believe that pre-accession, the “dialogue between the two courts” was in line with the “constitutional tolerance” model elaborated by Weiler.⁸⁵ We framed this dialogue, as

⁸² M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’, (2005) Vol. 11, No. 3, *European Law Journal* 299; and M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Dunoff and Trachtman (eds.) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009), p. 323-324.

⁸³ M.P. Maduro ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.) *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), p. 501-537.

⁸⁴ C.F. Sabel and O. Gerstenberg, ‘Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order’, (2010) *European Law Journal*, Vol. 16, No. 5, 511-550.

constitutional dialogue based on deference – between Courts, in the name of European integration.⁸⁶ This concept focuses on the underlying (sociological) ethos of a policy. It accepts the constitutional discipline demanded by the European legal order; it is a voluntary act, which constitutes “*an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism*”⁸⁷. It is the expression of the ethics of political responsibility in Europe that should be founded on mutual recognition and respect among the national and supranational authorities.⁸⁸ This theory shows a high level of maturity based on overlapping consensus between legal orders by recognising each order’s self-determination and mutual deference in name of a superior integration goal.⁸⁹

However, the question remains as to whether the EU constitutional narratives can be triggered post-accession in light of the aims and terms enshrined in the Draft Accession Agreement. Concerns have been raised in relation to all previous models for the after accession stage as summarised in the following table:

The ***epistemic meta-constitutionalism*** seems contrary to the accession’s aim of gravitating and harmonising the two strings of case law emanating from the ECtHR and the CJEU in the human rights field. Thereby by promoting a relationship on the basis that there can be no Archimedean point does seem to be completely counter-intuitive to such an aim. Then, human rights are a sensitive area that might affect an individual’s liberty and where the nature and limits of power can be legitimately exercised over an individual by society. Thereby having a legal construct with multiple competing claims of no possible solubility seems highly prejudicial considering the need for certainty of law and the sensitive nature of human rights.

Whereas both the ***Harmonic discursive Constitutionalism*** and ***the “best fits” theories*** intend for a European rule of law to provide guiding principles and questions that are entrenched with the need to be universal, still promote competing constitutions for an individual in the human rights realm. An application of both theories to the current situation couldn’t be accomplished as the Courts need to develop in synchrony as one system offers more extensive protection than the other. To have one European standard would indirectly extend the ECtHR’s level of being a minimum standard of protection going further than the terms of the draft Accession Agreement. In any case, the Convention is already an integral part of Union law, and therefore such model would seem unnecessary after accession.

Lastly, in relation to the ***co-ordinate constitutionalism*** it is also held that it is unsuitable post-accession, because this seems to fit and illustrate the current relationship between the ECtHR and the CJEU. This comes from both Courts harnessing: (i) judicial dialogue, by which each Court is essentially mutually monitoring each other and minimises the risk of a clash; and (ii) informal dialogue, where the two courts have created a form of discussion and hold regular meetings to enhance compatibility and preach issues of common interest.

⁸⁵ See J.H.H. Weiler, ‘Prologue: Global and Pluralist Constitutionalism – Some Doubts’, in G. De Burca and J. H. H. Weiler (eds.) *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011).

⁸⁶ See Morano – Foadi, supra note 32.

⁸⁷ See Weiler, supra note 85, p. 13.

⁸⁸ Ibid

⁸⁹ See Morano – Foadi, supra note 32 at 72.

The present study suggests that, after accession, the approach, which would ensure a smooth functioning of the two systems, is a **monist (quasi) federal model** based on an umbrella of judicial, institutional and informal dialogues between the two Courts in the field of human rights by placing the ECtHR at the apex of the hierarchy.

It seems that rather than a relationship based on a “constitutional pluralistic” narrative, it appears that **a form of monism** seems to be more tenable given the aims and implications of the accession agreement. Accordingly, the Strasbourg court will be recognised as the final arbiter in the field of human rights. This implies that the ECHR will enjoy direct effect and priority over domestic law, as after accession it will have become part of EU law.⁹⁰

This would avoid conflicts and different interpretations by placing fundamental rights on a single consistent foundation throughout the EU. Such a theory is reinforced by the mechanisms contained within the accession agreement to allow for an internal review by the CJEU and an external review by ECtHR. The accession agreement itself provides that the CJEU will then be bound by the decisions of the ECtHR illustrating a monistic relationship in the human rights field. By having a two speed Europe in relation to fundamental rights would only put the protection of such rights at risk.

As suggested by our empirical findings, since the Union is acceding, in so far as possible, to be on *equal footing* with the contracting parties, the ECtHR will be the final arbiter in judging the compatibility of EU law with the Convention. Thus, as opposed to a pluralistic approach, a **monist (quasi) federal approach** will be envisaged.

Conclusion

This part of the Report discussed an array of “constitutional pluralistic” narratives to question whether or not they could be used to describe the relationship between the two Courts in light of the aims and implications of the Accession Agreement.

Two final remarks emerge:

First, after accession, legal pluralism will not ascend once more in the context of a **constitutional narrative**, rather the relationship between the CJEU and the ECtHR will be one of **monism in a federal quasi monistic** capacity.

Second, provided that the CJEU makes the Accession Treaty compatible with EU law, the **internal and external review mechanisms** will ensure a coherent and monolithic human rights protection leading to legal certainty for both the individuals and the national courts within the European sphere.

⁹⁰ This proposal is shared by W. Weiß in ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon’, (2011) *European Constitutional Law Review*, Vol. 7, No. 1, 64-95 at 89.

However, a number of legal issues raised by the Luxembourg and the Strasbourg judges that were interviewed as part of this project will be addressed in the following pages. These parts of the Report will deal with concerns raised in relation to the post accession era:

- a) The relationship between the CJEU and the ECtHR and the effects of their reciprocal relationship for the EU's legal autonomy.
- b) The Accession Treaty's implications for the autonomy of the EU.
- c) The implication for CJEU's autonomy in relation to Protocol 16 ECHR.
- d) The future of *Bosphorus* judgement after accession.
- e) The *ne bis in idem* principle in competition cases.
- f) Judicial protection and the CFSP.

b) The two Courts and their Dialogue

As above mentioned, three sources of human rights law operate within the European sphere: (i) both the Charter, which became binding in 2009, and the fundamental rights emanating from the general principles of law under the jurisprudence of the EU; and (ii) those protected under the Convention by the ECtHR.

Therefore two sources of law operate under the EU itself, while the other maintains a capacity as an additional source of inspiration or a tool for interpretation. This can be seen for instance in the wording Article 52(3) of the Charter, which states '*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention (...) the meaning shall be the same as those laid down by the Convention*'. However, it is important to note that Article 52(3) also states that the Charter may provide more extensive protection. Furthermore some of the rights provided by both the Charter and the Convention are *verbatim*, which can be seen in both the wording of Article 4 of the Charter and Article 3 of the Convention. Therefore the CJEU takes into account both the corresponding provisions and also the case-law emanating from the ECtHR when determining a decision before it.

Despite the apparent attempt at maintaining a harmonious relationship there have been, in the past, a few clashes between the two Courts due to different interpretations of infringement of an applicant's rights. For example, differences in the Court's judicial interpretation can be seen in relation to search orders in the CJEU's judgement *Hoechst*⁹¹ and the ECtHR's case *Niemietz*⁹².

As stated by one judge:

"We have seen some discrepancies between the two Courts for example the access to privacy in Hoeck case ... both Courts are very careful in looking at each other. I am not sure they are working towards coherence but they tolerate each other; they aim at avoiding conflicts and frictions. There are informal meetings where we discuss problems of fundamental rights if there is a need for research, the research department can find cases".⁹³

The CJEU favours what is known as a teleological interpretation, which is a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules i.e. interprets a rule in a much broader context in the light of the aims of the legal order. By contrast, the ECtHR employs the margin of appreciation doctrine. The Court mostly strikes a balance between individuals and collective goals, where an individual's existence or identity is at stake.⁹⁴ Furthermore, this can also be widened as the parties to the ECtHR are better placed to decide human rights in particular cases, for instance where there is no European consensus.

⁹¹ Joined Cases C-46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859.

⁹² Appl. No. 13710/88 *Niemietz v Germany*, ECtHR (16 December 1992)

⁹³ Interview No 14 (CJEU, Luxembourg 15 December 2010).

⁹⁴ Appl. No. 17488/90 *Goodwin v United Kingdom*, ECtHR (27 March 1996).

Thus, the two Courts can be understood as two supranational constitutional courts which have their own constitutional tools and instruments, as stated by one of the judges:

*“Strasbourg Court is the Court of Human Rights, whereas our Court is a Court that controls legality. However, judges are responsible people and, for obvious reasons, they want to avoid conflicts or create chaos. Judicial appreciation is more appropriate in the area of HR. We don’t see ourselves as the primary implementers of EU legislation. More than half of our case-law is dealing with preliminary references from national courts of the MSs [...] and of course judicial review cases.”*⁹⁵

However, setting aside the miniscule divergences in the judgements between the two Courts, both have sought a co-operative and united approach. It is evident that due to the conflict of the cases cited above, the CJEU in the case *Roquette*⁹⁶ reversed its approach adopted in *Hoechst*. Moreover, there have been references to the other Court’s approach in a related issue and deference has been given to that Court in the promotion of legal certainty in the human rights domain.

One of the interviewed judges affirmed that so far their interaction has been smooth:

*“I think convergence is quite likely to happen whether we consciously work towards this or not. We take into account their case law and they do the same with ours. There are two regional supreme courts dealing with these issues of fundamental rights and it would be surprising if they did not take some interest on each other’s case law”.*⁹⁷

Therefore, it can be deduced that the two Courts, to date, have tried to maintain a more co-operative and harmonic approach in relation to human rights, but the possibility of divergences between the two Courts exist due to diverse methods of interpretation and goals of the two systems. At this stage of development, the ECHR is a non-binding source of inspiration or tool of interpretation for the EU. However, this is not the sole means for an accession, as substantive issues and lacunas were created by having a multi-layered platform in Europe with two supranational systems affecting 28 national legal systems, party to the Convention and EU.

The final question of which Court out of the two has the ultimate competence (Kompetenz-Kompetenz) has not yet been resolved. As already affirmed in the theoretical part of this Report (Part III B a), their rapport resembles a ‘pluralist’ model founded on the reciprocal recognition of each other’s decisions in the assumption that the two entities are genuinely independent and autonomous. Although this approach has been functioning to date, accession will bring about change. To avoid possible clashes, the two Courts have reached an implicit prior ‘constitutional’ consensus as regards the core norms of constitutional governance itself, i.e. the

⁹⁵ Interview No 6 (CJEU, Luxembourg 14 December 2010).

⁹⁶ Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333.

⁹⁷ Interview No 10 (CJEU, Luxembourg 15 December 2010).

presence of a uniform minimum standard and this consensus has become more explicit as a result of the inter-judicial dialogue between them.

1. The jurisprudence of the two Courts - paths crossed and collisions made

The potted history explored above in Part III A of this Report is – in one sense – the story of the case law of two Courts; the Courts started their journey on different paths, but over time – as the European Community (and now the Union) has focused on fundamental rights – the jurisprudence of these two supranational Courts has, to a certain extent, met.

As this has occurred it was, perhaps, inevitable that some collisions and divergences would occur in relation to specific areas;⁹⁸ after all until November 2009, human rights were being regulated by two distinct and independent regional regimes: the Luxembourg system and the Strasbourg order. The danger is of course inconsistency, something which Judges of both Courts agree to be problematic: *“inconsistencies are inevitable, but they will have to be followed up so that legal certainty is not harmed.”*⁹⁹ and *“...it is extremely important to find a mechanism of co-operation between the Courts, which can resolve the open conflicts between the two jurisprudences. If not, it might be quite dangerous for the coherence of the EU legal system”*.¹⁰⁰

Inconsistencies can also be dangerous to the very fundamental nature of human rights:

*‘If one asks the question “what makes fundamental rights fundamental?”, one might meet a broad consensus that fundamental rights are supposed to go to the very essence, the basic needs - or indeed the dignity - of every human being and that, because of this fundamental nature, they should be enjoyed in the same way by the largest possible number of people.*¹⁰¹

One particular area of divergence that has been considered as part of this project is the treatment of TCNs within Europe. The authors of this Report have explored this area in a paper entitled: *“The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and the ECtHR Jurisprudence”*.¹⁰² The theoretical conclusions that were drawn from this particular case study are as follows:

1. In general, the two regimes have co-existed in harmony with no major conflicts of authority or hierarchy issues. The two Courts have managed to generate a strong relationship of

⁹⁸ When a conflict arises it usually falls within one of the following categories: (a) when there is an absence of ECtHR case law of the matter in hand (b) when the procedural rules differ between the two courts (c) open conflict – when the courts actively disagree and, therefore, fail to refer to each other’s differing case law. For more detail see D. Spielmann, ‘Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementariness’, in Philip Alston, Mara Bustelo and Lames Heenan (eds.) *The EU and Human Rights* (Oxford: Oxford University Press, 1999) Ch 23, p. 757.

⁹⁹ Interview No VI (ECtHR, Strasbourg 20 June 2012).

¹⁰⁰ Interview No 17 (CJEU, Luxembourg 16 December 2010).

¹⁰¹ J. Callewaert, ‘The European Convention on Human Rights and European Union Law: a long way to harmony’, (2009) 6 *European Human Rights Law Review*, 768–783, 782.

¹⁰² S. Morano-Foadi and S. Andreadakis, *supra* note 8.

cooperation by initiating a dialogue that has led to a remarkable convergence between their legal orders in some areas (i.e. the right to protection for property, the right to freedom of expression, the right to respect for private and family life, the right to a fair trial).¹⁰³

2. That it should not be ignored that the CJEU has set different objectives from the ECtHR. Luxembourg speaks the language of freedoms and it is committed to offering a sound interpretation of the Treaties and facilitating the operation of the internal market. It is devoted to ensuring that EU citizens enjoy all the rights and freedoms provided and protected by the European legal order. On the other hand, the ECtHR is a specialized Court, focusing on human rights and the ECHR. Therefore, it is reasonable to come across differences in the approach, the interpretative methods, the justification of judgments, as well as the analysis of provisions and legal terms.

3. Overall, although the identification of common approaches between the two Courts can be characterised as an indication of harmony, full harmonization of the human rights standards is yet to be achieved in the field of migration.

However, it is indeed surprising how recently even in the area of TCN's migration each of the two Courts has started to respond to points of law raised by the other Court, when necessary, to increase human rights' protection of migrants. This has occurred in several instances and constitutes an essential tool for the Courts.

Some of the EU measures in relation to migration law, for example the Qualification directive¹⁰⁴ and indeed the Charter, based on their texts, ensure a more extensive protection than the Convention. However, as the ECtHR has considered the Convention to be a "living document" the Court has been extending its interpretation over the years and it will continue to do so in the future. Thus, the interesting question is how will the two Courts align to each other's case law even at the interplay between human rights and migration?

As one of the Strasbourg judges affirmed:

"As far as asylum seekers are concerned, great if the EU gives more protection. We say that migrants should have rights protected under the minimum standard. What we say, when migrants are staying in one of the countries who are Member States of CoE and are also Parties to the Convention, they have some rights which go further if the Member State is also an EU

¹⁰³ N. Krisch, 'The Open Architecture of European Human Rights Law', (2008) 71 *Modern Law Review* 183, 198; see also Scheeck, supra note 8, at p. 837; Callewaert, supra note 101, 769–770.

¹⁰⁴ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, 30.9.2004, p. 12. This directive has been replaced by the recast Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20/12/2011, 9–26. However, Directive 2011/95/EU does not apply to the UK, Ireland and Denmark.

country. But for me it is the same when EU gives more protection like when any other CoE Member State does at the national level".¹⁰⁵

Four strands of cases emerge as an example of convergence between the two European Courts' approaches in the field of migration and human rights:

- In relation to Article 15 Qualification Directive¹⁰⁶ and Article 3 ECHR (CJEU cases: *Elgafaji*¹⁰⁷ and *Diakite*¹⁰⁸; ECtHR cases: *NA v UK*¹⁰⁹ and *Sufi and Elmi*¹¹⁰)
- In relation to the EU Dublin II Regulation¹¹¹ and Article 3 ECHR (ECtHR case: *M.S.S. v Belgium and Greece*¹¹²; CJEU cases: *NS and M.E. v UK*¹¹³; *CIMADE*¹¹⁴)
- In relation to EU Returns Directive¹¹⁵ and Article 5 ECHR (CJEU cases: *El Dridi*¹¹⁶ ECtHR cases: *Saadi v UK*¹¹⁷ plus CoE's guidelines¹¹⁸)
- In relation to the Qualification Directive, EU Procedure Directive¹¹⁹ and Article 13 ECHR: revocation of the refugees' status (CJEU cases: *Abdulla*¹²⁰, *Diouf*¹²¹ and several ECtHR cases¹²²)

¹⁰⁵ Interview No V (ECtHR, Strasbourg 20 June 2012).

¹⁰⁶ Article 15 Qualification Directive recites "Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

¹⁰⁷ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-00921.

¹⁰⁸ Case C-285/12 *Diakité v Commissaire général aux réfugiés et aux apatrides* (Judgment of the Court Fourth Chamber of 30 January 2014), not yet reported.

¹⁰⁹ Appl. No. 25904/07 *N.A. v the United Kingdom*, ECtHR (Judgment of 17 July 2008).

¹¹⁰ Appl. Nos. 8319/07 and 11449/07 *Sufi and Elmi v. the United Kingdom* (Judgement of 28 November 2011)

¹¹¹ The Dublin II Regulation, issued in 2003 by the EU, includes the principle that an asylum-seeker's application can be examined in only one member state of the European Union. When it becomes clear that the applicant has entered the EU via another Member State or has already applied for asylum in another state, the applicant is returned to that state and the process is handled by that state's authorities.

¹¹² Appl. No. 30696/09 *MSS v Belgium and Greece* [2011] 53 E.H.R.R. 2.

¹¹³ Joined cases C-411/10 *N.S. v. Secretary of State for the Home Department* and C-493/10 *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (Grand Chamber Judgement of 21 December 2012).

¹¹⁴ Case C-179/11 *Cimade and GISTI v Ministre de L'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* [2013] 1 CMLR 12.

¹¹⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, O J L 348, 24 Dec 2008.

¹¹⁶ Case C-61/11 PPU (*Hassen El Dridi, alias Karim Soufi*) (Judgement of 28 April 2011).

¹¹⁷ Appl. No. 13229/03 *Saadi v United Kingdom* [2008] 47 E.H.R.R.

¹¹⁸ Committee of Ministers of the Council of Europe, 'Twenty Guidelines on Forced Return' (2005) Council of Europe, available at: http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf

¹¹⁹ Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting O J L 326/13

¹²⁰ Joint Cases C-175/08 (*Aydin Salahadin Abdulla*), C-176/08 (*Kamil Hasan*), C-178/08 (*Ahmed Adem, Hamrin Mosa Rashi*) and C-179/08 (*Dler Jamal*) v *Bundesrepublik Deutschland* [2010] ECR I-01493.

¹²¹ Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* [2011] ECR I-07151.

¹²² See the following cases: Appl. No. 25389/05 *Gebremedhin v France* (26 April 2007) (suspensive effect of domestic remedy for asylum claims in transit zone); Appl. No. 27765/09 *Hirsi Jamaa and Others v Italy* [GC] (23 February 2012), paras. [197-207] (absence of suspensive effect of domestic remedies against military personnel operating a "push back at sea"); Appl. No. 30471/08 *Abdolkhani and Karimnia v Turkey* (22 September 2009) (Right to an effective remedy: domestic remedy needs to deal with the substance of the claim); Appl. No. 9152/09 *I.M. v*

Despite the Courts' approach, the interpretative methods, the justification of judgments in the migration field at the intersection with human rights seem to differ, the above-mentioned cases, show elements of convergence between the two Courts.

In the light of these findings, thought goes to the extent to which harmony could be fully realized. Legal scholars have often contemplated the answer to this question;¹²³ the simplest answer was for the EU to accede formally to the ECHR, which has, of course, been made possible by the Treaty of Lisbon. And whilst this is indeed true, the answer also lies with the EU and the CoE and their respective Courts whom must learn how to interact completely, not just co-exist.

2. Special relationship between the CJEU and the ECtHR

The CJEU and the ECtHR have comparable jurisdictions and despite the Courts operating in two different regimes that are independent from each other, they are in no sense isolated from each other. Instead the Courts have formed an extraordinary link through the judiciary of each Court, and the two institution's shared interests and values. This has resulted in a formal and informal dialogue being created between the Courts. Following accession, the Strasbourg Court will be the ultimate arbiter and guarantor of the compatibility between EU law and the Convention. It may need to intervene if EU law has clearly failed to apply the Convention obligations or if there are significant points of interpretation which need resolution. However, the Court itself has always recognised these cases as being exceptional.¹²⁴ Thus, with an appropriate level of cooperation, clashes will be avoided.

c) Some remarks from the CJEU and ECtHR judges

1. The "Luxembourg" perspective

As already mentioned, the EU was originally an economic organisation and thus their founding treaties did not provide for the protection of fundamental rights. Subsequently due to the CJEU's initiative, the system of fundamental rights protection was developed based on its case law.

The CJEU has regularly considered, mentioned and found inspiration in the Convention, and in its case law assigned a "special significance" to it. However, CJEU held that the European Community (now Union) was not bound by the ECHR, despite all its MSs' ratification of the Convention. This was because the EC lacked competence to accede to the ECHR.

France (2 February 2012), (procedural safeguards for accelerated asylum procedures); Appl. No. 1365/07 *C.G. and Others v Bulgaria* (24 April 2008) (lack of procedural safeguards in deportation proceedings).

¹²³ See D. Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementariness', in Philip Alston, Mara Bustelo and Lames Heenan (eds.) *The EU and Human Rights* (Oxford: Oxford University Press, 1999) Ch 23, p. 777.

¹²⁴ The Rt Hon Kenneth Clarke, QC MP in 'Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and beyond' (n. 44) p. 73.

After the entry into force of the Treaty of Lisbon, the ECHR is referred to in Article 6(3) TEU, which makes the ECHR an integral part of the EU law. Thus, the Treaty basis defining the relationship between the Luxembourg and Strasbourg regimes has been formally established.

However, what if the two Courts adopt a different approach and reach different solutions? Will the clash, after accession, be solved in favour of the Strasbourg Court? Could a situation where the CJEU “react” vis-à-vis Strasbourg judgements in a similar manner as some ECHR MSs’ Supreme Courts be envisaged?

Answers to these questions will be attempted in the following pages.

i. Dialogue between the two Courts: the Judges’ reflections

A solution for avoiding clashes impacting on each Court’s sphere of jurisdiction and expertise is to maintain a dialogue between the Courts.

The dialogue between them is a very powerful instrument for a convergent human rights system in Europe, as a judge has affirmed:

*“...this dialogue is crucial not only on the EU level, but also on the national level. I think that this is a change in mentality in the past decade, it is quiet new, recent. At the beginning of the EC it was not there. And this is a very important development and you can feel it everywhere. Also after enlargement of the EU into Eastern Europe it is important...We of course try to keep ourselves up to date with the CJEU case law, we have tables of cases, and we also keep record of our own case law mentioning the EU law”.*¹²⁵

Three categories of dialogue between the two Courts have emerged: the informal, the institutionalised, and the judicial dialogues.

The “informal dialogue”

This is an ongoing mechanism, consisting of regular meetings between the two Courts of Strasbourg and Luxembourg. During these meetings members of the Courts discuss various issues in relation to their respective work. They do not discuss individual cases but general points of convergence or concerns in relation to fundamental rights issues or general factors impacting on the rule of law in Europe.

Within each Court, there is then an internal dialogue, as there are many working groups on EU law within the Strasbourg Court and within the CJEU, each judge’s cabinet keep detailed information on ECtHR case law.

As stated by some judges:

¹²⁵ Interview No VI (EctHR, Strasbourg 20 June 2012).

“Some years ago we started the meetings.... We call this “dialogue between the Courts”. Even though, the meetings have not so far given so much on the substantial level, they give an opportunity to meet, raise some topics and to know each other. When accession will be more concrete and political decisions have been taken this will even be more important”¹²⁶

“The dialogue is very intensive. I do not think it should be “officialised”.¹²⁷

“We meet once or twice a year ... We also meet with the German Constitutional Court and the British Supreme Court and the French Constitutional and the Council de Etate. We discuss issues of common interests and this enhances the relationship of trust.”¹²⁸

“There is a dialogue. I have been fortunate to be part of the Court’s delegation [...] I think the dialogue is very important as we have to understand each other’s few points and the approaches.... For example, one of the areas that this Court [CJEU] needs is consciousness of human rights dimension as the last thing we have ever wanted is a situation where we were going to have a condemnation from Strasbourg. It should be always a possibility and hopefully never an actuality if we are doing our job correctly in both Courts.”¹²⁹

“We do not only have dialogue with the Strasbourg Court we have also a dialogue with the Bundesverfassungsgericht (German Federal Constitutional Court) or other constitutional courts and I do not think it should be formalised. I believe in informal meetings you achieve much more in this way. We inform what as judges we are doing and we pay respect to each others’ courts.”¹³⁰

“There are meetings once a year and we also meet each other in conferences and other meetings. I don’t think that we necessarily need more formal meetings.”¹³¹

The “institutionalised dialogue”

This will be enacted after the EU’s accession to the ECHR, and is described in more details in the section on accession, below. It foresees an arrangement ensuring that the EU and its MSs may appear jointly as defendants before the Strasbourg Court in cases concerning EU law, the so-called co-respondent (or co-defendant) mechanisms. This provision is present in the Accession Treaty which is at the CJEU for its opinion on its compatibility with the EU Treaties.

The “judicial dialogue”

¹²⁶ Interview No VII (ECtHR, Strasbourg 20 June 2012).

¹²⁷ Interview No 18 (CJEU, Luxembourg 10 December 2010).

¹²⁸ Interview No 3 (CJEU, Luxembourg 13 December 2010).

¹²⁹ Interview No 9 (CJEU, Luxembourg 15 December 2010).

¹³⁰ Interview No 14 (CJEU, Luxembourg 15 December 2010).

¹³¹ Interview No 5 (CJEU, Luxembourg 14 December 2010).

It is based on the fact that each European Court looks at the respective case law, when dealing with points of law that were raised in previous case law by any of the two European Courts.

It is submitted that this form of dialogue is an excellent tool, which aims at bringing coherence within the European human rights legal system as a whole, as the following quotes show:

*“First of all, I want to say that we have been using the jurisprudence of the Court for ages. There is nothing new about it. If we have in the Charter a particular right, which comes out in the Convention so evidently, we will look what the Strasbourg Court has said in relation to this right when interpreting the Charter.”*¹³²

*“What we need is to be more attentive to the Strasbourg case law and make sure that our secretaries are doing their research properly and look for all the relevant cases. This is more practical issue but to a certain extent I could say that paradoxically after the accession we would have to be more cautious [...] because we are two separate and independent Courts. Imagine that they are almost no contacts with the General Court which is located in Luxembourg as well. We are the Court of Appeal for the General Court and we only know what they are doing when we see a particular judgement. There is no dialogue. On the other hand, there is a dialogue with the national courts. Not on pending cases, but an exchange of information and advice on procedural issues for the future references that they might make to us. [...] They would do the same; mention cases or draw our attention to cases that they might be citing EU law sometimes even as a source of inspiration. It is definitely a two-way street. I cannot think of any formal way, a more formalised way to take place.”*¹³³

*“The Courts are already close together not only because they study each other’s judgements and also because there is no rivalry. One is the Supreme Court of the Union and the other is a specialised Court on human rights representing a wider range of states, but without having to deal with institutional questions like Luxembourg and to answer questions from the national judges. The ECHR represents the minimum standards of protection, but the CJEU, although not bound by the jurisprudence of the Strasbourg Court, is keen to use it when necessary. In certain issues, the Strasbourg Court has a large number of case-law and more expertise. The dialogue is definitely important”.*¹³⁴

As mentioned above, judges have even suggested that dialogue alone is not enough. Cooperation is indeed needed as the following quotes demonstrate:

“Dialogue cannot solve all problems between the two Courts. Cooperation is useful. Cooperation is better, but anything else will be complicated. It will take time and given the principle of exhaustion of national remedies it will not be the best solution to go to Luxembourg

¹³² Interview No 10 (CJEU, Luxembourg 15 December 2010).

¹³³ Interview No 5 (CJEU, Luxembourg 14 December 2010).

¹³⁴ Interview No 4 (CJEU, Luxembourg 14 December 2010).

*and then to Strasbourg or vice versa. It will be burdensome and it will be a problem of resources”.*¹³⁵

*“The substance of the cooperation is based on what each Court is doing. No individual cases are discussed. There are presentations and exchange of information about jurisprudence.”*¹³⁶

*“The relationship will not be hierarchical, but based on the principle of cooperation. The Court recognises that the ECtHR will have the ‘last word’ and we reasonably expect that we will have somehow the opportunity to have the ‘first word’ [on EU law]. This is the essential requirement.”*¹³⁷

ii. Preserving EU law’s autonomy

One of the main concerns the CJEU judges raised was about the loss of EU law’s autonomy after accession. Theoretically, this is not going to happen as the CJEU will still be the EU Supreme Court with the mandate to interpret EU law and decide on the validity of secondary legislation and the ECtHR will maintain its role of external as a specialised Court in area of human rights.

Although, there was a general agreement amongst the judges that the “last word” on human rights’ compliance is a matter to be dealt with by the ECtHR, doubts persist as to the extent to which, in deciding the EU law’s conformity with the Convention, the ECtHR would abstain from actually interpreting EU law.

As one of the judges stated:

*“We have to be the arbiter of Union law and they have to be the arbiter of whether that conforms with the Convention. [...this is] very important because there is always a danger that they would ended up interpreting our law rather than testing its conformity”.*¹³⁸

However, as the nature of the Convention is international public law, the ECHR is not directly applicable within the EU system and consequently any ECtHR judgment will be binding on the EU, as a matter of public international law.

Nevertheless, it can be affirmed that, as already dealt with in previous sections of this Report, Article 52 (3) of the Charter and Article 6 (3) TEU formally refer to the ECHR. Hence, the CJEU applies the ECtHR’s case-law when interpreting fundamental rights’ provisions of EU law. The

¹³⁵ Interview No 5 (CJEU, Luxembourg 14 December 2010) and Interview No 7 (CJEU, Luxembourg 14 December 2010).

¹³⁶ Interview No 4 (CJEU, Luxembourg 14 December 2010).

¹³⁷ Interview No 12 (CJEU, Luxembourg 15 December 2010).

¹³⁸ Interview No 9 (CJEU, Luxembourg 15 December 2010).

EU's accession to the Convention would simply reaffirm what is already in the Treaties about the CJEU's interpretation of EU's fundamental rights.

However, despite Article 6(3) TEU's recognition of the ECHR as general principle of EU law, the Convention is mainly a 'gap filler' for the EU as the CJEU's role is not to directly apply it, and the CJEU does not feel formally bound by the ECtHR's case law. Basing its competence on Article 19 (1) TEU, it believes to be the sole and ultimate arbiter of EU law even when ECHR provisions and ECtHR case law are involved. This enables the CJEU to interpret ECHR in a flexible fashion in order to enhance the effectiveness of EU law.¹³⁹ When questions of fundamental rights protection have been dealt with by the Strasbourg Court, the CJEU relies on the Convention and ECtHR's case law repeatedly using the formula '*as interpreted by the European Court of Human Rights*'.¹⁴⁰ The Strasbourg jurisprudence is also used as an interpretative tool in relation to the legality of EU institutions' acts and omissions.

However, as highlighted in the theoretical part to this Report, after accession, a monolithic framework is likely to prevail over a pluralistic one, making the ECtHR's judgments binding on CJEU. It is indeed the real purpose of the accession to address failures in human rights protection compatibly with Article 6(2) TEU which makes the EU specific characteristics to remain preserved.

There will be a delicate balancing exercise for the ECtHR as it attempts to avoid interfering with the CJEU's role as interpreter of EU Law. A diplomatic agreement between the two Courts and a cautious intervention from the Strasbourg Court would guarantee a smooth coexistence of these two institutions. The judicial and the institutionalised dialogue will assist the Courts in such an endeavour.

As commented by one of the judges:

*"Article 6(2) TEU and Protocol 8 talks about accession and an eventual participation of the Union to the ECHR, but here we ask the specificity of the EU law to be taken into account and that we don't deal only with civil and political rights but also with social and economic rights. This approach of the Court leads to the acceptance of an idea of solidarity which emerged also in the Laval case".*¹⁴¹

¹³⁹ Gragl, supra note 73, p. 53-54.

¹⁴⁰ See for example *Case C-540/03 European Parliament v Council of the European Union* [2006] ECR I-05769 para 85.

¹⁴¹ Interview No 12 (CJEU, Luxembourg 15 December 2010).

This judge added that Article 6(2) TEU and Protocol 8 require that the Accession Treaty does not encroach on the autonomy of the EU's legal order. They might just as well be read as only allowing accession to the ECHR, given that this can be reconciled with the EU's legal autonomy.

Whatever the implications of ECtHR's external scrutiny for the EU's legal autonomy may be, they are inherent and inextricably linked to the concept of the EU's accession to the ECHR. Accession is happening through an agreement, a common consensus of the EU and ECHR contracting parties, which has required negotiations between all.

Thus, on the one hand, the CJEU would enjoy a *margin of discretion* when implementing the ECtHR's judgments on *equal footing* with other high contracting parties and, on the other hand, the ECtHR would need to respect the *principle of subsidiarity* and the *margin of appreciation* also *vis-à-vis* the EU.

A diplomatic solution, either in the form of the above-mentioned dialogues or a more intense form of cooperation between the two Courts, would keep conflicts away

However, if a conflict were to manifest between EU law and ECtHR judgements, then theoretically the monolithic architecture of Europe would make the ECtHR the Supreme Court in terms of human rights. This results from the EU being treated on "equal footing" as other MSs.

Such a solution might not be acceptable for the CJEU as EU's autonomy is paramount for the CJEU. In which case, even if not desirable, the Luxembourg Court might envisage a position reminiscent of rulings developed by the German Federal Court in the Solange and the Görgülü cases, regulating respectively the relationship between the CJEU and the ECtHR and their national courts.¹⁴² The CJEU could affirm that ECtHR judgements would be observed **as long as** the ECtHR respects autonomy of EU law.

However, the Luxembourg judges do not seem to favour such an "*extrema ratio*" as they all share the need to cooperate rather than to show antagonism. They wish to be considered as allies of Strasbourg, the good brother and show compliance with human rights, as a role model for the other courts in Europe, rather than showing animosity

Judges expressed their views as shown in the following quotes

"There is no rivalry....this Court needs to have the 'first word' not the 'last word'".¹⁴³

"Judges are responsible people and, for obvious reasons, they want to avoid conflicts or create chaos. Judicial appreciation is more appropriate in the area of human rights...The Union must

¹⁴² See Morano – Foadi, supra note 32.

¹⁴³ Interview No 4 (CJEU, Luxembourg 14 December 2010)

*accede to the ECHR and this means that the last word belongs to the ECtHR. This is the logical response, not as compromise but as a realistic outcome”.*¹⁴⁴

*“..[Strasbourg] will have the last word] but just concerning the minimum standards, i.e. the Convention. This does not mean that there is a restriction to protect at a higher level. It is clear that protection is higher at Union level”.*¹⁴⁵

*“If the Court of Strasbourg will recognise the European law as not conform to the Convention, this decision should have direct impact for the European law system. For this reason it is extremely important to find a mechanism of cooperation between the two courts that can avoid open conflicts, if not it might be quite dangerous for the coherence of the legal system in Europe”.*¹⁴⁶

*“It is not a disastrous if the ECtHR finds a violation. If that happens, the EU legislator or this Court would change [the status quo]. It is sharp. There is cooperation through discussion when you have opposite interests and views”.*¹⁴⁷

Moreover, the EU has the opportunity to influence the ECtHR’s interpretation if its arguments are well-structured and articulated. This is indeed possible in a spirit of cooperation and “judicial dialogue” between the two Courts.

The last point to be raised is in relation to the EU’s accession to Protocol 16 ECHR and its implication for CJEU’s autonomy. There are two issues that need to be discussed:

1. Protocol 16 will reinforce a “dialogue” between the higher national courts of the signatories Contracting Parties and the Strasbourg Court without indeed undermining the CJEU’s autonomy and authority.
2. It will introduce a mechanism that can ensure consistency in Europe as the CJEU being the higher court at EU level could raise issues of compliance with the Convention, during the preliminary ruling or the annulment procedure, thus preventing a possible condemnation for violation of human rights by the Strasbourg Court at a later stage.

In relation to the first issue, the Luxembourg court’s autonomy might be challenged in cases where a higher national courts decide to address an advisory question on human rights, to one of the two European Courts, picking and choosing the most appropriate Court, even if the issue is related to an EU measure (i.e. a form of *sui generis forum shopping*). The second concern

¹⁴⁴ Interview No 6 (CJEU, Luxembourg 14 December 2010).

¹⁴⁵ Interview No 1 (CJEU, Luxembourg 13 December 2010).

¹⁴⁶ Interview No 17 (CJEU, Luxembourg 16 December 2010).

¹⁴⁷ Interview No 15 (CJEU, Luxembourg 15 December 2010).

relates to the attempt to void clashes and conflicts but raises issues of procedure and length of time.

To conclude, the essential elements of EU integration and the minimum standards of ECHR rights are not prejudiced with EU's accession. In case of divergences between the two Courts a harmonious solution is likely to be found. Protocol 16 and its implications for the EU will be examined in more detail in the relevant sections in Part B section c2 iv) and Part C section c3 i) of the Report.

2. The “Strasbourg” Perspective

When discussing the historical context of human rights protection in Europe we briefly explored the case law of the ECtHR. In this section we expand on that earlier discussion.

i. Earlier ECtHR’s case law on the relationship between the Convention and EU law

As stated in other parts of this Report, the two legal systems of the CoE and the EU preceded in parallel from their inceptions up to early the nineties with no major interference in each other’s domain. Their respective Courts were adjudicating on the cases before them using different legal systems and methods of interpretation and at times reaching discordant decisions.

This was the case, as the founding treaties of the European Communities did not expressly protect human rights and these entities were not part of the ECHR; then, slowly the two respective Courts started paying attention to each other.

The CJEU enshrined fundamental rights within the general principles of the then Community law (*Stauder*)¹⁴⁸. It confirmed that, in protecting such rights, it was inspired by the constitutional traditions of the MSs (*Internationale*)¹⁴⁹ and, by international human rights treaties on which the MSs were signatories (*Nold*)¹⁵⁰. In 1975, the Luxembourg Court explicitly referred to the Convention's provisions¹⁵¹, and in 1979, it recognised special significance amongst international treaties to the protection of human rights (*Hauer*)¹⁵². Subsequently, the CJEU began to refer extensively to Convention provisions where EU legislation under its consideration had referred to ECHR¹⁵³ and also to Strasbourg Court's jurisprudence.¹⁵⁴

¹⁴⁸ Case C-29/69 *Stauder v City of Ulm* [1969] ECR 419.

¹⁴⁹ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁵⁰ *Nold* supra note 16

¹⁵¹ Case C-36/75 *Rutili v Minister of the Interior* [1975] ECR 1219; see also paragraph 10 of Opinion No. 256/2003 of the European Commission for Democracy through Law (Venice Commission) on the implications of a legally binding EU Charter of Fundamental Rights on human rights protection in Europe.

¹⁵² Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

¹⁵³ See, for example, *Hauer*, cited above, para [17] (Article 1 of Protocol No. 1); Case C-63/83 *Regina v Kent Kirk* [1984] ECR 2689, para [22] (Article 7); Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para [18] (Articles 6 and 13); Joined Cases C-46/87 and C-227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR 2859, para [18] (Article 8); Case C-249/86 *Commission of the European Communities v the Federal Republic of Germany* [1989] ECR 1263, para [10] (Article 8); Case C-260/89 *ERT v DEP* [1991] ECR I-2925, para [45] (Article 10); Case C-415/93 *Union royale belge des sociétés de football and Others v Bosman and Others* [1995] ECR I-4921, para [79] (Article 11); Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International, Inc. and Others v Commission of the European Communities* [2003] ECR II-1, para [121] (Articles 6 and 13); and Case C-101/01 *Criminal proceedings against Bodil Lindqvist* [2003] ECR I-12971, para [90] (Article 10).

¹⁵⁴ See, for example, Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X*, [1996] ECR I-6609, para [25] (Article 7); Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, paras. [25-26] (Article 10); Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd* [1998] ECR I-621, paras. [33-34] (Articles 8, 12 and 14); Case C-185/95 *P Baustahlgewebe GmbH v Commission of the European Communities* [1998] ECR I-8417, paras. [20] and [29] (Article 6); Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-1935, paras. [39-40] (Article 6); Case T-112/98 *Mannesmannröhren-Werke AG v Commission of the European Communities* [2001] ECR II-729, paras. [59] and [77] (Article 6); Case C-274/99 *Connolly v Commission of the European Communities* [2001] ECR I-1611, para [39] (Article 10); Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, paras. [41-42] (Article 8); Case C-276/01 *Proceedings against Joachim Steffensen* [2003] ECR I-3735, paras [72] and [75-77] (Article 6); Joined Cases

The ECtHR, in *Confederation Francaise Democratique du Travail*,¹⁵⁵ the first case lodged before the European Commission on Human Rights (EComHR), held that the EU was not a party to the Convention and thus the Court did not have jurisdiction *ratione personae* on its actions.

This was repeated in several other cases relative to the EU, raising the question as to whether the EU MSs were somehow responsible for legal acts they transposed in order to give effect to the EU law. In *M & Co*¹⁵⁶ the EComHR held that the transfer of powers to a supranational organisation did not automatically absolve a State from its responsibilities under the ECHR in relation to the exercise of the transferred powers. Nonetheless, the transfer of powers to an international organisation was compatible with the ECHR, provided that within that organisation, i.e. in the case at stake it was the EU, fundamental rights would receive an ‘equivalent protection’. It was concluded that the EU legal system not only secured human rights, but also provided for a scrutiny of their observance.

The EComHR introduced a new concept concerning the relationship between the two legal orders, namely the ‘*Solange*’ principle¹⁵⁷, which states that a transfer of competences to another international or supranational organisation is not prohibited ‘*as long as*’ fundamental rights receive an equivalent protection within the legal order of this organisation.¹⁵⁸

Such a judgement proved significant as acknowledged that the EU’s legal system was a separate and most importantly autonomous system of human rights protection.¹⁵⁹ However, in recognising that the Convention did not prohibit Contracting Parties from transferring sovereign power to an international/supranational organisation in order to pursue cooperation in certain fields of activity, the ECtHR did not abstain from scrutinising MSs’ acts which in fact

C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* [2003] ECR I-4989, paras. [73-77] and [83] (Article 8); Case T-224/00 *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* [2003] ECR II-2597, paras. [39], [85] and [91] (Article 7); Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607, paras. [58-60] (Article 8); Case C-117/01 *K.B. v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541, paras. [33-35] (Article 12); Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025, paras. [50-51] (Article 10); Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri v Land Baden-Württemberg* [2004] ECR I-5257, paras. [98-99] (Article 8); and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp., Nippon Steel Corp., JFE Steel Corp. and Sumitomo Metal Industries Ltd v Commission of the European Communities* [2004] ECR II-2501, para [178] (Article 6).

¹⁵⁵ See Appl. No. 8030/77 *Confédération française démocratique du travail v European Communities*, Commission decision of 10 July 1978, Decisions and Reports 213, DR 13, p. 231 para [3]; Appl. No. 13539/88 *Christine Dufay v. European Communities and their Member States*, Commission decision of 19 January 1989; See also *M. & Co.*, supra note 28 at 144, and *Matthews v United Kingdom* supra note 27, para [32].

¹⁵⁶ *M & Co*, see supra note 27.

¹⁵⁷ BvR 197/83 *Solange IIB* VerfGE 73, 339. See also Part III B(2)(ii) of this Report.

¹⁵⁸ See Scheeck, supra note 8, 858.

¹⁵⁹ See Douglas-Scott, ‘A Tale of Two Courts: Luxemburg, Strasbourg and the growing European Human Rights Acquis’, (2006) 43 *Common Market Law Review*, 629 – 665, 637.

implemented EU law.¹⁶⁰ This was based on the fact that the State retains Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.¹⁶¹

In *Procola*¹⁶² and *Cantoni*¹⁶³ the ECtHR reached a turning point in its relationship with EU law. In *Procola*, the Court reviewed an act of Luxembourgish authorities that had incorporated two EU regulations regarding the fixation of milk quotas. The ECtHR scrutinised domestic legal acts and found a violation of Art 6 ECHR, and it also implicitly scrutinised the EU regulations.

In *Cantoni*, the ECtHR held that national laws, based almost verbatim on the EU directive, were still within the ambit of the ECHR and therefore subject to the judicial review of its Court. The ECtHR showed a general tendency to monitor EU activities in an increasingly detailed manner before concluding that these EU-related applications were inadmissible *ratione personae*.¹⁶⁴

The seminal case, which laid the foundations for the subsequent evolution of the ECtHR's case law on the relationship between the Convention and EU law, is *Matthews v the UK*¹⁶⁵. A resident of Gibraltar, Ms Matthews, was denied the possibility to vote for the European Parliament, on the grounds that such elections were reserved to British nationals resident in the United Kingdom, even though most of EU law applies to this British Overseas Territory. She complained that her disenfranchisement was a violation of Article 3 Protocol 1 of the Convention which guarantees the right to free elections.

The issue at stake was a complex one, as the principle of democratic representation was balanced with the application of the 1976 Act on direct elections, a measure having the same value as the Treaties. The Direct Elections Act was an international Treaty that the UK entered into, as a matter of national and not EU law¹⁶⁶ and was not reviewable by the CJEU, even if the violations were caused by some EU act (Council decisions).¹⁶⁷

In relation to the question whether the UK could be held responsible since the European Parliament is an organ of the EU (para 31), the ECtHR reiterated that the EU's acts could not be scrutinised as the EU lacked standing. The ECtHR held the UK responsible *ratione materiae* under Art 1 ECHR and Art 3 Protocol 1 ECHR, for the absence of elections to the European Parliament in Gibraltar, declaring the territory within the UK jurisdiction.

¹⁶⁰ Appl. No. 19392/92 *United Communist Party of Turkey and Others v Turkey* [1998] EHRR 121, p. 17-18, para [29].

¹⁶¹ *Matthews v United Kingdom* supra note 27, paras. [29] and [32-34]; and Appl. No. 42527/98 *Prince Hans-Adam II of Liechtenstein v Germany* [GC] ECHR 2001-VIII, para [47].

¹⁶² *Procola v Luxembourg*, supra note 27

¹⁶³ *Cantoni v France*, supra note 27

¹⁶⁴ See Scheeck, supra note 8, 859

¹⁶⁵ See supra note 27

¹⁶⁶ *Matthews* supra note 27, paras [29] and [32-34]

¹⁶⁷ J. Klabbers, *Treaty Conflict and the European Union*, (Cambridge: Cambridge University Press, 2008), p 170.

This case makes clear that gaps in fundamental rights' protection cannot be tolerated any longer and when the CJEU is unable to protect those rights, the ECtHR is willing to step in and hold the MSs responsible for violating Convention rights.

ii. The “Bosphorus” case: ECtHR’s Solange Approach

In the landmark *Bosphorous*¹⁶⁸ decision, the ECtHR has refused to review an EC Regulation implementing a UN Security Council Resolution, despite restricting the applicant’s property right, on the presumption that EU law did not breach the Convention. The ruling in *Bosphorous* ensures that the Convention remains in place even when the contested act is ascribable to the EU rather to its MS. This case suggests that the *Bosphorous* assumption might be rebutted if in its case-by-case evaluation the ECtHR considers human rights protection ‘manifestly deficient’.

In other words, the ECtHR held that the system of safeguarding fundamental rights as guaranteed at the EC level was *comparable* to that provided by the Convention. Hence, to reconcile the two diametrically opposed principles of states’ sovereignty and autonomy to enter into international agreements, on the one hand, and of States’ obligations under the ECHR, on the other, the ECtHR introduced “*the equivalent protection*” formula.¹⁶⁹ Such an equivalent protection would only be presumed in cases where the States had no discretion at all in implementing the legal act.¹⁷⁰

Nevertheless, although *Bosphorous* established a presumption of “equivalent protection of EU law” with Convention, the claimant could prove that such equivalent protection was not only lacking but “manifestly deficient”. Thus, the formula can be rebutted if it is considered that the ECHR rights’ protection within the legal order of the international organisation in question is ‘manifestly deficient’. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a “*constitutional instrument of European public order*” in the field of human rights.¹⁷¹

In *Michaud v France*¹⁷² the ECtHR clarified that the presumption of equivalent protection applies only when the control mechanism provided for by EU law has been fully brought into play. This is not the case where a national court refuses to make a reference on the compatibility between EU law and fundamental rights. Furthermore, in cases where MS are exercising discretion (e.g. normally when implementing directives but also when they implement Regulations), the ECtHR will exercise full jurisdiction on the (discretionary) act of the MSs, since the latter are parties to the Convention.

¹⁶⁸ *Bosphorous* supra note 31.

¹⁶⁹ Ibid at para [155].

¹⁷⁰ Ibid at para [156].

¹⁷¹ Ibid.

¹⁷² Appl. No. 12323/11 *Michaud v France*, ECtHR (6 December 2012).

This scenario is indeed a tacit compromise to mutual respect each of the autonomous systems and recognition of CJEU's authority on the basis of the equivalence protection guaranteed by the EU regime. The two Courts, mutually agree, on core norms of constitutional governance as part of their political responsibility to European human rights' protection. The Strasbourg court is thus prevented, by a self-denying ordinance, from examining the procedure of the CJEU directly in the light of the requirements of the ECHR on the assumption of an equivalent protection.

In 2009, a ECtHR non-admissibility decision, in the *Kokkelvisserij* case¹⁷³, contained a presumption that a contracting party, in the specific scenario the Netherlands, "*had not departed from the requirements of the Convention where it has taken action in compliance with legal obligations flowing from its membership of an international organisation, to which it has transferred part of its sovereignty, as long as protection of fundamental rights is considered at least equivalent to that for which the ECHR provides*".¹⁷⁴

The *Kokkelvisserij* case raises concerns in relation to indirect Strasbourg reviews of the Convention compatibility when the ECtHR considers that the CJEU procedures do not provide 'equivalent protection'. Contracting parties, who are also individual EU MSs, might be invested with the responsibility for procedures and proceedings before the CJEU over which, as individual States, have no direct control.

In *M.S.S.*¹⁷⁵ the ECtHR resisted the 'temptation' and did not apply the 'equivalent treatment' presumption on a national legal act involving the EU law. The ECtHR held the Member State accountable without interfering with the EU law's autonomy. It referred to *Bosphorus*, but did not apply the presumption of equivalent protection, as the Regulation in question allowed a degree of flexibility.¹⁷⁶

As affirmed by one of the judges interviewed, it is clear that even within the EU there could be protection flaws: "*...we cannot create any double standards. ...in the M.S.S v. Belgium and Greece case of the ECtHR; and then reported in NS case before the CJEU it was decided that there should be mutual trust and recognition, but at the same time there is a need of a compliance check, it cannot take it for granted even in EU countries*".¹⁷⁷

¹⁷³ Appl. No. 13645/05 *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands*, ECtHR (20 January 2009) concerning the applicant association's complaint about the unfairness of proceedings before the Court of Justice of the European Communities with regard to its right to dredge cockles in a tidal wetland area, the Wadden. See reference to the Case C-127/02 *Kokkelvisserij*, see supra note 32.

¹⁷⁴ Ibid. at para 20.

¹⁷⁵ Appl. No. 30696/09, *M.S.S. v Belgium and Greece* [2011] 53 E.H.R.R. 2.

¹⁷⁶ Ibid. at para [340].

¹⁷⁷ Interview No VI (ECtHR, Strasbourg 20 June 2012).

However, in the joined case *NS and M.E. v. United Kingdom*¹⁷⁸, decided on 21 December 2011, the CJEU's replied to the *M.S.S. v. Belgium and Greece*.¹⁷⁹ The CJEU was asked to rule on 'Dublin transfers' from the UK and Ireland to Greece. Although it found the Dublin II system compatible with international human rights law, the court asserted that if a *de facto* overload of a member state's asylum system were to mean that rights protected under the EU Charter would be adversely affected, then the other member state should be obliged not to deport asylum seekers to that state in order to apply the Dublin Regulation in accordance with EU primary law.¹⁸⁰ The aim of Dublin II was to expedite the examination of asylum seekers' applications in the interest of both the asylum applicant and the respective MSs, and prevent a situation where multiple MSs process applications by the same applicant.

Some commentators questioned whether the interpretation given by the CJEU in this case was comparable to the ECtHR's standard of protection in line with the *Bosphorus* case, which clearly states that "*domestic judicial procedure [should] respect and protect individuals against any infringement of absolute human rights no matter whether systemic flaws are involved or not*".¹⁸¹

In the *CIMADE Case*,¹⁸² the CJEU clearly stated that asylum seekers may not be deprived, even for a temporary period of time, of the protection of the minimum standards concerning respect and protection of human dignity.¹⁸³

Even if this might constitute an example of alignment of the two jurisprudences, it can be questioned whether there is "equivalent protection" between these two Courts in this field. The "equivalent protection" doctrine is actually closely linked with the EU law's autonomy, in the sense that if the ECtHR will adhere to the "*in meritum* adjudication of cases' doctrine", there might a threat against EU's autonomy.¹⁸⁴

A number of concerns on the survival of the *Bosphorus* formula after accession and in view of possible ECHR Contracting Parties' reactions to an EU's preferential treatment are dealt with in Part C of this Report.

¹⁷⁸ Joined Cases *N.S. and M.E.*, supra note 113.

¹⁷⁹ J. Laffranque, 'Who Had the Law Word on the Protection of Human Rights in Europe?' (2012) *XIX Juridica International*, 117–134, 119.

¹⁸⁰ Joined Cases *N.S. and M.E.*, supra note 113, paras. [114], [122], [131] and [135-6].

¹⁸¹ B. Zalar, 'Comments on the Court of Justice of the EU's Developing Case Law on Asylum', (2013) *Int J Refugee Law* 25(2) 377-391 at 378.

¹⁸² *Cimade and GISTI* supra note 114.

¹⁸³ *Ibid*, para 56.

¹⁸⁴ P. De Hert and F. Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights', (2012) *German Law Journal*, Vol. 13, No. 7, 874-895, 893.

iii. The two Courts: the ECtHR judges' reflections

As mentioned in previous parts of the Report, the two Courts enjoy a special relationship. The ECtHR judges interviewed in the project were all very satisfied about the level of cooperation they have with the CJEU judges as these quotes demonstrate:

*"I think there is no reason to believe that the relationship is not going to be harmonious. First...for everything that is related to the ECHR and for each and every topic there is a chapter [in the Charter], which is more or less the same as in the Convention and this should be interpreted under the scope per se of the lens of the European Convention and the case law of the Strasbourg Court. Secondly, the Luxembourg Court's case law is very close to our case law with very few discrepancies."*¹⁸⁵

*"The dialogue with the CJEU is important. Even though, the meetings have not so far given so much on the substantial level, they give an opportunity to meet, raise some topics and to know each other. Now when the accession will be more concrete and the political decisions have been taken this will even be more important"*¹⁸⁶

The extent to which the ECtHR will only carry out the "compatibility with the Convention" scrutiny without interpreting EU law remains a challenge in the after accession era. Judges have been interrogated in the course of the project to gather some reflections on such a complex issue. It is interesting to observe that Luxembourg judges' quotes match what has been said by Strasbourg judges even though the concerns expressed by the judiciary are different.

The following quotes from Luxembourg judges reflect on the *Bosphorus* formula:

*"Now the relationship between the two courts is quite good because of the Bosphorus judgement but this is going to change with the accession. I do not think there are big discrepancies between the case law of the two Courts. We accept very much Strasbourg court's case law there are very minor questions of differences. In some area there is something that needs to be done ... with a dialogue...but there are no conflicts between the two courts. ... It is clear that after accession the Strasbourg court will have the "last word" on how to interpret compliance of human rights to the Convention."*¹⁸⁷

*"Competing interests? There are no frictions but emotions. This court is not considered the good guy, they are the good guy. We do not know whether Strasbourg will follow the Bosphorus case later on".*¹⁸⁸

¹⁸⁵ Interview No IV, (ECtHR, Strasbourg 19 June 2012).

¹⁸⁶ Interview No VII, (ECtHR, Strasbourg 20 June 2012).

¹⁸⁷ Interview No 1 (CJEU, Luxembourg 13 December 2010).

¹⁸⁸ Interview No 13 (CJEU, Luxembourg 15 December 2010).

*“Even if the ECtHR abandons the Bosphorus case, the CJEU has to take into account these problems [...] The relationship between the two Courts can be one of cooperation with recognition of the ‘last word’ for the ECtHR, with a mechanism that ensures that when a case arrives in the ECtHR, there is the possibility that the CJEU takes position. The only thing that is reasonable is that the CJEU has the chance to take position before the ECtHR has the ‘final word’”.*¹⁸⁹

Against this backdrop, the Strasbourg judges did not express a unanimous position on the after accession era in relation to the *Bosphorous* approach:

*“Whether there is room for some special treatment of the EU, well under the Bosphorous logic, yes. How can I know if it will be followed? This is one of the problems under discussion. There are different expectations; the expectations of Luxembourg are not exactly the same as ours. What will be our position I simply do not know. It will be probably solved in the first important cases to what extent the court will be ready to accept what is going on at the EU level, if those cases are let say drastic cases of clear violation, the outcome will be completely different as far as the Lisbon treaty is concerned. All options are open as margin of appreciation is rather flexible”.*¹⁹⁰

*“Personally I would find it very difficult to follow Bosphorus after the accession; otherwise accession does not make sense. But of course the Court here will have to say soon, what will happen to Bosphorus”.*¹⁹¹

*“It is sure that the Court after accession will carefully examine every case. The application of the doctrine will not change. This is the essence of the accession. There will still be the presumption of compatibility of EU law with the ECHR but this will be tested on a case by case basis. It is a rebuttable presumption, not written on stone”.*¹⁹²

*“We cannot predict these kinds of things. I have no idea how this court will react once the EU has acceded to the Convention. The only thing we know for sure is that something different will have to be found from the Bosphorus approach because, the Bosphorus approach is still on the ‘equivalent level of protection’, and something different can be found.”*¹⁹³

*“The situation as it stands now is: a Bosphorus presumption. As far as CJEU is concerned in case *Kokkelviserij* this is a very important inadmissibility decision, and we applied it in other cases. Even in cases where the CJEU did not formally intervene, we said that since there was a possibility to send a case to the CJEU for preliminary ruling, Bosphorus presumption applies,*

¹⁸⁹ Interview No 12 (CJEU, Luxembourg 15 December 2010).

¹⁹⁰ Interview No III (ECtHR, Strasbourg 19 June 2012).

¹⁹¹ Interview No VI (ECtHR, Strasbourg 20 June 2012).

¹⁹² Interview No IV (ECtHR, Strasbourg 19 June 2012).

¹⁹³ Interview No V (ECtHR, Strasbourg 20 June 2012).

*because there is judicial protection. One of the reasons for Bosphorus was the need to collaborate with international organisation. This will not change after the accession. There are arguments against and for are on the table, and if a case is before the Grand Chamber it will decide whether it will apply Bosphorus in the future or not”.*¹⁹⁴

The extent to which a proper scrutiny will be exercised by the Strasbourg Court is still a focal point of the debate. Dialogue is essential to ensure a smooth functioning of the system and perhaps in case of doubt, the advisory system proposed by Protocol 16 of the ECHR could be of some assistance to the Courts.

iv. Development at Strasbourg’s level: Protocol 16 ECHR.

At the time of our empirical work with the European judiciary, Protocol 16 to the Convention was not yet a reality. Even though we were aware of the proposal¹⁹⁵ to extend the ECtHR’s jurisdiction to include advisory opinions, we simply raised with our respondents the issue of a potential ECtHR’s advisory role and its long-term effectiveness implications.

The introduction of a system under which the national courts could apply to the ECtHR for advisory opinions on legal questions relating to the interpretation of the Convention and its Protocols, was raised for the first time in 2005 and then evoked again in April 2011.¹⁹⁶

Following several meetings,¹⁹⁷ a Parliamentary Assembly’s opinion,¹⁹⁸ and a draft,¹⁹⁹ finally on 2nd October 2013, Protocol No. 16 was adopted.²⁰⁰ The key issues addressed during the adoption process were: the nature of the domestic authority that may request an advisory opinion, the type of questions, the procedure for considering requests and the legal effect of an advisory opinion on the different categories of cases.

The introduction of a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention would indeed foster the dialogue between the national courts and enhance the ECtHR’s ‘constitutional’ role. The interaction between them would potentially strengthen human rights

¹⁹⁴ Interview No VIII (ECtHR, Strasbourg 20 June 2012).

¹⁹⁵ Council of Europe, Report to the Committee of Ministers of the Group of Wise Person set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005). The Steering Committee for Human Rights (CDDH) as part of its work on follow-up to the former’s report, examined the proposal. See the CDDH Activity Report on guaranteeing the long-term effectiveness of the control system of the European Convention on Human Rights, doc. CDDH(2009)007 Addendum I, paras. 42-44.

¹⁹⁶ Izmir High-level Conference on the future of the Court (26-27 April 2011). Then, see CDDH Opinion on the issues at the Interlaken Conference, doc. CDDH (2009)019 Addendum I, para. 19.

¹⁹⁷ Brighton Conference, the 122nd Session of the Committee of Ministers (23rd May 2012) instructed the CDDH to draft the required text. This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the plenary Committee of experts on the reform of the Court (DH-GDR), following which the draft was further examined and approved by the CDDH at its 77th meeting (22 March 2013) for submission to the Committee of Ministers.

¹⁹⁸ Opinion No. 285 (2013) on the draft protocol on 28 June 2013.

¹⁹⁹ See CETS No. 214 adopted at the 1176th meeting of the Ministers’ Deputies. At the same time, note was taken of the Explanatory Report to Protocol No. 16.

²⁰⁰ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 214).

protection and assist States Parties in avoiding future violations. Higher Courts might need guidance on the provisions of the Convention and the Court's case-law and require an optional non-binding opinion on its interpretation in the context of a specific case at domestic level. Following the ratification of Protocol 16 by the EU, the same would likely apply, to the CJEU which could consult the ECtHR on issues of compliance with the Convention raised during an annulment action or a preliminary ruling procedure before this Court.

Even though, Protocol 16 was not in place at the time of the interviews, the research team did discuss the introduction of a possible referral mechanism from the CJEU to the ECtHR with interviewees. The judges interviewed expressed some concerns when we asked the following question:

"Would you envisage a mechanism whereby the CJEU could require an optional non-binding opinion to the ECtHR on its interpretation of the Convention?"

The following quotes show the Luxembourg judges' view on such a proposal:

"No, for practical reasons. We now try to keep our procedures within reasonable time, a year and a half on average. We don't want the whole procedure to last ten years. Even if there is a special procedure, it will be difficult and even frustrating for national citizens to understand this system.... For the economy of the procedure it would be better to avoid lengthy processes and avoid increasing workload. After all, if there is a serious question of fundamental rights violation, then it is most probably that we arrive at the same conclusion as the Strasbourg Court".²⁰¹

"We have to take into consideration the length of proceedings....For example, for a preliminary ruling now we need around 17 months to deal with, because of the translations and whatever it is necessary, so imagine if we have to interrupt and wait for 3 years for Strasbourg to answer the question. Then, it is really a problem in the award of justice. It is better that CJEU ... takes into account the jurisprudence of the ECtHR and then if the party is not satisfied can later go to Strasbourg on a separate proceeding".²⁰²

"Why should we?... As a national judge I had to apply the Convention and then some cases went to Strasbourg I do not see any reason why this should be different for this Court".²⁰³

"The mechanism before Luxembourg to suspend the case and refer it to Strasbourg for an opinion, as far as I know it is not in negotiation. We have to try to work out how we can make the most out of accession in terms of resources without making the lives too complicated".²⁰⁴

²⁰¹ Interview No 5 (CJEU, Luxembourg 14 December 2010).

²⁰² Interview No 4 (CJEU, Luxembourg 14 December 2010).

²⁰³ Interview No 13 (CJEU, Luxembourg 15 December 2010).

²⁰⁴ Interview No 14 (CJEU, Luxembourg 15 December 2010).

“This could be at a first sight a very good solution but the question is the workload Strasbourg court has 120,000 cases backlog...Now we are billing approximately 600 cases each year”.²⁰⁵

The main issue raised during the interviews was the length of the procedure and the effectiveness of justice of such an advisory system. The Strasbourg Court is under considerable pressure and is risking not playing its role efficiently. The number of decisions and judgments has increased almost tenfold in ten years but the number of applications continues to be even higher. There are 120,000 cases pending, that is nine times more than the number pending ten years ago.²⁰⁶

Most of the judges have raised concerns about the practicalities of such a system, particularly in view of the fact that the Luxembourg Court follows the Convention and the ECtHR’s case law.

The question of whether this Protocol would have implications on the EU’s autonomy in case national courts would use it as a *forum shopping* tool to avoid compulsory referral to the CJEU will be discussed in Part C, section c3 of this Report.

d) The “Brussels” perspective: the policy makers' reflections

Having discussed the judicial perspective regarding the relationship between the Strasbourg and the Luxembourg Court, the last part of this section will focus on the Brussels perspective, reflecting on the policy makers’ views about the two Courts and their relationship in the post-Accession era.

During the negotiations, there was a positive perception about the spirit of co-operation and the constructive dialogue between the two Courts. It was commonly recognised that *‘there has been a lot of co-operation in very little time’* not only in dealing with the procedural aspects, but also in shaping their future relationship.²⁰⁷

In the eyes of the policy makers, the accession will *‘subordinate the Luxemburg Court to the Strasbourg Court’*, in the same way that *‘the German Constitutional Court or French Supreme Court is subordinated to the ECtHR’*.²⁰⁸ The CJEU in its relationship to the ECHR and ECtHR will be *‘in a position comparable to that of highest courts of any other high Contracting Party’*.²⁰⁹

²⁰⁵ Interview No 16 (CJEU, Luxembourg 16 December 2010).

²⁰⁶ Judge Costa in ‘Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and beyond’ (n. 44) p. 21.

²⁰⁷ Interview A (Council of Europe, Strasbourg 18 June 2012).

²⁰⁸ Interview A (Council of Europe, Strasbourg 18 June 2012).

²⁰⁹ Interview C (EU Commission, Brussels 1 August 2012).

Establishing a relationship of mutual respect is in the interest of both Courts and will significantly contribute to good administration of justice in Strasbourg.²¹⁰ There were several issues that could transform this relationship into a competitive one, where two powerful and authoritative courts are striving for more power and influence. However, both institutions have shown that they value each other's authority and they are willing to work closely with each other to finding the right formula for their future interaction. This is evidenced by the creation of the prior involvement mechanism.

The ECtHR allows the CJEU to have the "first word" in a case regarding an alleged violation of the ECHR by an EU act, not as a gesture of good will, but because *'the assessment of the ECtHR should be based on the assessment of the legal system which is at stake'*.²¹¹ A prior examination at internal level is necessary so that the Strasbourg Court can take into account the perspective of the legal system which is challenged and the balancing exercise is conducted at EU level. It is reasonable to presume that the ECtHR would attach considerable weight to the judgements and the interpretations given to fundamental rights by the CJEU. We have already seen numerous examples where the ECtHR has drawn from the case-law of the Court of Justice and *vice versa*.

At the same time, the CJEU *'preserves its role as regulatory court of the EU, even in cases involving human rights issues, which have not been submitted to its attention'*.²¹² In any case, it was suggested that there is a small difference in the scope of the review that each of the two Courts undertake. The CJEU has the power to assess the compatibility of an act on the basis of a source of superior level, while the ECtHR assesses the role that an act has played in a *de facto* situation, which led to the alleged violation of human rights. Violation in most cases is not the consequence of the loss, but the result of the application of the law.²¹³

Nevertheless, this 'first word-last word' relationship has not been properly clarified and some of the comments focused on whether the CJEU's first word is a binding judgment or just an opinion. The binding character comes with the power to annul an act, but can it be argued that the CJEU does have the power or would this go beyond what is written down in the Treaties?²¹⁴ If the CJEU does not have such powers, these cannot be granted as the competences and powers of the EU institutions shall not be altered by the Accession Agreement. On the other hand, if we favour the view that the CJEU in fact gives a non-binding opinion, this would mean

²¹⁰ Interview C (EU Commission, Brussels 1 August 2012).

²¹¹ Interview C (EU Commission, Brussels 1 August 2012).

²¹² Interview B (EU Council, Brussels 21 June 2012).

²¹³ Interview B (EU Council, Brussels 21 June 2012).

²¹⁴ Interview B (EU Council, Brussels 21 June 2012).

that the EU would allow the situation where an act has been declared incompatible with the ECHR but is kept in the legal system.

In the course of the negotiations, the policy makers had to come up with a document, which would contain a series of commonly acceptable rules and provisions, dealing with a considerable amount of controversial, politically sensitive and thus hard to resolve issues.

Although the negotiations were far from being characterised as smooth and uncomplicated, it was seen as a *'balanced result'*; not a compromise, as this quote demonstrates:

'There are some special arrangements, which one could say favour the EU with respect to the other Contracting Parties, but I think most of them are strictly linked to the peculiarities of the EU, not being MS contracting party'.²¹⁵

Equally, the EU will have to adapt to the new reality, follow the developments in Strasbourg very carefully and *"take whatever the ECtHR says seriously from the day that the court actually says it. That is the point. Sentencing against the EU will not weight the same as sentencing against a Member State"*.²¹⁶

Another issue which was raised during the interviews is about the role of the ECHR in the EU legal order following accession. In the Treaty, as it currently stands, the ECHR is listed as one of the general principles of law. However, the policy makers raised concerns as to what the CJEU will say *"once a case is brought before it when the ECHR is the sole parameter for the judgement. How will the judges solve the riddle of what is the status of the Convention?"*²¹⁷

Pursuant to Article 216 TFEU, the ECHR should be given the same position within EU law as any other international treaty. In line with the *Haegeman* principle, the ECHR will be binding, as an integral part of EU law.²¹⁸

However, concerns can be raised in relation to the provisions of the Convention whether they are "directly applicable" to the EU as well as before national courts. This might be the case. If the two conditions laid by the CJEU are fulfilled; more specifically, as affirmed in relation to an international agreement, direct effect must not be excluded if its provisions are clear, precise and unconditional.²¹⁹

Scholars have suggested that the ECHR would satisfy both conditions, as it does not exclude direct effect, being its provisions not only clear, but requiring no further implementation and

²¹⁵ Interview B (EU Council, Brussels 21 June 2012).

²¹⁶ Interview B (EU Council, Brussels 21 June 2012).

²¹⁷ Interview B (EU Council, Brussels 21 June 2012).

²¹⁸ Case C-181/73 *Haegeman v Belgium* [1974] ECR 459.

²¹⁹ Case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] 3719, para [14]. In this case, the Court concluded that in relation to the first condition, nothing in the agreement could exclude direct effect, including its wording, spirit, nature and purpose.

their content can be read with reference to the comprehensive case law of the Strasbourg Court.²²⁰

If we accept that the Convention is considered directly applicable after Accession, then the claim that this would constitute a deviation from what the TEU provides regarding the relationship between the ECHR and national law needs to be challenged. Article 6(3) TEU encapsulates the CJEU's jurisprudence, according to which fundamental rights form an integral part of the general principles of law, the observance of which, the Court ensures.²²¹ As affirmed by the CJEU, Article 6(3) does not affect the relationship between the ECHR and the legal systems of the MS and, in particular, when there is a conflict between national law and the Convention, it does not instruct national courts to apply the provisions of the ECHR directly.²²² Indeed, it is not Article 6 (3) TEU the relevant provision to refer to in relation to the role of the ECHR in national legal orders, but Article 52(3) of the EU Charter, that incorporates, even before accession, several elements of the ECHR, as a minimum standard.²²³

According to the *Haegman* doctrine, if the Convention is to be considered as an integral part of EU law, it would be accorded the same treatment as EU law, including in case of a conflict, supremacy over domestic legislation. Consequently, MSs would be bound by the ECHR, as part of EU law, when their authorities implement obligations under EU law.

However, the ECHR's potential direct effect would not have practical relevance given that the Charter provides more extensive protection and ranks higher than the ECHR in the hierarchy of the sources of EU law. Where MSs act outside the scope of EU law, the Convention will apply to it in accordance with its own domestic law.²²⁴

Overall, post-accession the status of the ECHR in the EU legal order is likely to have no practical implications for the human rights protection in MSs, as it will not enhance the protection afforded beyond the level provided by the Charter.²²⁵

The policy makers' side has given much emphasis on avoiding radical changes and keeping the adaptations to what is strictly indispensable. In this context, they tried to minimise the differences in comparison to the normal procedure before both Courts, highlighting at the same

²²⁰ T. Lock, 'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR', (2012) Vol. 31, No. 1, *Yearbook of European Law*, 162-197, 192.

²²¹ Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947.

²²² *Kamberaj v IPES*, supra note 74, at para [62].

²²³ Weiß, supra note 90 at 89-90.

²²⁴ Lock, supra note 220 at 195.

²²⁵ This point is shared by Weiß, supra note 90 at 91. However, the question is whether it is possible to have domestic legal orders which distinguish between human rights cases for which the ECHR is directly applicable (as these cases are coined by a situation in which EU law has to be respected), and "pure" domestic cases to which the ECHR only applies without any direct effect. From a doctrinal point of view, one may be able to draw such a distinction. But from a practical perspective, citizens will always expect to enjoy the same level of protection under the ECHR.

time the importance for the EU to have clear internal rules on the “co-respondent mechanism” or “CJEU’s prior involvement” as discussed in Part C.²²⁶

C. ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

a) EU’s Accession to the ECHR: An Overview

Accession has been a topic in the EU agenda for many decades, but during the early years the focus was on the establishment of the internal market, removal of barriers and economic integration. This explains the complete absence of any reference to human rights in the Treaty of Rome and the lack of any system of fundamental rights protection. The latter was the mission of the CoE, which had shown remarkable commitment to fundamental rights through the ECHR and the Strasbourg Court.

Even though it was clear that the EU and the CoE were like ‘twins separated at birth’²²⁷, in practice, they were serving different purposes, had different priorities and there was no overlap between their courts and institutions.

The more powerful the Union was becoming in the political strand and the more it was expanding its areas of competences. The area of human rights was transforming into a field where both EU and the CoE were operating and thus gradually more and more incidents of divergence would manifest between these European entities and with their coexisting national legal systems. For instance, as mentioned in Part III B(2)(ii) of this Report, in the case of *Solange I*²²⁸, the German Constitutional Court made it clear that MSs would not unquestionably accept the Union’s precedence over fundamental constitutional rights, drawing a line between supremacy of EU law and effective protection of fundamental rights. This is when progress in relation to fundamental rights’ case law was developed as it was becoming increasingly apparent that a more robust system of protection was essential.²²⁹

Discussions over the development of an efficient human rights protection’s system led to a dilemma as to the choice of the preferred method and means to be used: i.e. either the EU’s accession to the ECHR or the adoption of an EU Bill of Rights. Each of these two options had its own merits and the EU institutions, in cooperation with the MSs, were trying to reach consensus as to which of the two constituted the most suitable option.

²²⁶ Interview A (Council of Europe, Strasbourg 18 June 2012).

²²⁷ G. Quinn, ‘The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated At Birth’, (2001) 46 *McGill Law Journal* 849.

²²⁸ *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Solange I), decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.

²²⁹ *Internationale Handelsgesellschaft* supra note 149

At first glance, the EU's Accession to the ECHR was the most straightforward solution: firstly because all EU MSs were already signatories to the Convention; secondly all future MSs would also become Contracting Parties, as it was one of the conditions for EU membership; and thirdly as it was rather "oxymoron" for the Union not to be legally bound by the Convention and not to be subjected to the ECtHR's review, when all its existing and future MSs were committed to act in accordance to the ECHR. However, the plans for accession preceded a lack of an adequate legal basis for accession to the ECHR, as highlighted in the CJEU'S Opinion 2/94.²³⁰

The Union was not discouraged by this unfortunate development and started moving towards the direction of an EU Bill of Rights. The first step was made in 1999 in the Cologne European Council, where it was decided that it was time to consolidate the fundamental rights applicable at Union Level through a Charter of Fundamental Rights, making them more visible for EU citizens and enhancing the legitimacy of the Union. What started as a EEC was gradually transforming into a 'Union of people' and the EU wanted its own Bill of Rights; a modern and comprehensive document, which would encapsulate the Union's vision for the new era of rights.²³¹

The Charter has been welcomed as an extremely positive development and fundamental rights are not only more visible, but are also protected by a legal document, which has the same status and effect as the Treaties. The introduction of the Charter did not rule out the possibility of the EU's Accession and, despite the setbacks, this was deemed necessary and complementary to the adoption of the Charter.

The decisive step for the Accession came with the introduction of the Lisbon Treaty and Protocol 14 to the ECHR. In this way the EU and the CoE made the necessary amendments to the Treaties and the ECHR respectively, so that Accession was made possible, pursuant to Article 6(2) TEU and Article 59(2) ECHR. Negotiations started immediately in the summer of 2010, with the view of concluding the Accession as soon as possible. Apparently, the pathway to Accession was open, but there were still numerous issues that needed to be resolved.

A draft Accession Agreement was concluded on October 10, 2011, which was described as '*an acceptable and balanced compromise*' by many delegations during the extraordinary meeting of

²³⁰ Opinion 2/94 Accession By the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759, para 36.

²³¹ See Cologne European Council, Conclusions of the Presidency, Annexes (1999), available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/kolnen.htm. See also Tampere European Council, Conclusions of the Presidency (1999), available at: http://www.europarl.europa.eu/summits/tam_en.htm

the Steering Committee for Human Rights (CDDH) in Strasbourg on 12-14 October 2011.²³² The delegations from the 47 CoE Contracting Parties also agreed on a couple of minor changes to the Explanatory Report, as well as to two linguistic adaptations to the French text of the draft Accession Agreement.²³³ However, when the discussion went on to consider the substantive provisions of the Agreement, the lack of unanimity and common approach became evident among the EU MSs. It is worth noting that certain delegations expressed the concern that they were *'not in a position to express substantive views in the CDDH'*²³⁴. Following the involvement of the Committee of Ministers, negotiations started again in an *ad hoc* group of 47+1, with the view to finalising the legal instruments setting out the modalities of accession of the EU to the ECHR without any delay.²³⁵

After 5 meetings in Strasbourg, the two parties reached a milestone agreement finalizing the text of the Accession Agreement on April 5, 2013. It was July 7, 2010 when the official talks were launched by the Secretary General of the CoE, Thorbjørn Jagland, and the Vice-President of the European Commission, Viviane Reding. The agreement was welcomed as a *'decisive step' that will 'contribute to the creation of a single European legal space, putting in place the missing link in the European system of fundamental rights protection'*.²³⁶

When the Accession Agreement was finalised, the Commission asked the CJEU to give an opinion on the compatibility of the Agreement with EU law, pursuant to Article 218(1) TFEU.²³⁷ Once the Opinion 2/13 is given and the Agreement has passed the scrutiny of the CJEU, the Council of the EU will have to express its unanimous consent, in addition to the approval of all MSs *'in accordance with their respective constitutional requirements'*, as provided by Article 218(8) TFEU, before we proceed to the ratification stage by all ECHR Contracting Parties.

²³² 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', (CM/Del/Dec(2011)1126/4.1, CM(2011)149), para 9, available at: <http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf>.

²³³ Ibid para [13].

²³⁴ Ibid para [11].

²³⁵ CDDH, Revised Draft Decisions, 1145th Meeting 13 June 2012, available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Accession_documents/2012_CM_Decision_accession_en.pdf

²³⁶ Council of Europe, 'Milestone reached in negotiations on accession of EU to the European Convention on Human Rights', Press release - DC041(2013), available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR041%282013%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>

²³⁷ Presidency, Council of the European Union, 'Accession of the EU to the ECHR - State of play and way forward' (September 30, 2011) para 10, available at: <<http://register.consilium.europa.eu/pdf/en/11/st14/st14842.en11.pdf>>

b) Accession Negotiations and Policy-Makers: Reflections and Remarks

The Accession Agreement constitutes a major step in the process of the EU Accession to the ECHR. The post-accession era is based on three basic pillars:

a) The EU will be subjected to the external scrutiny and control of the ECtHR and will be formally integrated into the ECHR fundamental rights protection system. The external scrutiny will come to complement and reinforce the internal system of protection based on the Charter and the CJEU.

b) There will be more effective judicial protection of individuals, as EU citizens will have the right to bring complaints against EU institutions directly to the ECtHR. In addition, it is expected to increase consistency between the Courts in Luxembourg and Strasbourg in terms of harmoniously developing their case law and maintaining a coherent approach towards human rights protection across Europe.

c) The Accession will enhance the credibility of the EU internationally and it will increase transparency, accountability and overall legitimacy regarding its commitment for the effective protection of fundamental rights.

In its Opinion 2/94, the Court of Justice, even though effectively put a (temporary) end at the plans for Accession, it did stress that the accession would be of '*constitutional significance*', as it would '*entail a substantial change in the present Community system in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order*'.²³⁸

The CJEU's Opinion on the compatibility of the Accession Agreement with the ECHR is anticipated with great interest and thus carries additional importance, because the Accession Agreement cannot be easily compared to any previous international agreements between the Union and other parties. The EU Accession *per se* has no substantial differences compared to when a state becomes a party to an agreement, submitting itself to the external control of compliance with the provisions of the agreement as exercised by the competent authorities. This is what public international law provides and as such applies to the ECHR, but the EU is not simply "another" State. The EU is a *sui generis* Contracting Party. It is the first not-state party and there are no specific rules in place within the ECHR system for such occasions.

²³⁸ Opinion 2/94, supra note 224 at paras 34-35

As stated by one of our interviewees: *“It[the EU] does not have a privileged position, but it will naturally receive particular attention.”*²³⁹ As argued during the interviews with Strasbourg judges *“..the judgments of the ECtHR would only be binding on the Union as a matter of public international law, without direct effect on EU law. The ECtHR will act not as a superior court in relation to the CJEU but more as a more specialized court on human rights issues”*.²⁴⁰

In order to balance the need to preserve on the one hand *‘the specific characteristics of the Union and Union law’*²⁴¹ and the essential features of the ECHR mechanism on the other, the negotiators had to come up with practical solutions to successfully fit the EU into the existing ECHR system.

As mentioned during the interviews, the accession is a complex process, which *“requires not only the conclusion of the Accession Agreement; it also requires the parties, particularly the EU, to adopt a series of provisions which will govern the way they will need to function in the post-Accession era”*.²⁴²

Most of these provisions are *“strictly linked to the peculiarities of the EU not being a State-Contracting Party and thus special arrangements are required, not different treatment”*.²⁴³

Amendments were definitely contemplated, particularly in the judicial system of the ECHR, but the negotiations gave more emphasis on facilitating the process of Accession on the basis that the Union will accede on an “equal footing” and any adaptations should not undermine the Council’s authority and prerogatives.

Our empirical findings stress the fact that the Union has been in favour of the idea of having control exerted upon it by the Court of Strasbourg, however there needs to be a clear framework within which such control is exerted.

The CJEU has also been clear on that the protection of fundamental rights *‘must be ensured within the framework of the structure and objectives of the Union’*.²⁴⁴ It was difficult to talk about absolute rights in a market-orientated Community, so it is not surprising that the CJEU was supporting the view that rights *‘must be considered in relation to their function in society’*

²³⁹ Interview C (EU Commission, Brussels 1 August 2012).

²⁴⁰ Interview No VI (EctHR, Strasbourg 20 June 2012).

²⁴¹ Protocol 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.

²⁴² Interview C (EU Commission, Brussels 1 August 2012).

²⁴³ Interview B (EU Council, Brussels 21 June 2012).

²⁴⁴ *Internationale Handelsgesellschaft* supra note 149, para [4].

and that it is not inconceivable for certain restrictions to exist as long as they are proportionate and do not interfere with the substance of these rights.²⁴⁵

Despite the fact that the focus of the Union has been gradually shifting, as evidenced by the Lisbon Treaty, it is still far from the rationale underpinning the CoE and the absolute objective of guaranteeing individuals, not just citizens or some categories of third-country nationals' protection of fundamental rights.

As affirmed by one of our interviewees:

*“In terms of the substantive standards, there will be no change since the Charter builds on the Convention and goes even further. What is added is this procedural aspect – the external scrutiny. We go beyond the dynamic reference to the Strasbourg case-law to highlight that the ECHR is of utmost relevance for the EU legal. This is important for every individual, not only citizens, but everyone in the jurisdiction of the EU, including TCNs”.*²⁴⁶

As repeatedly mentioned in the interviews, both Courts are *“well-aware of the benefits and the added value of the Accession in the strengthening of the ECHR system and on the basis of a very careful scrutiny there will be practical concordance between them”.*²⁴⁷

As highlighted by the vast majority of the CJEU's judges interviewed in Luxembourg, the Court has been closely observing the progress of the negotiation between the Council and the Commission ahead of the Accession. The negotiators showed optimism and affirmed that there is *“ample space for the CJEU to treat the challenge of the Accession as an opportunity to rise up and start acting as proper Court of HR with view to ensuring that all EU institutions comply with the ECHR”.*²⁴⁸

c) Post-Accession: Concerns and Challenges

Both the judiciary and the policy-makers were positive about Accession eventually being completed, not only because this is specifically provided in Article 6(2) TEU, but also to bring *“coherence and legal certainty among the different sources of fundamental rights which coexist in Europe”.*²⁴⁹

²⁴⁵ See among others, *Nold* supra note 16; Case C-177/90 *Kihhn v Landwirtschaftskammer Weser-Ems* [1992] ECR I-35, para [16]; Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010] ECR I-11063, para [48]; Case C-543/09 *Deutsche Telekom AG v Bundesrepublik Deutschland* [2011] ECR I-3441, para [51]; Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para [18], Case C-20/00 and C-60/00, *Booker Aquaculture trading as Marine Harvest McConnell, Hydro Seafood GSP v Scottish Minister* [2003] ECR I-7311, para [68].

²⁴⁶ Interview C (EU Commission, Brussels 1 August 2012).

²⁴⁷ Interview C (EU Commission, Brussels 1 August 2012).

²⁴⁸ Interview B (EU Commission, Brussels 21 June 2012).

²⁴⁹ Interview No IV (ECtHR, Strasbourg 19 June 2012).

At the same time, they all acknowledged that there can be obstacles and that there are issues that need to be ironed out before the Accession takes place and certain areas of concern for the MSs, the EU institutions, the Courts and the CoE. These are related to institutional, procedural and substantive aspects of the Accession, and, although they were taken into account by the negotiators during the negotiation process, there have been concerns expressed by both governmental and academic circles that they might come to the surface again and cause the clogging of the ratification process. The experience from the Constitutional Treaty as well as more recently the Lisbon Treaty serves as a good illustration of such worries.

This section will touch upon some of these areas of concern, giving an overview of these difficulties along with their potential impact on the final stages of the Accession process.

1) Accession to the ECHR's Protocols

Article 6(2) TEU imposes an obligation on the EU to accede to the ECHR, but is silent concerning accession to ECHR's Protocols. Given the fact that one of the main aims of the Accession is the effective protection of individuals and the accountability of the Union, one would expect the EU to be automatically bound by all Protocols irrespective of whether the MSs have ratified them or not.

On a more objective note, Protocol 8, which was discussed in Section B, section c1 ii), stipulates that Accession must not affect the competences of the Union and thus it would seem sensible for the EU to ratify at least those Protocols related with rights contained in the Charter. However, the European Council decided to negotiate accession only in relation to Protocols that all MSs of the EU had already accepted, such as Protocol No 1 about the peaceful enjoyment of one's possessions, the right to education and the right to vote and Protocol No 6 on the abolition of the death penalty. This decision clearly reflects the MSs' reluctance to accept any extension of the EU's competences.

In practice, this can be problematic in the light of Article 52(3) of the Charter. This provision confirms that the rights protected under the Convention have exactly the same meaning under EU law. Thus, it basically requires that to the extent that Charter's rights correspond to Convention, *'the meaning and scope of those rights shall be the same as those guaranteed by the Convention'*. However, an issue is likely to arise with regards to Charter's rights contained in a Protocol to the Convention, which has not been ratified by all MSs. As this Protocol is not binding for the MSs, it should not as such be included in the Accession Agreement. However, the interpretation to be given to the Charter's rights in question rests within the judgement of the CJEU.²⁵⁰ Protocol 16, introducing an advisory system whereby national courts and the CJEU can consult the ECtHR on issues of compliance with the Convention has been dealt with in Part B 2 i(v) of this Report and will also be discussed in Part C Section 3 i.

²⁵⁰ V. Miller, 'EU Accession to the European Convention on Human Rights', (2011) Standard Note SN/IA/5914, House of Commons Library, available at: www.parliament.uk/briefing-papers/sn05914.pdf.

2) Co-Respondent Mechanism

The co-respondent, or co-defendant, mechanism was developed for instances where an alleged violation of fundamental rights may not be attributed to a MS's fault or misconception of its obligation. If said violation has its roots in a provision of EU Law, this means that the MS, even if convicted by the Strasbourg Court will be unable to remedy the violation. Therefore, it was decided that it is fair and more justifiable that the Union should be called to participate in the proceedings and potentially held responsible for a violation.

Article 3 of the Agreement provides that the EU may become a co-respondent if it appears that the alleged violation of the ECHR calls into question the compatibility of a provision of EU law with the Convention rights at issue: where the violation could have been avoided only by disregarding an obligation under EU law or where a provision of EU primary law is allegedly in breach of the ECHR.

On such occasions, the respondent and the co-respondent shall be jointly responsible for the alleged violation, unless the Court decides that only one of them should be held responsible, pursuant to Art 3(7) of the Agreement.

The use of this mechanism will be subject to the preconditions laid down in Article 3(5), which states that a Contracting Party shall become co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that Contracting Party.

Respondents and co-respondents shall be jointly responsible for the violation at issue, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, concludes that only one of them is to be held responsible.

The rationale behind the introduction of this mechanism, as stated by one of our respondents, is that *"all the parties involved in a case are given the opportunity to present their views, and to be held fully responsible, relieving in a way the ECtHR from the task of having to determine which party is really responsible for an alleged violation. The EU will be held liable for any primary law provisions which contravene the ECHR, while the MSs will remain responsible only for national measures, which are adopted in application of EU law and they infringe the ECHR"*.²⁵¹

Initially there were concerns about the need to introduce a new mechanism instead of relying on the third-party intervention mechanism already set out in Article 36 ECHR. Most concerns

²⁵¹ Interview A (Council of Europe, Strasbourg 18 June 2012).

had to do with its application in practice, as it was not clear how the participation of the Union would not adversely affect the position of the individual applicants; how abusive use of this mechanism would be prevented; and how the purpose of the participation of a correspondent along the side of the original respondent would be more efficiently served. However, despite the concerns about its complexity, the adoption of the co-respondent mechanism was advanced.

As stated by one of the policy makers interviewed, *“the co-respondent mechanism is maybe a complication, but it is a complication on the EU side”*.²⁵² There were no concerns regarding potential disadvantage in relation to the individual applicant, who will have to overcome the obstacles of both the EU and the MS(s) in their attempt to get protection. Then, another respondent stressed that *“judges will focus on the quality of the arguments presented, not at the number of participants to the procedure, which make that argument”*.²⁵³

An interesting argument that came up during the interviews was that the co-respondent mechanism is basically a “safety valve” for the enforcement of the ECtHR judgments by the EU, as this quote suggests: *‘Without the co-respondent mechanism in a case against an EU Member State, if the Court finds that there is a violation, the Member State would be under obligation to abide by the judgment, but then, since the EU is not party to the proceedings, it would not be legally bound by that judgment. In other words, the enforcement of the judgment would effectively depend on the good will of the Union and its MSs’*.²⁵⁴

Finally, it was mentioned that according to the Commission’s very minimalistic impact assessment, done in June 2012, only 3-4 cases, such as *Matthews* and *Bosphorus*, would be potentially subject to such a mechanism.

Thus, the following quote suggests that *“after all, the assumption is that all the States and the EU institutions will do their best to ensure that their acts are already fully compliant with the Convention, so that the ECtHR is the last resort”*.²⁵⁵

3) Prior involvement of CJEU

The ‘first word’ of the Luxembourg Court has been advertised as an essential mechanism in relation to the EU’s Accession to the ECHR. As the Presidents of both Courts highlighted in their Joint Statement in 2011, this mechanism is based on the *‘respect to the principle of*

²⁵² Interview B (EU Council, Brussels 21 June 2012).

²⁵³ Interview C (EU Commission, Brussels 1 August 2012).

²⁵⁴ Interview C (EU Commission, Brussels 1 August 2012).

²⁵⁵ Interview A (Council of Europe, Strasbourg 18 June 2012).

subsidiarity', offers flexibility and most importantly ensures that an internal review takes place before the external review without the need to amend the ECHR.²⁵⁶

National courts dealing with a dispute in which the application of a rule of EU law raises questions can refer to the Court of Justice to resolve these questions. The reference for a preliminary ruling can either be on the interpretation or the validity of EU law. More specifically, the national courts can seek clarification on a controversial point of law or can check the validity of an act in the EU legal order.

Regarding questions of validity, the procedure is rather straightforward. If an individual intends to directly challenge the legality of any EU measure and bring a claim against the EU institutions, the competent Court is the General Court. It is indeed before this Court that such cases can be brought by natural or legal persons. In the event that the claim is not successful, the individual has the right to make an appeal before the CJEU.

If the appeal is also unsuccessful, there is still the possibility for the individual of making an application before the Court of Human Rights in Strasbourg for breach of any rights under the ECHR.

Under such circumstances, there are no complications, as the "prior involvement" of the CJEU is ensured, and the judges in Luxembourg have the opportunity to rule on the validity of EU law before their counterparts in Strasbourg have the "last word".

The complications begin in cases involving the interpretation of EU law and particularly when the claim is related to measure that implements EU law in the national legal order, when national courts do not refer the matter to the CJEU. In principle, there is the obligation of exhaustion of legal remedies at national level, before an application reaches the ECtHR.

However, the lack of reference to the CJEU for a preliminary ruling does not render an application before the ECtHR inadmissible. This is because the preliminary reference procedure is not considered *stricto sensu* a domestic remedy in the first place. Since national courts are allowed a degree of discretion as whether to place the reference request. Then, the whole preliminary reference system is based on trust, mutual respect and bona fides. The judges in Luxembourg have a '*more panoramic view of EU law*' and are thus more competent to resolve difficult questions or give guidance on controversial issues.²⁵⁷

National courts of last instance have an obligation and '*shall*' submit a question for a preliminary ruling but only when there is a question of interpretation of EU law or on the

²⁵⁶ Joint Communication from Presidents Costa and Skouris, 24 January 2011, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

²⁵⁷ *Commissioners of Customs and Excise Comrs v ApS Samex* (1983) 1 All ER 1042, at 1055.

validity of an act of a Union's institution. The CJEU guidance does not aim to substitute the judgement of the national courts, but offers essential help to national judges in reaching their decision.

The courts do not have an obligation to refer in the event that '*the correct application of EU law is so obvious that leaves no scope for any reasonable doubt*': the *Acte Clair* doctrine. Such a doctrine serves as a guarantee that the CJEU does not have to revisit its settled case law, re-examine issues already resolved and re-state the obvious.²⁵⁸

Another valid justification for not submitting a reference to the CJEU is the *Acte éclairé* doctrine, "*where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical*".²⁵⁹ Although this principle is strongly associated with the doctrine of precedent, the courts might refer if they feel that they would require additional guidance for making a ruling or they feel that a change in the precedent must take place.

Since the CJEU is entrusted with the sole jurisdiction to declare an EU act invalid, the negotiators had to come up with a mechanism that would allow the Luxembourg Court to have a say on the conformity of an EU act with the provisions of the ECHR, before the Strasbourg Court decides on this issue.

Thus, in order to preserve the characteristic of EU's legal system, the Accession Agreement has provided for the "prior involvement" of the CJEU in all cases where the Court '*has not yet assessed the compatibility with the Convention rights at issue of provisions of European Union law*', pursuant to Art 3(5) of the Agreement.

As highlighted by the authors' empirical work, this mechanism has been advocated by the judges as essential to the Accession Process see Part III C of the Report; references to the need to have the "first word" were a consistent pattern raised by the Luxembourg judges.²⁶⁰ Hence, the CJEU is given the "first word" on the alleged violation of the ECHR before the Strasbourg Court has the "final word", being the latter an expert body on human rights issues and having the responsibility to interpret and apply the ECHR.

Consequently, any external review should be preceded by an effective internal review. Both Courts consider this mechanism as an acceptable platform for shaping their relationship and there is *consensus* among the judiciary about the efficacy of prior involvement, even though it

²⁵⁸ Case C-283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, at para [16]; see also Case C-231/96 *Edis v Ministero delle Finanze* [1998] ECR I-4951, at paras. [15] and [16].

²⁵⁹ *Ibid.* *CILFIT*, at para [14].

²⁶⁰ Among others, Interview No 3 (CJEU, Luxembourg 13 December 2010).

elevates the Luxembourg Court to a privileged position compared to the courts of last resort of the MSs.

Although it is clear the reason why the CJEU considers the prior involvement mechanism as a “*condition sine qua non*” for the Accession to take place and to be successful, there are benefits for the ECtHR as well. Prior involvement is “*in the interests of the Strasbourg system, because through this prior examination at an internal level, the Strasbourg Court can observe the perspective of the legal system which is challenged as well as the balancing exercise that takes place in the context of proportionality. The assessment of the ECtHR should be based on the assessment of the legal system which is at stake*”.²⁶¹

Although the issue of the “prior involvement of the CJEU” has been at the centre of attention before and during the negotiations, it raises a number of concerns.

An obvious concern is to do with the delay that this extra procedure will bring to the proceedings. Article 3(6) provides that the CJEU’s adjudication should take place without any “undue delay”, so that the final resolution of the case is not further extended to the detriment of the parties and without affecting the powers of the Strasbourg Court.²⁶²

It is of paramount importance that the rules of procedure, which will be discussed in the following pages (Part III C section ii), are carefully drafted in a way that the relationship of the two Courts is not affected by undue competition or unnecessary tensions. As emphasised by the judiciary interviewed in the project, there should be an atmosphere of co-operation and mutual trust between the two Courts, to ensure the effective protection of the applicant and the harmonious enjoyment of his or her rights.

Adopting a wider perspective and trying to see the merits for the adoption of such a mechanism, it is subsumed that this mechanism will not be used as frequently as the preliminary ruling procedure or the judicial review. This was confirmed by the negotiators, who were optimistic about the practical application of this procedure as this quote shows “*I think this will be rarely used because when it comes to the question of compatibility of the EU law with the ECHR, it will be very few national courts that will not make reference, when asked in national proceedings. This is an exercise of great superficiality. When it will happen, I am sure it will help the dialogue between the two courts. To me it is clear that the CJEU will decide these rights in a way which ensures the proper co-ordination with Strasbourg*”.²⁶³

²⁶¹ Interview C (EU Commission, Brussels 1 August 2012).

²⁶² See Fifth Negotiation Meeting, *supra* note 13, art. 3(6).

²⁶³ Interview C (EU Commission, Brussels 1 August 2012).

Despite the fact that the application of Article 267 TFEU can leave gaps and issues unresolved (*Acte clair* and *Acte éclairé* doctrines²⁶⁴), so that the Court in Strasbourg might be the “first one” having to decide on the question of compatibility with the ECHR, in the majority of cases national courts will refer a question to the CJEU, particularly when an EU norm or measure is profoundly contrary to the Convention or when the implementation at national level is contrary to the Convention.

The only scenario is when national courts refrain from declaring invalidity as *per Foto-Frost*²⁶⁵ or from making a reference to the CJEU, pursuant to the *Acte Clair* doctrine. As mentioned earlier, in these occasions, the CJEU is deprived of the opportunity to assess the potential incompatibility. A solution would be to change the requirements or toughen the conditions for the national courts to rely on *Foto-Frost* or *Acte Clair*. However, Article 267 operates on the basis of a system of cooperation between the Court of Justice and national courts so that EU law is interpreted uniformly and this system does not allow the imposition of an obligation to national courts to refer without exceptions. National courts enjoy a discretion whether to refer or not, unless otherwise stipulated. Possible imposition of an obligation for national courts to refer to the Luxembourg Court would end up overburdening the CJEU even more and this is also a factor that would have been taken into account before any such decision.

i. Protocol 16 and post-accession concerns

We cannot disregard the potential effect of Protocol 16, once signed and ratified by all States. As mentioned earlier in Part III B (c), this Protocol introduces the possibility for highest courts and tribunals to request an advisory opinion from the ECtHR. There are, however, two issues which could emerge if such a Protocol is ratified,

1. a *sui generis* forum shopping from national courts who would pick and choose the best forum available at European level which mainly threatens EU law’s autonomy.
2. a reinforced dialogue between CJEU and ECtHR, if Protocol 16 is also used as a mechanism of cooperation between the two European courts.

In this section, we focus on the first issue as the second one has been dealt with in Part B, section c) (iv). A number of the questions that need to be discussed relate to procedural matters. When there is an EU law issue, the principal concerns stand in the way national Court’s use the new procedure in practice. The following, are a number of potential problems which needs to be considered in light of Protocol 16’s ratification:

²⁶⁴ As it was held in the CJEU’s judgement in the case of *CILFIT* (C-283/81 *CILFIT v Ministry of Health* [1982] ECR 3415), a domestic court of last resort is exonerated from its duty to make a reference to Luxembourg if the question raised is irrelevant, the EU provision has already been interpreted by the CJEU (*acte éclairé*) or the correct application of Union law is so obvious as to leave no scope for any reasonable doubt (*Acte clair*)

²⁶⁵ C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

- If the national court requires an opinion from the ECtHR, would this Court reply or would it involve the Court of Justice?
- Will the preliminary ruling reference or the annulment procedure respectively questioning the interpretation or the validity of EU law precede a request to the ECtHR for an advisory opinion on EU law's compliance with the Convention?
- Would it be possible to ask Strasbourg for an advice first, without involving the CJEU?

The above-mentioned questions raise issues in relation to the scope of the 'prior involvement' mechanism and also in relation to the autonomy of EU law's debate.

In particular, national courts cannot reasonably be expected to suspend proceeding at national level, refer a preliminary ruling question and then send a request for an advice to the ECtHR. For example, if the MSs' highest national court has to deal with a case that challenges the validity of a regulation and raises a human rights issue, it has to refer a question to the CJEU via the preliminary ruling. Then, assuming that particular MS has acceded to Protocol 16, its highest court could be tempted to choose the ECtHR instead of the CJEU for a reference as in this way might pre-empt a future condemnation from Strasbourg at a later stage. This would create a *sui generis* forum shopping, thus undermining the CJEU's autonomy and authority.

A good defensive mechanism against this scenario would be the CILFIT doctrine (as explained in section 3) unless the reference to the CJEU was made earlier by a court of lower level. In this case, the CILFIT doctrine would not apply at the highest judiciary levels and this court would be allowed to refer to the Strasbourg Court for an advisory opinion. This is an issue that needs to be resolved in the internal rules, provided EU's accession will also include Protocol 16. It is another example where a balancing exercise needs to take place between not encroaching upon the EU's legal autonomy and providing efficient protection to the applicant.

ii. Internal Rules on EU's accession to the ECHR: EU rules of procedures and rules of the Committee of Ministers

The rules of procedure will be laid down independently at Union level, without involving the ECtHR or the other contracting parties to the ECHR, as their purpose is to ensure that the "people(s) of Europe" enjoy more complete recognition and protection of their human rights.

The EU Accession has raised a number of legal, political and procedural issues that need to be addressed by the Union, such as the 'co-respondent mechanism', the "representation of the EU before the ECtHR", the "EU judge", the "prior involvement" of the CJEU. The development of a set of clear and detailed rules will facilitate a smooth transition period in the post-accession era, minimise the possibility of any conflict between the EU and the European Court of Human Rights and remove any obstacles for an effective human rights protection in Europe.

The negotiators were in favour of the “co-respondent mechanism” and rejected the presumption that it creates imbalance of powers to the detriment of the applicant. More specifically, in the eyes of the negotiators the *‘applicant has the full range of actors at his disposal without having to preventatively pose himself question of distribution of competences, because it is not only the party which is allegedly responsible for the violation in question, but also another party, which may be potentially responsible’*.²⁶⁶

At Strasbourg level, it will make no real difference, as the Court already deals with cases where there is more than one respondent, but the situation will be different at Brussels level. Considering how tight deadlines can be, while most EU decision making processes take extremely long, it will be interesting to see whether these internal rules will solve complexities between the three EU institutions. For instance, an interesting question would be why the Commission will ask the Council of the EU only and not the Parliament for determining the positions to be adopted on the EU’S behalf for a legislative act, for which both institutions are responsible? How is it ensured that the Council is in position to defend the position of that act without the involvement of the Parliament?

Therefore, it was repeatedly underlined that the internal rules are of paramount importance for the balancing interests of all the different parties involved in the accession process as well as its success as a whole.²⁶⁷

Finally, the negotiators have also touched upon the political aspects of the relationship, particularly with reference to the execution of judgements and its supervision.

Concerns were expressed as to whether some of the EU MSs have fully understood the implications of this problematic issue.²⁶⁸ It is not easy to reflect on the way voting rights will be exercised in the Committee of Ministers and speculate on the EU’s position.

The Union’s vote will be based on MSs’ unanimous decision, but at the same time EU MSs will vote individually. The fact that all MSs will be acting in a consistent manner was seen as a major *‘threat to the integrity of the system’*.²⁶⁹ For instance, the EU could have been easily able to decide on its own cases or its MSs’ cases, and this would play against the non-EU countries.

Acting in a coordinated manner, when expressing positions and voting, is indeed encouraged by Article 4(3) TEU which establishes that *“pursuant to the principle of sincere cooperation, the*

²⁶⁶ Interview B (EU Council, Brussels 21 June 2012).

²⁶⁷ Interview B (EU Council, Brussels 21 June 2012).

²⁶⁸ Interview A (Council of Europe, Strasbourg 18 June 2012).

²⁶⁹ Interview A (Council of Europe, Strasbourg 18 June 2012).

Union and the MSs shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”.

In dealing with this issue, the Accession Agreement sets the rules for the participation of the EU in the supervision of the execution of judgments.

Pursuant to Article 7.2 of the Accession Agreement, when the Committee of Ministers supervises the compliance of obligations by the EU, either on its own or jointly with one or more MSs, the Union and its MSs must state their positions and vote in a coordinated manner, as required by the Treaties.

A possible complication could be created with regards to the supervision of the fulfilment of obligations in cases against one of the EU MSs. This is why the EU is precluded from voting in such cases for reasons pertaining to its internal legal order. As an additional safeguard mechanism for the credibility of the ECHR system, the Union Treaties do not oblige the MSs of the EU to express positions or to vote in a co-ordinated manner.

Finally, regarding the supervision of judgments against MSs, outside the ambit of EU law, any participation of the EU would constitute a new competence for the Union and would thus violate the requirements of Article 6(2) TEU and Article 2 of Protocol No. 8. In this event, the EU MSs will be under no obligation under the Treaties to act in a coordinated manner and they will be able to freely express their own position. This is stipulated in Article 7(4)(b) of the Accession Agreement, which basically provides that MSs can even express a different position than the one expressed by the Union.²⁷⁰

Although the provisions of Article 7 are clear and straightforward, it was obvious that, unless there are special voting rules or majorities introduced, non-EU MSs would not be able to supervise the execution of ECtHR's judgments in the Committee of Ministers properly and the execution of judgments against the Union would end up being problematic. This has led to discussions for the modification of the rules of procedure of the Committee of Ministers in view of the creation of a mechanism to compensate this block of votes and prevent potential unfair results. As a result, new rules on the majorities to adopt decisions were introduced.

The Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (Draft Rule 18) introduces three different majorities:

(i) **Simple majority** of the representatives of the non-EU contracting parties for the supervision of obligations either by the EU or the Union and one or more of its MSs jointly.

²⁷⁰ The EU is allowed to vote in such circumstances as per Article 21 TEU which makes reference to the objective to contribute to the protection of human rights on the international scene.

(ii) **Two thirds majority** of the representatives of the non-EU contracting parties for the referral to the Court for interpretation of a judgment (Rule 10) and infringement proceedings (Rule 11).
(iii) **Double majority**, which consists of the majority set out in Article 20 d of the Statute of the CoE (two thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee) plus simple majority of the representatives of the non-EU contracting parties for final resolutions.

These rules do not form part of the Accession Agreement, but will be submitted to the Committee of Ministers for adoption. Any revisions or amendments will thus not affect the Accession Agreement, as they will be made by the Committee of Ministers without requiring a revision of the Agreement or the Convention.²⁷¹

4) Post Accession: the “Bosphorus” Ruling

The last issue which has attracted much attention as well is the *Bosphorus* presumption and its future after the completion of the Accession. The *Bosphorus* case²⁷², as already discussed in Part B c) 2 ii. of this Report, is of seminal importance as it has shaped the relationship between fundamental rights protection afforded by the ECHR and the EU.

The Strasbourg Court found that the legal order of the Union offered satisfactory means to deal with alleged violations of the Convention, that action taken in compliance with obligations arising from the membership to an international organisation to which part of its sovereignty has been transferred is justified as long as the organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.²⁷³ In the context of the ‘*substantive guarantees offered and the mechanisms controlling the observance*’ of fundamental rights, equivalent is synonymous to comparable rather than identical.²⁷⁴

However, this is just a presumption which is not final and is subject to review in light of any new developments or any changes in the system of fundamental rights protection. This presumption protects the EU against constant scrutiny, because the level of protection afforded is considered to be equivalent to the extent that the Union has not deviated from its obligations under the Convention and fulfils its obligations that flow from its membership to the CoE. In

²⁷¹ 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’, (2011) 009, available at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/CDDH_2011_009_en.pdf

²⁷² Case C-84/95 *Bosphorus Hava Yollari Turizin Vc Ticarct AS v Minister for Transport, Energy and Communications and others* [1996] E.C.R. I-3953.

²⁷³ *Bosphorus* supra note 31 at para [155].

²⁷⁴ *Ibid.*

other words, the level of protection afforded by the EU is presumed to be the same as the one provided by the CoE and all the existing Parties, which are under the scrutiny of the ECtHR. If there is evidence that the protection of fundamental rights becomes manifestly deficient, then the presumption is rebutted and an examination of the case takes place, which can ultimately lead to a finding of violation.

The case of *Michaud v France*²⁷⁵ offers an excellent illustration of both the presumption and its rebuttal in case where there is no equivalent protection. As stated in the case '*The presumption of equivalent protection is intended to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which is not party to the Convention and to which it has transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the Convention*'.²⁷⁶

In the case of the EU, it was clearly intended to give some breathing space and a degree of flexibility to the Union during the period that the negotiations for the Accession were conducted.

Pursuant to Article 19 ECHR, the supervisory role of the Strasbourg Court was less intense in the interests of good faith and international cooperation. The presumption does not mean that the Union is free to disregard the Convention, as it applies only where the rights and safeguards are given protection comparable to the one afforded by the Court.

In fact, this is where some of the concerns lie. As indicated in the case of *Cantoni*²⁷⁷, the Court of Human Rights can review the exercise of State's discretion which is provided by EU law, as in the case of the implementation of a Directive.

This can be problematic in practice: firstly as a source of tension between the two Courts, due to the fact that this is an area under Luxembourg Court's review, as the Union's highest Court responsible for uniform application and interpretation of EU law.²⁷⁸ Secondly, and perhaps more importantly, *Cantoni* reveals another dimension of the problem. The review in this case was extended beyond the narrow limits of the method of implementation of the Directive used by the EU MS. The more extensive review of the Strasbourg Court involved the definitions and the terminology included in the EU's secondary legislation, about which there was no discretion on the side of the MSs.

²⁷⁵ *Michaud v France*, supra note 172.

²⁷⁶ *Ibid.*, at para [111].

²⁷⁷ *Cantoni* supra note 27.

²⁷⁸ P. Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance', (2013) 36 *Fordham International Law Journal* 1114, 1139.

The concerns are reasonable, although this judgement was made before the Lisbon Treaty and the commencing of the Accession process.

This is why the key question about the future of the *Bosphorus* presumption and the principle of equivalent protection needs to be answered. In principle, the presumption will not be upheld after accession, provided that the EU will accede on an “equal footing” and will be treated in the same manner as any other of the 47 Contracting Parties.

If we wish to extract some lessons from this case for the future, then it can be argued that the Strasbourg Court has revealed its willingness to be quite thorough in its rulings about what is considered to be contrary to the Convention’s rights and will not refrain from exerting extensive or even indirect control over the implementation and the content of EU Law as applied by the MSs.

Having said that, and bearing in mind the Courts’ reluctance to create tensions from the outset of the Accession era, there is another aspect that needs to be taken into account. Before the Strasbourg Court engages in the abovementioned indirect review, the judges should be mindful that EU secondary legislation is the outcome of a relatively long and onerous process of 28 MSs’ deliberations and as such, show the necessary degree of flexibility, similar to when the ECtHR applies the margin of appreciation.²⁷⁹

To conclude, it is still not clear whether the *Bosphorus* presumption will stand the test of time and it is for the ECtHR to decide on this issue. The decision will have to put on the plate, on the one hand, the principle of equality among the Contracting Parties and, on the other, the EU as a *sui generis* Party and the principle of equivalent protection.

However, as lately demonstrated in *M.S.S.*²⁸⁰, the ECtHR has exercised a close scrutiny, despite considering the protection of fundamental rights within the EU legal system of a comparable level with the ECHR.

5. The *ne bis in idem*²⁸¹ principle and competition law

Competition law is one of the biggest and most complex areas of EU law and the Commission’s enforcement powers in this area are unique to the EU legal order.²⁸² For decades, the Commission has been given a central role in enforcing EU competition provisions with significant power of investigation and the right to impose penalties.²⁸³ In the name of

²⁷⁹ Ibid. at 1141.

²⁸⁰ *MSS*, supra note 112.

²⁸¹ The *ne bis in idem* principle is enshrined in Article 50 of the Charter. This fundamental right not to be tried or punished twice must be interpreted in the light of Article 4, Protocol 7 to the ECHR. It is worth mentioning that Protocol 7 to the ECHR has not been ratified yet by all MSs; some MSs have ratified it subject to reservations or interpretative declarations in relation to Article 4.

²⁸² L. Woods and P. Watson, *Steiner and Woods EU Law* (11th ed., Oxford: Oxford University Press, 2009), p. 635.

²⁸³ Ibid. at p. 678 ff.

procedural fairness and in an attempt to reduce the DG Competition's high workload, the original enforcement system was replaced by a decentralised system in accordance with Regulation No 1/2003²⁸⁴ supplemented by Regulation 773/2004²⁸⁵ and a "Modernisation Package"²⁸⁶.

Through this new system the Commission is sharing enforcement with National Competition Authorities (NCAs) and national courts. It is not directly involved in assessing whether undertaking's agreements, decisions and practices conflicting with Article 101 (1) TFEU are exempt under article 101(3) TFEU. The Commission is now indirectly involved in providing support to the undertakings, which have to self-assess the conformity of their practices.

However, the Commission still retains the powers to investigate the most serious anticompetitive practices on its own initiative or as a response to third parties' complaints. Therefore, if it finds an infringement, it should send a Statement of Objections (SO) to the undertaking concerned, which has a right of defence and a right of access to the Commission's file.²⁸⁷

The main points emerging in relation in this area of law relate to the role of the Commission, nature of the sanctions imposed and also the role of the Courts (EU and national Courts and the ECtHR).

The Commission's powers are summarised in the following table:

<p>The Commission must adopt final decisions and procedural decisions during investigations which consist of</p> <ul style="list-style-type: none">• A finding and termination of infringements;• Interim measures• Commitments• Finding of applicability <p>It can impose the following fines on undertakings:</p> <ul style="list-style-type: none">• Substantive fines, that can be as high as 10% of the undertaking's global turnover in the preceding business year, for<ul style="list-style-type: none">○ Infringements of Articles 101 and 102○ Failure to comply with an interim measures decision○ Failure to comply with a bonding commitment made under art 9 Regulation
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²⁸⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003 OJ L 1/1) which entered into force in May 2004.

²⁸⁵ Council Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to articles 101-2 TFEU (2004 OJ L123/18).

²⁸⁶ Modernisation Package of Commission notices providing guidance on the operation of the new system and the interpretation of key concepts (2004 OJ C101).

²⁸⁷ A. Kaczorowska, *EU Law* (2nd ed., Abingdon: Palgrave 2011), p. 924-25.

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- **Procedural fines**, that can be up to 1% of the undertaking's global turnover in the preceding business year, when the undertaking has committed offences in relation to requests for information or inspections
- **Periodic penalty payments** for defiance of the Commission of up to 5% of the average daily turnover in the preceding business year at a daily rate.

Source: Alina Kaczorowska, *EU Law*, (Palgrave, 2011), p. 925 ff.

These procedures are administrative and consequently the fines imposed should have an administrative nature. However, the issue requires further analysis. The Commission, as an administrative body, does not fall within the meaning of the word “tribunal” as required by Article 47 of the Charter. Art 47 confers an individual right to an effective remedy and to a fair trial, which corresponds to art 6 ECHR.

Though, the Commission’s decisions are subject to a subsequent double review by judicial bodies that have full jurisdiction as guaranteed by the requirements of Art 47 of the Charter. In particular, the General Court (GC) can review both the law and the facts at the basis of a Commission’s decision, and in case of an appeal on points of law, the GC’s judgment is subject to a further review by the Court of Justice.²⁸⁸

An interesting reflection that has emerged in our empirical work in relation to competition law in general, is about the value pursued by this area of law. As stated by one of the judges “*the value of competition law might sound very economic but is also very social, because what is guaranteed to consumers is the restoration between prices and quality of product or service...*”²⁸⁹

Then, as suggested by this judge “*balancing societal interest with fundamental rights is a clear problem for the EU Courts, as the Courts are dealing mainly with legal persons rather than natural persons. Thus it is questionable whether the case law developed in relation to national persons is evenly transposable to legal persons in such an economic context*”.²⁹⁰

In relation to accession, we are facing potential dilemmas and the following issues require further analysis:

- i. **The nature of the fines** imposed by the Commission for infringements of EU competition rules: potential conflicts between the two European Courts;

²⁸⁸ Case C-272/09 P *KME and Others v Commission* (Judgment of December 8, 2011), not yet reported at paras 106 and 133; Case C-386/10 P *Chalkor v Commission*, [2011] not yet reported, para. 67; Case C-199/11 *Otis and Others*, [2012] not yet reported, para. 63.

²⁸⁹ Interview No 3 (CJEU, Luxembourg 13 December 2010).

²⁹⁰ *Ibid.*

- ii. **Individual complaints** to the ECtHR after the exhaustion of legal remedies within the EU legal order
- iii. **Parallel proceedings** in competition law under EU and national law and the role of the ECtHR.

i. The nature of the fines imposed by the Commission for infringements of EU competition rules: potential conflicts between the two European Courts

The question here relates to whether “administrative penalties” qualified under EU law, could be re-branded as “criminal sanctions” by the ECtHR. The *ne bis in idem* principle could potentially play a role in relation to the nature of such penalties when the two Courts are involved.

At first, Regulation No 1/2003 expressly provides that the fines imposed by the Commission on undertakings and associations which have infringed the EU competition rules “*shall not be of a criminal law nature*”.²⁹¹ Therefore, it is not surprising that the General Court of the EU has consistently held that Commission decisions imposing fines for infringements of competition law are not of a “criminal law” nature.²⁹²

The Court of Justice has been reluctant to deal with this question and the first indications were provided in the case of *Bonda*²⁹³ and subsequently in *Akerberg Fransson*²⁹⁴, where the Court basically followed the jurisprudence of the Court of Human Rights. More specifically, the CJEU, for the purpose of deciding on the criminal nature of certain administrative sanctions imposed, used the criteria laid down in *Engel*²⁹⁵. These criteria are: (i) the legal classification of the offence under national law; (ii) the very nature of the offence; and (iii) the nature and degree of severity of the penalty that the person concerned risks incurring.²⁹⁶ This means that the interpretation of the Article 6 ECHR’s criteria concerning a criminal charge by the CJEU is fully in line with the interpretation of that article by the ECtHR.²⁹⁷

²⁹¹ Article 23(5) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003 OJ L 1/1)

²⁹² See Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, para [235]; Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, para [717]; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, para [390]; Case T-138/07 *Schindler Holding and Others v Commission* [2011] ECR II-4819, para [53].

²⁹³ Case C-489/10 *Criminal proceedings against Łukasz Marcin Bonda*, (judgment of June 5 2012), not yet reported.

²⁹⁴ C-617/10 *Åklagaren v Hans Åkerberg Fransson* (Judgment of 26 February 2013), not yet reported.

²⁹⁵ Appl. Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 *Engel and Others v the Netherlands* [1976] 1 EHRR 647, paras [80–82]; and Appl. No. 14939/03 *Sergey Zolotukhin v Russia* [2007] ECHR 442, paras. [52] and [53].

²⁹⁶ *Bonda*, supra note 293 at para [37]. In Appl. Nos. 39665/98 and 40086/98 *Ezeh and Connors v UK* ECHR 2003-X, it was stipulated that the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative. In other words for Article 6 ECHR to be held applicable, it suffices that the offence in question is by its nature to be regarded as “criminal” from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere.

²⁹⁷ J. Pfaeltzer, ‘Naming and Shaming in Financial Market Regulations: A Violation of the Presumption of Innocence?’ (2014) *Utrecht Law Review* Vol. 10, No. 1, 134-148 at 142

In addition, Advocate General Sharpston has stated in her Opinion in *KME* that there is “*little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article [101(1) TFEU] falls under the criminal head of Article 6 ECHR*”.²⁹⁸ Other than these instances, the Luxembourg Court has never explicitly confirmed that competition fines are of a criminal nature.²⁹⁹ In fact, as stated by one of the judges interviewed “*the sanctions are not criminal but under article 6 ECHR are “quasi” criminal*”.³⁰⁰

By contrast, the Court in Strasbourg had no reservations to find that ‘*a fine imposed for a violation of national competition rules was of a criminal law nature and related to a criminal charge within the meaning of Article 6(1) of the ECHR*’.³⁰¹ The judges in *Jussila* also found a ‘*gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example [...] competition law*’.³⁰²

Thus, “administrative penalties” qualified under EU law could potentially be re-branded as “criminal sanctions” by the ECtHR. However, the *ne bis in idem* principle plays an important role in this field, as generally discussed in the following section.

ii. Individual complaints to the ECtHR after the exhaustion of legal remedies in the EU legal order and the principle of the *ne bis in idem*

The EU’s accession to the ECHR will open up the possibility for anyone claiming that his or her rights under the Convention have been violated by a Commission’s enforcement action or the EU Courts reviewing a Commission’s decision. Such an individual after having exhausted all remedies before the EU Courts could thereby bring an application against the EU before the ECtHR. This will most probably be something the CJEU would like to avoid or even prevent.³⁰³

This possibility raises the issue of the application of *ne bis in idem* principle. In general, such a principle instead of being seen as a restraint for the prosecution authorities, can serve as an incentive for a more efficient system of offences’ prosecution.³⁰⁴ This means that public

²⁹⁸ *KME and Others*, supra note 288, AG Opinion para [64].

²⁹⁹ K. Lenaerts, ‘Due Process in Competition Cases’, (2013) Vol. 1, No. 5, *Zeitschrift fuer Kartellrecht*, 175-182, 178.

³⁰⁰ Interview No 3 (CJEU, Luxembourg 13 December 2010).

³⁰¹ Appl. No. 43509/08 *Menarini Diagnostics v Italy* (Judgement 27 September 2011), para [44].

³⁰² Appl. No. 73053/01 *Jussila v Finland* [2006] ECHR 996, (2007) 45 EHRR 39, para [43].

³⁰³ W. Wils, ‘EU Anti-trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention On Human Rights’, (2011) 34 *World Competition*, Issue 2, 189–213.

³⁰⁴ S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), p. 384; H.G. Schermers, ‘Non Bis in Idem’ in F. Capotorti et al (eds.) *Du Droit International au Droit de l’Integration, Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos Verlagsgesellschaft, 1987), p. 604; W. Wils, ‘The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis’, (2003) *World Competition: Law and Economics Review* Vol. 26, No. 2, 131, at 138–40; and B. van Bockel, *The Ne Bis in Idem Principle in EU Law: A Conceptual and Jurisprudential Analysis* (Leiden: Meijers Institute of Legal Studies, 2009), p. 27.

authorities would be motivated to investigate and prosecute offenders as competently as possible with the result that only worthwhile cases would be prosecuted. Consequently, the authorities could be incentivised '*not to leave any stone unturned in the preparation of a case rather than to waste resources on fishing expeditions leading nowhere or on repeated prosecutions of the same person for the same offence*'.³⁰⁵

Although the legal basis for the *ne bis in idem* principle is the same within the two European legal systems, as Article 50 of the Charter and Article 4 of the Protocol No. 7 ECHR contains the same text, the two Courts do not share the same notion of the principle.

Pursuant to Article 50 of the Charter, only a **final acquittal** or **conviction** within the Union gives rise to a preclusion of further proceedings. In other words the question is whether the principle of *ne bis in idem* not only applies when there has been a **conviction** or a **penalty**, but also when an undertaking has been **acquitted** or **exonerated**. The solution differs if there has been an:

- Exoneration - If an undertaking has been exonerated, then the exonerating decision is no longer amenable to challenge³⁰⁶.
- Acquittance - If an undertaking has been acquitted for the purposes of the *ne bis in idem* principle, for instance, when the Commission considers that there are not sufficient grounds for acting on a complaint, it shall reject the complaint according to Article 7 of Commission Regulation 773/2004. This decision, however, being a complaint's rejection, *prima facie*, seems subject to further proceedings thus challenging the *ne bis in idem* principle, which does not apply in such a case.³⁰⁷

However, the ECtHR is not prohibited from examining an alleged violation, as its judgement will not be a case of "repeated prosecutions" of the same person for the same offence, but an efficient review of competition law's compliance with the Convention. This could imply that the nature of the fines will change or the seriousness of it would be reconsidered in view of such a compliance exercise.

Nevertheless, in *Tetra Laval*, it was held that '*the Commission has a margin of discretion with regard to economic matters*', but the EU Courts must not '*refrain from reviewing the Commission's interpretation of information of an economic nature*'; they must ensure that evidence is '*factually accurate, reliable and consistent*'.³⁰⁸ On a similar note, the EFTA Court

³⁰⁵ R. Nazzini, 'Fundamental Rights beyond Legal Positivism: Rethinking the Ne Bis in Idem Principle in EU Competition Law', (2014) *Journal of Antitrust Enforcement*, 1–35, at 14.

³⁰⁶ Case T–224/00 *Archer Daniels Midland v Commission* [2003] ECR II–2597, paras. [85–86]; Joined Cases T–271/03 and T–245/03 *Federation nationale des syndicats d'exploitants agricoles (FNSEA) v Commission* [2004] ECR II–271, para [340]; Case T–39/06 *Transcatlab SpA v Commission* [2011] ECR II–06831, para [254]; Case C–17/10 *Toshiba Corporation v Úřad pro ochranu hospodářské soutěže*, [2012] OJ C98/3, para [94].

³⁰⁷ C. Kerse and N. Khan, *EU Antitrust Procedure*, (6th ed., London: Sweet and Maxwell, 2012), p. 86.

³⁰⁸ Joint Cases C–12/03 *P* and C–13/03 *P. Commission of the European Communities v Tetra. Laval BV* [2005] ECR I–1113, para [39].

highlighted in *Posten Norge* that ‘the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision’.³⁰⁹

Thus, provided the EU Courts in reviewing any Commission’s action have acted in accordance with article 47 Charter, there should be no problem when the case reaches Strasbourg, as article 6 EHRC and article 47 Charter coincides.

iii. Parallel proceedings in competition law under EU and national law. What is the role of the ECtHR?

EU law and national competition law apply in parallel without any overlap due to the different perspectives and areas of application. Since 1969, the Court of Justice has allowed parallel proceedings under EU law by the Commission and national competition authorities under national law and, if multiple sanctions are imposed on the same person under EU and national laws, the firstly imposed punishment is taken into account in determining the second sanction.³¹⁰ Even when the Commission has established an infringement and imposed fines on an undertaking, when its decision is annulled by the EU courts on procedural grounds, further proceedings are not barred.³¹¹

For the CJEU, parallel proceedings within the European competition network are not contrary to the principle of *ne bis in idem* insofar as both EU and national competition rules pursue “different ends”.³¹²

The ECtHR, in relation to the application of the *ne bis in idem* principle in parallel proceedings, requires that when an undertaking is punished for two different offences, which share the same “content of the wrongdoing”, in the sense that the one contains precisely the same elements as the other, such an undertaking cannot be punished again.³¹³ Then, the jurisprudence of the Strasbourg Court generally holds that a decision is final ‘when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them’.³¹⁴

As mentioned by one of the judges in Luxembourg, when discussing about the application of the *ne bis in idem* principle to extradition law, the CJEU has been “way more protective on the *ne bis*

³⁰⁹ Case E-15/10 *Posten Norge AS v EFTA Surveillance Authority* [2012] EFTA Ct. Rep, 246, para [100].

³¹⁰ Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt*, [1969] ECR 1, para [11].

³¹¹ Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM) v Commission* (PVC No 2), paras. [59–62]; Case T-24/07 *ThyssenKrupp Stainless AG v Commission* [2009] ECR II-2309, para [190].

³¹² *Wilhelm*, supra note 310 at para [11]. See also Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 *Aalborg Portland A/S v Commission of the European Communities* [2004] ECR I-123

³¹³ Appl. No. 37950/97 *Franz Fisher v Austria* [2001] ECHR 348, para [25]. See also Appl. No. 25711/94 *Oliveira v Switzerland* [1998] ECHR 68; Appl. No. 15963/90 *Gradinger v Austria* [1995] ECHR 36; Appl. No. 38237/97 *Sailer v Austria* [2002] ECHR 486.

³¹⁴ *Zolotukhin v Russia* supra note 295 at para [107]; Appl. No. 50178/99 *Nikitin v Russia* (2005) 41EHRR 10, para [37]; Appl. No. 70982/01 *Horciag v Romania*, ECtHR (15 March 2005).

in idem principle than the Strasbourg Court".³¹⁵ He then continued suggesting that "*the Strasbourg Court required in line with traditional extradition law that it needed the same facts and also the same incrimination.*"³¹⁶ Apparently this is not any longer the case, "*as from spring 2009 in the case of Zolotukhin, on the basis of article 4 Protocol 7, where the ne bis in idem is contained, they are now following the same approach than us*".³¹⁷

In conclusion, EU law and national competition law apply in parallel. The EU's Accession will add another dimension to this multi-layer system of protection: the ECtHR's external scrutiny. It can be argued that, as the two Courts' case law in relation to the *ne bis in idem* principle is now convergent, accession would not affect the EU law's autonomy or the CJEU's role in the EU legal order. The Strasbourg Court will ensure that protection does not go below the minimum level as guaranteed by the Convention.

As one of the Strasbourg judges has affirmed in our interviews:

"If the EU gives a better protection, it is great news, but for us it is like any other state, who gives higher protection at national level; we are only there for the minimum standard".³¹⁸

A particular intricate issue, which cannot be explored here in detail, is the relevance of *ne bis in idem* with regard to the cooperation of national competition authorities and the Commission within the European Competition Network (ECN) in the enforcement of EU competition law. The parallel prosecution of EU competition law infringements by different authorities within the ECN might threaten the respect for the *ne bis in idem* principle. The problem lies in Article 13 Regulation 1/2003 according to which if one NCA is handling a case, another NCA may suspend their proceedings or even reject a complaint. There is, however, no legal obligation to do so. In the end, simultaneous proceedings regarding the same infringement against EU Competition rules might even lead to double sanctions. Regulation 1/2003 does not define the effect of the decisions' of NCA. *Ne bis in idem* has to be respected fully when EU competition law is enforced, irrespective of the enforcing authority.³¹⁹

6. Judicial protection and the CFSP

Although the issue of judicial protection in the area of CFSP was not initially included in the questionnaires, it was raised during the interviews and thus reference is made in relation to two particular questions:

³¹⁵ Interview No 3 (CJEU, Luxembourg 13 December 2010).

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Interview No V (ECtHR, Strasbourg 20 June 2012).

³¹⁹ See W. Weiß, 'The EU Competition Policy as an International Human Rights Issue', in J. Wetzel (ed), *The EU as a Global Player in Human Rights?*, (Abingdon: Routledge, 2013), p. 179-180.

a) Whether it would be possible for the ECtHR to examine an application concerning the CFSP which has not been submitted to the CJEU?

This question is closely related to the compatibility of the Accession Agreement with the EU Treaties. If the ECtHR is allowed to examine such applications, then this can potentially threaten the autonomy of EU law and the CJEU's interpretative monopoly under Article 344 TFEU.

b) Whether the CJEU's limited jurisdiction over the CFSP could be incompatible with Article 13 ECHR.

This question raises the issue of judicial protection at EU level and the legal issue at question is whether there is in this case breach of Article 13 ECHR, as the EU is unable to ensure an effective remedy where ECHR rights are violated.

The Lisbon Treaty, transforming the European Community to what is now the EU, reformed its structure and abolished the old pillar structure. The CFSP was included in the second pillar of the Treaty, the intergovernmental pillar, where the decision-making procedures were based on cooperation and unanimity. The merger of the three pillars in one single structure, where decisions are taken at EU level, was intended to give the EU an international standing and a legal personality at international level, so that it could conclude international agreements and join conventions with international organisations.

Despite the organisational changes, the Lisbon Treaty did not affect the role of the Court of Justice maintaining a limited jurisdiction of the Court in the field of the CFSP. Pursuant to Articles 24(1) TEU and 275(1) TFEU governing the review by the Union courts in the area of the CFSP, the CJEU shall not have jurisdiction, in relation to an act or measure on the part of one or more MSs in the framework of the CFSP, if that act affects a person directly. This is because judicial protection of that kind is provided by the courts of the MSs.

In two cases the CJEU may exercise judicial control. The first one involves claims by individuals regarding restrictive measures taken by the EU against natural or legal persons under Article 275(2) TFEU. The Court may review the legality of CFSP decisions providing for restrictive measures, reducing in this way the possibility of absence of a judicial remedy in this area, and thus keeping possible violations of the ECHR to a minimum.

The second exception involves monitoring compliance with Article 40 TEU and monitoring respect of the powers of European institutions, when implementing the CFSP.³²⁰

Due to this 'limited' jurisdiction, most of the measures enacted within the CFSP framework are beyond the CJEU's 'review space' and thus outside the sphere of scrutiny for violations of the ECHR provisions. This means not only that the Luxembourg Court has no way to ensure the application of the ECHR standards of protection preventing violations of the Convention, but

³²⁰ Case C-355/04 *P Segi, Aritz Zubimendi Izaga and Aritza Galarraga v Council of the European Union* [2007] ECR I-1657. See also C-583/11 *Inuit Tapiriit Kanatami* case [2013] not reported yet

there is also a risk that the CJEU would not be able to interpret the applicable EU law before the ECtHR decides on a case, thus calling into question the compatibility of a CFSP measure with the ECHR. Even if the “prior involvement” mechanism is activated, it would only result in a dismissal from the Court of Justice. In such a case, the ECtHR would be left to interpret EU law without prior interpretation by the CJEU. This can potentially threaten the autonomy of Union law, and the CJEU’s interpretative monopoly under Article 344 TFEU.

A blanket exclusion of the CFSP acts from the ECtHR’s jurisdiction is definitely not an acceptable solution, firstly because reservations ‘*of a general character*’ are not permitted under Article 57 ECHR, so the EU can make reservations when acceding, but should not exclude an entire area of policy.

As suggested by one of policy makers interviewed in the project:

*‘There has been a strong request during the negotiation of the mandate to carve out CFSP policies from the accession. It has been decided that this is not possible. Art 6 of the Treaty requires accession of the EU and does not make any exceptions’.*³²¹

Secondly, such exclusion would contradict the whole idea of the Union acceding to the ECHR in *full and on equal footing*, with the view of being properly subject to external review of the ECtHR. This was repeated in the Explanatory Report to the draft Accession Agreement, where it was specified that any reservation should be consistent with the relevant rules of international law.³²²

Allowing the EU to exclude such a extensive area of its legal order from the ECtHR’s scrutiny would equal to a privilege similar to the ‘equivalent protection presumption’ under *Bosphorus* and this would in practice threaten more the autonomy of EU law than the scenario of the ‘non prior involvement’ of the Court mentioned earlier. A blanket exclusion would compel the Court of Human Rights to delineate violations of the ECHR found in primary law from violations rooted in secondary law or other executive or judicial acts.³²³ In this way, the ECtHR would end up interpreting EU law and effectively allocating the responsibility for the alleged violations to either the Union or the MS(s). Given the fact that the Union should not be held responsible for its own primary law when the MSs have been already held accountable for implementing this law without any degree of discretion, the primary law of the Union cannot be excluded from the scrutiny of the Strasbourg Court.³²⁴

³²¹ Interview B (EU Council, Brussels 21 June 2012)

³²² Council of Europe, ‘Steering Committee for Human Rights – 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 para 27.

³²³ Gragl, *supra* note 73, p. 131.

³²⁴ *Ibid* p. 132. See also T. Lock, ‘Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order’, (2011) 48 *Common Market Law Review*, Issue 4, 1025-1054 at 1038.

Adopting a more modest approach, a partial exclusion of the ECtHR's jurisdiction could be suggested, so that the jurisdiction is restricted only to cases over which the CJEU has jurisdiction. Such a proposal would most probably suffer from vagueness and would lead to the ECtHR having to decide on *a case-by-case basis* whether the CJEU would have had jurisdiction or not.³²⁵

The policy makers were in favour of a straightforward solution, given the fact that CFSP is '*a specialist sector in the EU action*' and the Accession Agreement should have a provision '*dealing with the specific nature of the CFSP acts, and ensuring that the control of the ECtHR is exercised against the correct respondent in that area*'.³²⁶

Moving now to consider the second question, the situation envisaged that the ECtHR will rule on the case relating to CFSP without the CJEU's prior involvement is theoretically possible, but it is argued that this would not entail a breach of Article 13 ECHR, due to the protection provided by national courts combined with the CJEU limited jurisdiction, and that this would not threaten the autonomy of EU law and the monopoly of interpretation of EU law by the CJEU.

This is because the attribution rule set out in Article 1(4) of the draft Accession Agreement would attribute responsibility for acts under the CFSP to the EU MSs, and not to the Union. Pursuant to Article 1(4) AA, an act performed or a measure taken in the framework of the CFSP is not allowed to be attributable to the Union, if under Union law is attributable to one or more MSs, and the national courts are responsible for and thus capable of providing effective judicial protection.

However, we need to be careful with the interpretation of Art 1(4) as it is not a rule on exclusive attribution. It is rather general in its wording and, thus as per the *Bosphorus* presumption, EU MSs are responsible when they implement Union law, even if they are afforded no discretion in the implementation of EU law.³²⁷ Therefore, it cannot be assumed that Art 1(4) provides that acts under the CFSP are always attributed to the MSs, whose courts will offer appropriate remedies and thus effective judicial protection.

A number of more innovative suggestions have been made to resolve this problematic issue. Based on the cases of *Kadi I*³²⁸ and *Commission v Council*³²⁹, it can be argued that the CJEU's

³²⁵ Lock, supra note 220.

³²⁶ Interview B (EU Council, Brussels 21 June 2012)

³²⁷ *Bosphorus*, supra note 31 at paras 136-137 and 153

³²⁸ Joined cases C-402/05P & C-415/05P *Kadi and Al Barakaat International Foundation v Council and Commission* [2005] ECR I-3533.

³²⁹ Case C-91/05 *Commission of the European Communities v Council of the European Union* (smallarms) [2008] ECR I-3651

jurisdiction is not as narrow in CFSP cases as traditionally held, because the CJEU has already in previous occasions afforded expansive interpretation along these lines. After all, in a Union of peoples, where the rule of law prevails, the CJEU should be given jurisdiction in relation to every act, including CFSP acts, in every situation where the rights of individuals are affected.

An alternative method to resolve this issue is through broad interpretation of the concept of “restrictive measures” under Article 275(2) TFEU, so as to include most cases of human rights violations that may arise under the CFSP. As far as these measures under the CFSP are concerned, the CJEU would have jurisdiction to assess their compatibility with fundamental rights under Article 37 TEU.

However, we need to be careful in proposing an expansion of the CJEU’s jurisdiction as this would go against the intentions of the legislators and would thus constitute a breach of the requirement set out in Article 1(3) of the Accession Agreement, as the Agreement is not supposed to alter the competences of the Union and its Court of Justice.

Despite the fact that the EU legislator was unwilling, if not reluctant, to include it in the CJEU’s jurisdiction, these solutions, apart from being radical and innovative, would aim at an extension of the CJEU jurisdiction to cover the area of CFSP.

As highlighted in one of the interviews, *‘the decision making in the CFSP has been already problematic enough without a question of outside control’*.³³⁰

³³⁰ Interview B (EU Council, Brussels 21 June 2012)

Part IV – CONCLUSIONS

A. Reflection on the future architecture of Europe

The Preamble to the Treaty of Lisbon indicates that the days of the Economic Community have long passed and the move towards a '*Union of peoples*' is underway. Thus, there is a need for the EU legal system to work towards the strengthening of fundamental rights in Europe in an unprecedented way, at the dawn of a new era based on rights. Such changes have been anticipated by the Union institutions and the MSs and, both the binding effect of the Charter and the EU's accession to the ECHR, are seen as steps towards this direction.³³¹

The Report has identified existing problems and gaps in human rights' protection stemming from:

- The overlapping entities (CoE and EU) having proper separate institutions and Courts (ECtHR and CJEU), abiding to different rules, mechanisms and modes of interpretations but at the same time dealing with human rights within the same geographical sphere;
- The complex system of fundamental rights' protection presenting three, albeit inter-linked, human right instruments: the ECHR, the general principles of EU law and the Charter;
- The lack of mechanisms allowing the EU, a supranational entity, to take part in the proceedings under the ECHR leading to the only way for the Union to be brought to account indirectly, via the MSs, and thus creating a highly inequitable system.
- The nature of balancing exercise between the EU MSs and ECtHR. On the one hand, MSs cannot blindly follow the provisions of the EU law and use it as a defence to actions, putting at risk or violating fundamental rights of individuals; on the other hand, the ECtHR cannot issue a judgment that would not take into account the specific characteristics of EU law.
- The presence of procedural mechanisms at EU's level, such as for example the Preliminary Ruling Procedure, which have at times prevented the Union's Court from ruling on issues of fundamental rights, prior to the applicant taking the claim to Strasbourg.
- The divergent conclusions reached by the two Courts in the past which need to be avoided to achieve convergence in Europe;

³³¹ Morano-Foadi and Andreadakis, supra note 18.

- The claim that the Union lacks legitimacy internationally, as it escapes “external” control in relation to human rights, as opposed to its MSs.
- The “extremely positive and beneficial” channel of communication between the two Courts, which appears limited if not accompanied by a complete EU system of protection of fundamental rights;
- The need to ensure legal certainty, justice and the rule of law in Europe and guaranteeing European citizens the same protection *vis-à-vis* acts of the EU as they presently enjoy from MSs.

These are amongst others the main claims made in the Report. The Accession Agreement provides important procedural and substantive mechanisms to bridge the gap in human rights protection in Europe dealing effectively with many of the issues mentioned above.

The future Union’s accession to the ECHR will complete the EU system of fundamental rights’ protection as “*accession is not only an option, it is the destination.*”³³²

As stated by one of our respondents: “*The most notable effect is that fundamental rights will be given the appropriate slot in the architecture of the EU. Accession should be seen as the key for completing this new architecture and a sort of counterbalance for what can be described as repressive powers in the exercise of its [EU] competences.*”³³³

The predictions of the future for the EU do not merely stem solely from the suggestion of a “*federal monistic relationship*” between the CJEU and the ECtHR being adopted once EU’s accession to the ECHR will be completed. This process rather seems to strengthen the claim of the Union being an autonomous constitutional legal entity of international law.

Along with the internal review by the Charter and the CJEU, there will also be an external review by an independent and specialised Court, the ECtHR, while at the same time the EU citizens will be able to bring complaints against EU institutions directly to the ECtHR. Indeed, the Union, introducing external accountability’s mechanisms within the human rights field, will acquire international legitimacy. This will reinforce the idea of a modern state, in that the EU legal system is accountable to an external body inspired by common shared values. The future might also see the inception of many more accessions within specific fragmented fields of international law (such as for example accession to other CoE instruments).

The post-Accession era is characterised by a change in the system in ensuring that cases will be directed against the EU in disputes where an applicant’s human rights have been infringed flowing from the Union itself and where the MS has fulfilled its obligations and implemented EU law.

³³² Viviane Reding, *supra* note 44.

³³³ Interview C (EU Commission, Brussels 1 August 2012).

This would supplement the current ECHR mechanisms of third party observer³³⁴ and its limitations that only the original respondent, the MS, could be bound by the decision. It would further enhance the legitimacy of the Union and strengthen the protection afforded to individuals by making EU law subject to the external scrutiny of the ECtHR.

Accession will further enhance the coherence of the judicial protection of human rights in Europe³³⁵, and present opportunities of mutual enrichment, a process of trial and error, and a sincere dialogue between the two courts to guarantee the consistency between the two strands of case law.

As affirmed by one of the judges:

*“When the EU accedes to the ECHR, it will become its signatory party, the convergence and the complementarity of both Courts will inevitably deepen. There are certain risks of divergence but these are possible to overcome. This is inevitable because the EU citizens, who are more and more identifying themselves through the fundamental rights in the EU, get compact and unitary answer to the fundamental rights issues regardless whether it will be given by the Strasbourg Court or Luxembourg Court”.*³³⁶

However, the draft Accession Agreement is silent on the future of the *Bosphorus* assumption of “equivalent protection” of human rights by the EU legal system, but our empirical data, also supported by academics³³⁷, reveal that this line will prove no longer tenable after accession.

Cooperation between the two Courts is needed more in the after accession era.

As affirmed by one of our interviewees “a ‘dialogue between specialised courts’ helps the circulation of ideas, the convergence of approaches and will make the transition to the new era less burdensome”.³³⁸

The Strasbourg Court should show flexibility and self-restraint, striking a fair balance between an individual applicant's enjoyment of fundamental rights and the constitutional identity of the EU, instead of operating as a “judicial review authority” without allowing a certain margin of appreciation. There is still the underlying issue over the margin of appreciation and whether or not it will apply to the Union. Indeed the Strasbourg Court might find it necessary to apply a wider margin of appreciation where the EU is concerned, since an EU legal act already

³³⁴ Article 36(1) ECHR.

³³⁵ Explanatory note 6, Draft Legal instruments on the accession of the European Union to the European Convention on Human Rights, CDDH-UE, (July, 19, 2011)

³³⁶ Interview No 18 (CJEU, Luxembourg 15 December 2010)

³³⁷ Weiß, supra note 90

³³⁸ Interview No VI (EctHR, Strasbourg 20 June 2012).

represents the product of harmonising European cooperation between 28 EU MSs, and compliance might have already been verified by the Court in Luxembourg.³³⁹

Judges from both courts need to focus more on how the two courts' judgments will not diverge rather than how they will converge. It is interesting to see whether the CJEU will adopt a similar interpretation's method as the "margin of appreciation", such as allowing a wide "margin of discretion" to the MSs when balancing fundamental rights and fundamental freedoms. This balancing exercise is present in the cases of *Omega*³⁴⁰ and *Schmitberger*³⁴¹ which represent the yardsticks on how the judges take into account the individuality and special characteristics of each MS as well as their constitutional traditions when giving their judgment. The challenge is to pursue the goal of uniform interpretation and application of EU law across the Union allowing a certain degree of flexibility when required.

The Court of Justice will arguably be compelled from now on to examine the execution of the Union's programme in the light of the commitment for the protection of human rights instead of verifying the respect of fundamental rights through the prism of the integration programme, as it used to do. The relationship between principle and exception is now reversed.³⁴²

Recently, the CJEU has showed no reservations to give full effect to fundamental rights for the protection of individuals, even in cases primarily concerned with fundamental freedoms.³⁴³ It is highly unlikely to see more cases in the line of the rulings in *Viking*³⁴⁴ and *Laval*³⁴⁵ giving priority to freedom of movement over fundamental rights.

³³⁹ J. Polakiewicz, 'EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?', (2013), *Fundamental Rights In Europe: A Matter For Two Courts* Oxford Brookes University, available at:

http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/Oxford_18_January_2013_versionWeb.pdf. See also Garlicki 'The Relationship between the European Court of Justice and the European Court of Human Rights: The Strasbourg Perspective' in J. Iliopoulos-Strangas and H. Bauer (eds) *La Nouvelle Union Européenne* (Athens: Sakkoulas, 2006), 127.

³⁴⁰ *C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ('Omega'), [2004] ECR I-9609

³⁴¹ *Case C-112/00 Schmidberger Internationale Transporte and Planzüge v Austria*. [2003] ECR I-5659

³⁴² D. Ritleng, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms A Threat to the Specific Characteristics of the European Union and Union Law?', (2012) Uppsala Faculty of Law Working Paper 2012:1 at 17. See also with regard to competition law enforcement Weiß, supra note 90 at at 86-87.

³⁴³ *Carpenter* supra note 154 para 40; *Orfanopoulos*, supra note 154 para 97; *Case C-441/02, Commission/Germany*, [2006] ECR I-3449, para 108.

³⁴⁴ *Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779

³⁴⁵ *Case C-341/05 Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767

The CJEU's tendency towards activism is also so entrenched that it cannot be considered as incidental and, even if some of the Judges seemed cautious to openly admit it, they are paving the way for a new era in the EU.

This is the blueprint that will shape the future architecture of the EU.

B. Policy recommendations

In anticipation for the CJEU's Opinion, this Report will provide policy recommendations on five key areas identified during the course of this research project. These recommendations are based on both empirical findings and academic reflections. The five areas are the following:

- a) The relationship between the CJEU and the ECtHR and its effects on EU law's legal autonomy;
- b) The compatibility of the Accession Treaty with EU law: questions of authority and autonomy;
- c) The implication for CJEU's autonomy and the remit of Protocol 16 ECHR;
- d) The future of "*Bosphorus*" judgement after accession;
- e) The effects of accession on competition law and the CFSP.

a) The relationship between the CJEU and the ECtHR and its effects on EU law's legal autonomy

The Report has highlighted that both Courts played a key role during the negotiations and showed a remarkable willingness to bridge their differences and establish a relationship of mutual trust and cooperation.

After accession, the ECtHR will be the Court expressing the "last word" in human rights issues in Europe. The Court of Human Rights' judgements will only be binding on the EU under public international law. However, this Court should refrain to interpret Union law as such interpretation will not bind the Court of Justice. The Strasbourg Court will operate as an "accountability actor", filtering the compliance of EU law to the ECHR.

Reflecting on the role of the two Courts during the negotiation process, it can be concluded that each Court pursued its own agenda, methodology and judicial approach and showed a *rather different perspective* of the whole accession.

The Court of Human Rights would carry on interpreting the ECHR and consider individual applications for alleged violations of the rights enshrined in the Convention.

The Court of Justice's judges were more concerned about accession, knowing that this would bring changes in their operation and had to ensure that the necessary procedures would be devised for the protection of the Court's prerogatives and the preservation of the Union's competences.

Instead of treating each other with suspicion and distrust, the two institutions engaged in a multi-level dialogue, which in the future will enable them to iron out any differences, resolve uncertainties and facilitate the negotiation process.

At first, they started a pattern of *inevitable* "judicial dialogue" looking at their respective case law, as both Courts operate in the same area and are party to overlapping entities. Issues related to human rights have been raised in numerous cases before the CJEU since the Union's early years and judges have shown remarkable activism in dealing with such cases. Needless to mention that this dialogue will continue and will be intensified after the accession, in view of the fact that the CJEU will be able to use freely the Convention as a legal basis for its judgements, along with the Charter, the Treaties and the general principles of law.

Secondly, the judges commenced an informal dialogue, through a series of regular meetings in Strasbourg and Luxembourg. During these meetings the judges had the opportunity to discuss issues of common interest, reflect on the process of accession and familiarise themselves with their counterparts' perspectives. The value of this informal dialogue for the achievement of quality and coherence of case law on the protection of fundamental rights in Europe was highlighted in the Joint Communication from Presidents Costa and Skouris in January 2011,³⁴⁶ together with a determination to continue the dialogue.

Thirdly, after accession, there will be another form of dialogue defined by the judges as the "institutionalised dialogue"³⁴⁷, based on the co-respondent or co-defendant mechanisms. Despite the lengthy academic debate about the scope and the effectiveness of these mechanisms, little reference has been made to the role of these mechanisms as avenues for "dialogue" between the two Courts. These apparatuses, apart from being designed to accommodate the *sui generis* nature of the Union as a contracting party to the ECHR, can be used by the two Courts as tools, facilitators of consistency, coherency and convergence.

The judges have acknowledged the benefits of a dialogue, which was constructive and this was reflected throughout the Accession Agreement. The Accession's negotiation process has been a test for the judiciary both in Luxembourg and in Strasbourg, so that they could start establishing

³⁴⁶ Joint Communication from Presidents Costa and Skouris, supra note 256

³⁴⁷ Interview No V (ECtHR, Strasbourg 20 June 2012).

a deep relationship of mutual respect and cooperation without any interference in each other's sphere, but observing closely each other's work.

The conclusion of the accession is not only meant to change this relationship, but it is destined to strengthen it in view of a convergent protection of human rights in Europe. The dialogue should continue at all three levels, for them to take advantage of this unique learning opportunity through exchange of ideas, reflection on the respective jurisprudence and coordinated efforts towards an efficient judicial protection in Europe. The pathway towards convergence is wide open now and as such the responsibility to smoothly proceed in this route is left to all interested parties' (EU, CoE, CJEU, ECtHR) who should keep away from any invasive or competitive behaviours.

Convergence is the only practical option that the Courts have to effectively deal with any case of potential future conflict. It is essential that both Courts are proactive and work ahead of any possible tension or conflict to minimise its impact on their relationship and/or any threat to their authority and autonomy.

The authors' main recommendation is for the two Courts to maintain the same approach towards each other and continue to make steps in the same direction.

The authors specifically recommend that the two Courts should continue to strengthen the existing judicial and informal dialogues and that upon the accession the two courts should develop an institutional dialogue.

The authors further recommend that in instances of divergence between the approaches of the two Courts, the CJEU must remain the ultimate decider of EU law matters and the ECtHR of human rights issues. Where there is a divergence resulting from a missing "common ground" between the sources of human rights law, such a common ground must be found. If one cannot be found the approach of the ECtHR as an external human rights Court should prevail.

The authors also recommend that the three inter-locking sources of human rights law (the general principles, the ECHR and the Charter) should continue to co-exist. Together these sources of law provide the bedrock for the realisation, protection and entrenchment of human rights protection in the EU legal arena.

b) The compatibility of the Accession Treaty with EU law: questions of authority and autonomy

The most important parameter for determining whether the Accession Agreement is compatible or not with EU law, is to establish whether it preserves the *EU legal order's autonomy*.

The Accession Agreement as such, does not impose obligations on the Union beyond the scope of the competences conferred on it by the Treaties or by reducing the Union's competences. Any Union competence needs to be exercised in accordance with the provisions of the ECHR.

The CJEU's role, pursuant Article 19 (1) TEU, is to ensure interpretation and application of EU law and thus this Court is the sole and ultimate arbiter of EU law. The Strasbourg Court's task is to check the compatibility of EU law with the Convention. Thus, on paper no problem is envisaged.

During the oral hearing of May 5th-6th 2014 in Luxembourg³⁴⁸, all 28 EU MSs in accord with the 3 EU institutions agreed that the Accession Agreement does not encroach upon the *autonomy of the Union's legal order*, does not *undermine the CJEU's role and prerogatives* under Article 19 TEU and does not conflict with the Court's *interpretative monopoly* under Article 344 TFEU. Therefore, the CJEU's Opinion should find that the Accession Agreement is compatible with the constituent Union Treaties.³⁴⁹

Thus, it needs to be submitted that even if the EU is an internal market, based on the rule of law and respect for human rights and, supervised by its own Court; after accession, the ECtHR will have the "final word", being a specialised Court on human rights. The Strasbourg Court will exercise an external control albeit under common standards.

The *final authority* will rest upon this judicial institution. This is what accession is meant to be. The use of the expression in Article 6(2) TEU "*The Union 'shall' accede to the ECHR*" and not 'might' accede shows a willingness of the EU legislator to make this accession a reality.

The implicit prior 'constitutional' consensus reached by the two Courts in preparation for accession needs to be replaced, in the after accession era, by internal and external review mechanisms, which will ensure a coherent and monolithic human rights protection in Europe.

The Report's authors conclude that the Accession Agreement is compatible to EU law in that it makes the Strasbourg Court the final arbiter in Europe, as the specialised forum on human rights.

³⁴⁸ One of the researchers involved in the project was present at the Oral Hearing that took place in Luxembourg at the CJEU on May 5th – 6th 2014. The present conclusion is thus based on notes taken during the hearing.

³⁴⁹ Against this backdrop, there is a consideration to be made in relation to the CJEU's concerns with its autonomy. The Agreement on the European Economic Area saga, which led to two opinions of the CJEU, is illustrative to this. The CJEU clearly opposed the creation of another Court which could threaten its autonomy in interpreting EU law. However, the CJEU's involvement as provided for in the Accession Protocol draft, should suffice to guarantee the Court's autonomy. See T. Lock 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg' (2010) 35(6) *European Law Review* 777-799 at 781 ff.

c) The implication for CJEU's autonomy and Protocol 16 ECHR

As a preamble to this section, it needs to be highlighted that Accession to Protocol 16 ECHR, is not expressly required by the Accession Agreement. Thus, arguably this should not constitute a problem as it should fall outside the scope of the present Report. Moreover, Protocol 16 at the moment has only been ratified by a small number of MSs. However, the authors wish to spend a few words to discuss potential risks posed by Protocol 16 in relation to the EU's legal autonomy.

Through Protocol 16, the highest courts and tribunals of CoE MSs can request an advisory opinion from the ECtHR. The aim is to reinforce a "dialogue" between the higher national courts and the Strasbourg Court and as such to prevent a possible condemnation for violation of human rights at a later stage.

As discussed in previous Parts of the Report, Protocol 16 can produce the following consequences:

1. a *sui generis forum shopping* from national courts who could pick and choose the best forum available at European level mainly threatening EU law's autonomy. The Luxembourg court's autonomy might be challenged in case higher national courts address an advisory question on human rights, to one of the two European Courts, picking and choosing the most appropriate Court, even if the issue is related to an EU measure.

2. It could be used as a mechanism of cooperation between the two European courts. This will introduce a mechanism ensuring consistency in Europe as the CJEU being the higher court at EU level could raise issues of compliance with the Convention, during the preliminary ruling or the annulment procedure, thus achieving consistency. However, such a possibility would create unnecessary length of time producing adverse effects on individuals.

The Report's drafters believe that as the ECtHR has already shown in a recent case³⁵⁰ its wiliness to act as EU enforcer of EU law, this Court is unlikely to interfere with the CJEU's autonomy and authority. The recent case of a Tunisian national (Mr Dhahbi), who sought to have a preliminary question referred to the CJEU and was refused by the national court. The ECtHR condemn the Italian courts which had failed to comply with their obligation to give reasons for refusing to submit a preliminary question to the CJEU. This is a clear example of the ECtHR acting as an enforcer of EU Law.

The authors recommend that provision should be included within the internal rules of procedure in relation to this Protocol to avoid any risk of possible *forum shopping* between the two Courts.

³⁵⁰ *Dhahbi v Italy* supra note no 4.

The authors, whilst unable to make a specific recommendation on this matter, do note the valid concerns expressed by mean of interview that Protocol 16 has the potential to place further burdens on the ECtHR, a Court that is already struggling to process the large volume of applications it receives. The risks associated with over burdening the ECtHR are serious: it can result in delays in access to justice and cause compromises in standards. If Protocol 16 becomes widely ratified and relied upon, further thought will need to be given to these practical concerns and the resource of the Court to meet demand.

d) The future of “*Bosphorus*” judgement after accession

The future of the “*Bosphorus*” judgement is an issue that has not been resolved yet, as the Accession Agreement is silent on it. Moreover, no extensive reference was made in the Oral Hearing before the CJEU.

The rationale behind the introduction of *Bosphorus* presumption is clear and its practical implications after accession are also evident. The Union’s unique characteristics and its status as a *sui generis* candidate were recognised by the ECtHR and thus review of EU measures through national implementing acts would take place only as an *extrema ratio* “*extreme and mean ratio*”. Although at first glance the ‘*equivalent protection*’ doctrine appears to grant the Union a considerable and unprecedented privilege, a closer look would reveal that in practice it has not (and it will not) make a huge difference due to the CJEU’s strong commitment to fundamental rights protection, the multi-level dialogue between the two Courts and the growing importance of the Charter in the EU legal order. The Charter recognises the ECHR as the minimum standards of protection in the Union system, while both Courts closely follow each other’s judicial approach and case law.

Therefore, it is clear that the EU has not shown any signs of complacency because it has the protection of the *Bosphorus* presumption and has been very active in ensuring that a finding of “*manifest deficiency*” is not made regarding the substantive guarantees offered and the mechanism controlling their observance as compared to the ones guaranteed by the ECHR.³⁵¹ This equivalent protection construction bears great resemblance to *Solange II*, but it was evident that there was no intention to create a ‘*double standards*’ system even temporarily, whereby different obligations were created for ECHR parties, which are Members of the EU and the non-EU ECHR contracting parties.

In the Joint Concurring Opinion, Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki pointed out that the criterion ‘*manifestly deficient*’ establishes ‘*a relatively low threshold*’. Indeed they found it ‘*difficult to accept*’ that in the name of ‘*equivalent protection*’, EU law could be authorised to apply less stringent standards than those of the ECHR, especially

³⁵¹ *Bosphorus* supra note 31 at para 155.

given that only a minimum level of protection is established by the Article 53 ECHR.³⁵² However, the equivalent protection was constructed in such a way that not only it was rebuttable, when the protection afforded was below the specified threshold, but also the review of the equivalence of protection was to be on a case-by-case basis.

In the case of *M.S.S.*³⁵³, the judges refrained from directly denouncing EU law when a clash was identified between the EU Asylum Directives and the ECHR, but gave priority to the protection of fundamental rights of the applicant. The same line of argument was adopted by the CJEU in the subsequent case of *M.E. v Refugee Applications Commissioner*³⁵⁴ where the judges clarified that there can be no 'conclusive presumption' that all EU MSs observe the fundamental rights of the EU'.³⁵⁵

The EU cannot accede on an *equal footing*, whilst maintaining the presumption of equivalent protection. This would elevate the Union at a '*primus inter pares*' status. Such status would not only contradict the notion of *equality* among Contracting Parties, but would also undermine the *credibility* of the Union internationally as to its commitment to adequate protection of fundamental rights. The whole idea of the external scrutiny by an independent forum would end up being futile, and criticisms will be raised on the Union's real motivations and the actual importance of the Accession.

Although, it is important that the CJEU is afforded a margin of appreciation or discretion, when implementing decision of the ECtHR is noted. This is also important for the ultimate autonomy of the EU legal order. Indeed the Strasbourg Court might find it necessary to apply a wider margin of appreciation where the EU is concerned, since an EU legal act already represents the product of harmonising European cooperation between 28 EU MSs

The authors of this Report recommend that in the post-Accession era, the *Bosphorus* presumption should be abolished.

They also recommend that in the post-Accession era, the CJEU should be afforded a margin of appreciation or discretion when implementing decisions of the ECtHR. Nevertheless, the final say of the ECtHR and the demands of the ECHR must be respected. A margin of leeway for the CJEU, thus, is only advisable insofar as specificities of EU law considerably impact on the facts of a given case and insofar as their respect requires flexible approaches.

³⁵² Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, and Concurring Opinion of Judge Ress, in *Bosphorus* supra note 31.

³⁵³ *MSS* supra note 112.

³⁵⁴ *M.E. v Refugee Applications Commissioner* supra note 113.

³⁵⁵ *Ibid* at para 105. See also the AG Trstenjak's Opinion in Case C-411/10 *N.S. v Secretary of State for Home Department* [2010] OJ C 274/21, where she talked about a rebuttable presumption, not a conclusive one and for an obligation on Member States to operate the Dublin Regulation in a manner consistent with fundamental rights under EU law.

As a consequence of the monistic approach proposed here, the direct effect of the ECHR must be acknowledged as the ECHR becomes a comprehensive part of EU law after accession.

e) The effects of accession on areas of EU law having peculiar rules: the case of competition law and the CFSP

Competition law and CFSP are two areas, which will be considerably affected by the accession, mostly because of the peculiarity of the legal framework that surrounds them. The operation of these two fields of law was already problematic before accession. However, it is not the Accession *per se* that will create uncertainty or instability. The Accession just revealed certain complications that might arise in terms of the relationship between the two Courts, the competences of the Union and the interaction between Union law and the ECHR. The impact of accession on both areas was examined during the negotiations and also raised during the Oral Hearing at the CJEU.

The first issue is about the *ne bis in idem* principle within the Commission's centred territory of competition law and its application in the context of economic integration.

Although it is still not explicitly stated in the jurisprudence of the CJEU, the Court seems to converge with the Strasbourg Court in the conclusion that fines imposed for violations of competition law rules are of *quasi* criminal nature, despite the fact that competition law does not belong to the traditional categories of criminal law. Then, the Commission does not fall under the definition of a "tribunal" under Article 47 of the Charter. Any difference between the CJEU and ECtHR's case law is minimal and mostly in relation to terminology. EU law will continue to apply administrative penalties and administrative proceedings under EU law, and those would be considered *criminal* or *quasi criminal* for the purposes of Art 6 of the ECHR.³⁵⁶ In principle, the same applies to proceedings at MSs' level.³⁵⁷

Given this convergence, the accession will not change the standards of protection; it will just add another dimension: the ECtHR will be responsible for ensuring that the protection afforded is not below the threshold of the minimum standards guaranteed by the Convention.

The Report authors' recommendation is that accession would not affect the EU law's autonomy or the CJEU's role in the EU legal order in relation to this area of law.

As it was mentioned in the Oral Hearing, the Union was able to provide sanctions before accession, while the *ne bis in idem* principle was also applicable at EU and national levels. The Court of Human Rights can use the opportunity to learn valuable lessons from the operation of the EU competition system and the interaction between the EU courts and the Commission.

³⁵⁶ Case C-235/92P *Montecatini Spa v Commission of the European Communities* [1999] ECR I-4539 at paras 175–176

³⁵⁷ See *Menarini Diagnostics* supra note 301.

Another potential lesson to be learnt is about the role of undertakings under competition law as the Strasbourg Court has limited experience in applying the Convention to legal persons. The experience of the Commission in striking a balance between fair competition and cross-border trading within the internal market and the EU Courts' case law could be extremely useful to the ECtHR, when issues of human rights are also raised.

The second issue is about the impact of the Accession on the controversial area of CFSP.

As a result of CJEU's limited **jurisdiction** in this area of EU law, the vast majority of measures enacted within this framework are not subject to the Court of Justice's review under any of the EU law's relevant procedures (such as Arts 263, 258-9 and 267 TFEU). Therefore, since the EU Court cannot monitor and offer effective remedies for human rights violations within the former second pillar of the European Community, it has been suggested that this area of EU law should be excluded from the scrutiny of the Strasbourg Court.

The authors of this Report believe that this suggestion is against the whole idea of the EU acceding to the ECHR on an equal footing with the other contracting parties. Moreover, a blanket reservation in relation to such a big area of EU's 'constitutional' law would also undermine the *equal footing* argument.

It is indicative that the Accession Agreement makes no reference to possible exclusion or to an upholding of the *Bosphorus* presumption or a similar formula of 'equivalent protection'. As mentioned earlier in this section, such privileges contradict the rationale behind the EU's accession to the ECHR and, as in the case of *Bosphorus* presumption, cannot be reasonably endorsed after the Accession.

The exclusion of EU primary law from the ECtHR's external review poses a greater threat for the EU law's autonomy rather than a scenario under which the ECtHR will rule on a CFSP's case without CJEU's prior involvement.

The authors recommend that the EU, at the earliest convenience, should also extend full jurisdiction to the CJEU to avoid potential risks of external interference by Strasbourg in such a delicate area of EU law.

Appendix I

Interview template – CJEU Judges

Date:

Time and Length of interview:

Personal details

Judge:

Country of origin:

General questions

1. How long have you served as a judge/AG at the Court of Justice?
2. Have you experienced significant changes in the approach used by the Court over your period of service?

To introduce question 3:

In the cases C-11/70 *Internationale Handelsgesellschaft*, C-4/73 *Nold v Commission* and C-44/79 *Hauer v Land Rheinland-Pfalz* the Court of Justice affirmed that Fundamental Rights were integral to EC Law. It affirmed that the protection was inspired by the constitutional traditions of MSs and the ECHR.

3. To what extent you think the Lisbon Treaty has strengthened the fundamental rights protection and how this will change (if it will) the Court's approach to fundamental rights? How do you feel about the changes introduced by the Lisbon Treaty? Can we talk about a new era of integration based on rights? Is the Court of Justice now a Human Rights Court?
4. We have now three layers of protection of fundamental rights: a) the Charter; b) ECHR; c) the unwritten source of general principles of EU law. The relationship between these three layers of protections is rather complex and raises a number of

problems and questions. This is a paradise for lawyers but headache for the Court.

To what extent will the Court use one or the others when dealing with case law?

5. Do you think that the two European Courts need to work towards a more convergent system in Europe in relation to fundamental rights?

Conflict between freedom and rights

To introduce question 6:

The CJEU affirmed to be committed to protecting the rights recognised by the ECHR and National Constitutions. However, ‘accidents of litigation’ (case-law) have determined which rights have been recognised so far.

6. How has the Court decided whether a right had to be recognised as fundamental?
What has now changed?

To introduce question 7:

In the *Schmitberger* case the Court had to balance the exercise of freedom of expression and assembly against the free movement of goods.

7. How can the Court balance fundamental rights against fundamental freedoms?
Please elaborate on this aspect considering the new developments introduced by Lisbon.

To introduce question 8:

In the *Omega case (C-36/02)* about the laser sport being banned as an affront to human dignity, Advocate General Stix-Hackl states “There is hardly any legal principle more difficult to fathom in law than that of human dignity.” It was given preference to Dignity as protected in national law (German Constitution) against freedom of services and freedom of movement of goods.

In her article “Unlocking Human Dignity: Towards a Theory for the 21st Century” European Human Rights Law Review Catherine Dupre 2009 affirms Dignity “highlights the depth and complexity of human emotions and needs”

8. How can the Court solve conflicts of rights? Is there a hierarchy of rights? Is human dignity at the top of the hierarchy?

To introduce question 9:

The Court in C-44/79 *Hauer* stated that “the question of a possible infringement of fundamental rights by a measure of the Community [Union] institutions can only be judged in the light of Community [Union] law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular MS would, by damaging the substantive unity and efficacy of Community [Union] law, lead inevitably to the destruction of the unity of the Common Market and the jeopardising of the cohesion of the Community [Union]” (para 14).

9. Has the Court departed from the approach used in the *Hauer* case later on in *Schmitberger* and *Omega*?
10. What is the legal value afforded to a right as against other competing interests?
11. Will European integration speak now the language of rights more than the language of the common market?

Method of interpretation

12. Are fundamental rights at the core of the European agenda? And at the core of the Court’s agenda?
13. Will the teleological approach used by the Court be based on the mission of the Union and how the new mission will influence the Court’s approach?
14. Will the margin of appreciation used by the ECtHR be of any influence to the interpretation methods of the CJEU?
15. The method used in cases such as *Schmitberger* and *Omega* resembles the margin of appreciation used by the ECtHR, as the Court of Justice referred to the constitutional

traditions of the specific member state. Do you think that in the field of human rights the Court of Justice has adopted a similar approach than the ECtHR?

Relationship between the Charter and General Principle of Union law

16. Do you feel that the Charter will change the Court's approach to fundamental rights within the EU? Art 6 (1) TEU says 'The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'

17. What is the role of the Charter in the new EU legal order? Do you feel that it mirrors and/or develops the content of the ECHR in the EU, also covering other fundamental rights, such as the social rights?

18. In *Kucukdeveci v Swedex GmbH*, which was a case of age discrimination, for the first time the Court has mentioned the legal nature of the Charter, but then it has discussed the case using the general principle of Union law. What is the reason for that? Is it because some MSs have opted out the Charter?

Relationship between the Charter and the Convention

19. What is the relationship between the Charter and the ECHR? Will the Court base its future judgements on the Charter or the Convention?

Introduction to question 20:

Weiler says this is not a real dilemma as one right's maximum protection is another right's minimum protection. Will the Court adopt the Lowest Common Denominator (Risks dilution of rights) or favour the Maximum Standard of protection (would favour MS with the highest level? Article 52(3) of the Charter suggests the use of the ECHR as a minimum standard of protection.

- 20.** How does the Court intend to establish a clear link between the two instruments and preserve the ECHR as a minimum standard of protection? What is the desired level of protection?
- 21.** The Court is not bound by its own precedent. Will the ECtHR jurisprudence bind the CJEU?

EU accession to ECHR

- 22.** Art 6(2) TEU states “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’ Do you think will this happen soon?
- 23.** How will the ECtHR exercise its external scrutiny in relation to EU law?
- 24.** Would you envisage a mechanism whereby the CJEU could require an optional non-binding opinion to the ECtHR on its interpretation of the Convention?

Relationship between the two Courts

- 25.** Do you think the Court of Justice and the ECtHR will be in a hierarchical vertical position? It has been argue that the EU's accession would not place Strasbourg 'above' Luxembourg, but would allow Luxembourg to fulfil the role of constitutional court. Therefore, before coming to Strasbourg for an interpretation on an ECHR point in EU law, Strasbourg litigants would have to exhaust all judicial avenues - including Luxembourg. However, do you think that the CJEU would be able to continue interpreting ECHR rights in the EU context?
- 26.** Initial concern that extending the competence of the Court of Justice to cover human rights issues would weaken the authority of the ECtHR. Lord Russell-Johnston

stated “Two parachutes are better than one...as long as you do not try to open them both at the same time”. Do you agree with his view?

- 27.** “Both European courts seem well aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and Member States alike” (Callawaert, 2009). Is there an intra-judicial dialogue between the CJEU and the ECtHR? If not officially, do you think that there should be a dialogue or a common understanding for the clarification of the future of HR protection from the 2 Courts?
- 28.** “The CJEU has treated...the European Convention on Human Rights, as if it was binding upon the Community [Union], and has followed scrupulously the case-law of the European Court of Human Rights, even though the European Union itself is not a party to the Convention.” (General Advocate Jacobs). Do you share this view?
- 29.** Do you have any procedures in mind that should be developed to strengthen the dialogue between the two Courts?
- 30.** What will happen if cases appear where there is divergence between the CJEU and the ECtHR case law?

Interview template – ECtHR Judges -

Date:

Time and Length of interview:

Personal details

Judge:

Country of origin:

A. General questions

1. How long have you served as a judge at the European Court of Human Rights?
2. Have you experienced significant changes in the approach used by the Court during your period of service, particularly following the enlargement of the CoE as a result of accession by many countries of central and east Europe and the fact that the Lisbon Treaty has assigned new responsibilities to the European Union?
3. Are you aware of the development at the EU level? The entry into force of the Lisbon Treaty has made the Charter binding and has introduced the legal basis to accede to the ECHR.

How do you feel about the changes introduced by the Lisbon Treaty? Do have strengthen the protection of human rights at EU level?

4. Are you in favour of the EU accession to the ECHR?

B. Hierarchy of rights

5. The CoE has affirmed that there are two broad categories of rights: absolute rights (Arts 2, 3, 4(1), 7) and limited rights (Arts 5 and 6). In the *Chahal v United Kingdom* (1996) the ECtHR declared that Article 3 is the most fundamental right in a democratic society and “no

derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation”.

a) What does this mean? Do you apply different criteria depending on the right, which is violated?

b) Which right is at the top of the hierarchy? (i.e. life, dignity?) How do you weight the different rights in case of conflict?

C. Method(s) of interpretation

6. The term “margin of appreciation” is not to be found either in the text of the Convention or in the preparatory work.

Do you share the view that this judge-made rule is the key for the success of the ECtHR over the years?

7. The margin of appreciation has been praised as a “*legitimate principle of interpretation of the Convention*”, but it has also been criticised for involving ‘*a risk of manipulation of the identified factors and parameters and the resulting lack of legal certainty*’.

(Spielmann, ‘Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?’, (2012) CELS Working Paper, p. 28)

Do you think that the margin of appreciation is too flexible as a method that might appear not so rigorous in the eyes of the citizens of the Contracting Parties?

8. Do you think that the margin of appreciation used by the ECtHR can be adopted by the CJEU as one of its interpretative methods? Is there room for convergence or do you share the view that the two Courts should retain their own methods?

9. The method used in cases such as *Schmidberger* (Case C-112/00) and *Omega* (C-36/02), where the Court of Justice referred to the constitutional traditions of the specific member states, resembles the margin of appreciation used by the ECtHR.

Do you think that this happened for the needs of the individual cases or is it the result of judicial influence? What is the difference between the margin of appreciation and the wide margin of discretion used by the Court of Justice/national specificities?

10. The ECtHR simultaneously celebrates a form of pluralism through the doctrine of the margin of appreciation and insists on hierarchy in stipulating a binding minimal norm.

How to balance these two in the relationship with any EU measure either implemented at national level or introduced by the institutions?

D. Relationship between the EU Charter of Fundamental Rights and the ECHR

11. The European Convention on Human Rights entered into force on the 3rd September 1953 in a post-war context. By contrast the Charter of Fundamental Rights is a more modern bill of rights.

Would you consider referring to the Charter as a tool when either an EU MS is violating human rights when implementing EU law or as part of its own legislative authority?

Alternatively, would you not base your judgement exclusively on the Convention ignoring the Charter?

E. Relationship between the CJEU and ECtHR

12. “Both European courts seem well aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and Member States alike” (Callawaert, 2009).

What are the greatest challenges that the two Courts have to face?

13. We are aware that there has been an intra-judicial dialogue between the CJEU and the ECtHR.

a) Do you think that this dialogue has a positive effect on the relationship between the two Courts?

b) Do you think there should be a more official dialogue between the two Courts, especially as the negotiation process intensifies?

c) How do you see the relationship between the two Courts in the post-Lisbon era?

14. The relationship between the CJEU and the ECtHR has been regulated so far in an analogous manner as the *Solange* principle “potential clash of jurisdiction has been solved

through an agreement to defer to one another's decisions, provided those decisions respect mutually agreed constitutional essentials".

The CJEU has regularly considered and mentioned the Convention in its case law recognising a "special significance" to it and its case law was inspired by this instrument. However, the CJEU held that 'the European Community was not bound by the ECHR, despite all its MSs ratified the Convention, and that the EC lacked competence to accede the ECHR'.

The ECtHR, in the "*Bosphorous*" case has refused to review an EC regulation implementing a UN Security Council resolution, although the content of the EC regulation was restrictive of the applicant's property right. The decision was based on the presumption that EU law did not breach the ECHR as the ECtHR held the system of safeguarding fundamental rights guaranteed at the EC level was comparable to that provided by the Convention.

To what extent the legal pluralism's doctrine applies to the interlocking EU and CoE's legal systems in the field of human rights?

15. In an attempt to avoid interferences with the ECtHR jurisdiction, the CJEU recently in *C-571/10, Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (IPES) has concluded that Article 6(3) TEU does not govern the relationship between ECHR and legal systems of Member States.

Will the relationship between the CJEU and the MSs be scrutinised after the EU's accession to the ECtHR, in case of wrong implementation by the MSs of an EU legal instrument?

F. The EU's accession to ECHR

16. Art 6 (2) TEU states "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".

a) Do you think accession will happen soon?

b) What do you think about the Accession Treaty?

c) How do you feel about the possibility of adding an 'EU' judge in the ECtHR?

17. The ECtHR will be required to exercise an external scrutiny in relation to possible violation of human rights if the infringement relates to EU law, for instance when the alleged violations relates to an EU legal act.

How will the ECtHR exercise its external scrutiny in relation to EU law?

Will the CJEU be heard first if a violation is a consequence of an EU act?

If the CJEU is given the “first word”, will the ECtHR follow the CJEU decisions or will act in a completely independent manner? In the latter option, the two decisions might diverge and this then might have implications at EU level for lack of precedence in EU law.

18. The Draft Agreement is silent regarding the future of the so-called *Bosphorus* (equivalent protection test (established in *Bosphorus v Ireland*). From one side, keeping the equivalent protection test would mean the continuity of the ECtHR practice and bilateral respect to the decision making procedures in EU, from the other side it would favour the EU contradicting to the idea of EU participation in the ECHR on the equal footing with the other High Contracting States.

What is your view on if and how this test should be applied in the future, and whether it should apply to all EU-related cases, including the ones against the EU?

19. If the EU is seen by ECtHR as another state/high contracting party, then the ‘quasi’ federal approach prevail over the extreme epistemic pluralism of no solution in case of conflicts. The ECtHR would be placed at the apex of the hierarchy of the multilevel European human rights system.

Have you any views to share about this?

20. Dr. Adam Weiss, assistant Director of AIRE, stated that the co-respondent mechanism envisaged by the Draft Agreement will put significant additional burdens on applicants who will be forced into facing two instead of one defendant, in a David versus Goliath battle.

Do you share this concern? What is your opinion about the proposed co-respondent mechanism?

21. Do you have anything else to add that you feel is relevant to the purposes of the project?

Appendix II

Interview template – EU and CoE officials-

Date:

Time and Length of interview:

Personal details

EU official's name:

Role:

Country of origin:

A. General questions

1. How long have you served in your institutional role?
2. Have you experienced significant changes in Europe during your period of service?
3. To what extent do you think the Lisbon Treaty has strengthened the protection of fundamental rights within the EU? How do you feel about the changes introduced by the Lisbon Treaty?
4. Can we talk about a new era of integration based on rights? Will European integration within the EU now speak the language of rights more than the language of the common market?
5. What is your role in the accession process? Do you think that the Council of Europe and the EU need to work towards a more convergent system in Europe in relation to fundamental rights?

B. General questions on accession:

6. The accession of the European Union (EU) to the European Convention on Human Rights (ECHR) constitutes a major step in the development of human rights in Europe.

Although it has been in the agenda of discussion since the late 1970s, it took almost 40 years for the accession to become a legal obligation. Despite its necessity, the EU accession to ECHR has raised a lot of legal, institutional and technical questions that have to be resolved in the current negotiations.

- **Can you please identify some of the main legal issues that lead to such a delay? What was the biggest challenge or obstacle that you had to overcome?**
- **When did the negotiations on accession officially begin between the Council of Europe and the European Union?**
- **Are the modalities of accession legally or/and politically complex?**

7. The EU's accession to the Convention is an incentive to develop the policies that strengthen the effectiveness of fundamental rights within the continent. According to the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, Viviane Reding, 'the accession of the EU to the Convention will complete the EU system of protecting fundamental rights'.

- **What does this accession mean from the perspective of the citizens?**
- **Does the accession constitute the missing piece of human rights protection's jigsaw puzzle?**

8. According to Thorbjørn Jagland, Secretary General of the Council of Europe, 'we now have a unique opportunity to create a continent-wide area of human rights, in which 47 governments and the institutions of the European union will be bound by the same set of human rights standards and scrutinized by the same human rights court'.

- **Do you see this dream come true within the next few years?**

9. Pursuant to Article 6(2) TEU, as well as Article 2 of Protocol 8 attached to the Treaty of Lisbon, the accession "shall not modify the EU competencies" as defined by the Treaties.

- **Do you think that the Union's specificity as a distinct legal entity vested with autonomous powers is an obstacle to the accession?**
- **Will the accession compromise the independence of the EU decision making process?**
- **At the same time, will it affect the positions of EU countries as Parties to the ECHR?**

10. In the context of the negotiations on accession:

- **Have you taken into consideration the views of the judges of the two Courts when drafting the accession treaty?**

11. The accession agreement will have to be ratified by all 47 contracting parties to the ECHR in accordance with their respective constitutional requirements, including those who are not EU Member States.

- **How smooth and swift do you think the process will be?**

C. Questions on the accession's procedures:

12. It is not under debate the fact that the EU will accede to the Convention on an "equal footing" with the other Contracting Parties, i.e. with the same rights and the same obligations.

- **Do you support the view that the proposed "co-defendant mechanism" is the most effective solution?**
- **What do you answer to the voices of concern arguing that the mechanism seems to be unnecessarily complex?**

13. The EU accession to ECHR will hopefully ensure that a complementary relationship, rather than one of competition, will prevail between the two courts.

- **How do you think this relationship will be shaped?**
- **Will both Courts use the ECHR as a common denominator or will the ECtHR also refer to the Charter of Fundamental Rights when dealing with EU Member States?**

- 14.** On July 19, 2011 the members of the CDDH-UE agreed on a set of draft legal instruments on the accession of the Union to the ECHR. The most important of these instruments is the draft Agreement on the Accession of the European Union to the ECHR.
- **At the extraordinary meeting many delegations “considered the draft instruments [...] as an acceptable and balanced compromise”. Had you anticipated such a reaction?**
 - **Do you consider the draft Agreement a strong basis for the finalization of the negotiations?**
- 15.** Article 218(11) TFEU states that a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice to verify whether an envisaged agreement is compatible with the Treaties.
- **Do you think this could stop/postpone the entry into force of the Accession Treaty?**
 - **Do you consider it a potential threat to the whole process?**
- 16.** From your experience so far during the negotiations, how conflicting or differing were the objectives and expectations of the two sides? Do you find that initially the Contracting Parties, which are not among the EU Member States, were not sharing the same enthusiasm for a swift conclusion of the accession negotiations?
- 17.** When a final Accession Agreement is ready, the Commission will ask the CJEU to give an opinion on it. Under the assumption that the final Accession Agreement does pass the scrutiny of the CJEU, the next step is signature and ratification.
- Do you think that there is a risk that one mischievous state may clog the entire accession process for years, similar to what happened with ECHR protocol 14?**
- 18.** Do you have anything else to add that you feel is relevant to the purposes of the project?

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