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Walking on a tightrope: the draft accession agreement and the autonomy of the EU legal order

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Abstract

Keywords: EU accession ECHR – autonomy – co-respondent – prior involvement of the ECJ

This contribution measures the first draft agreement on the accession of the EU to the ECHR by the strict requirements of the autonomy of the EU legal order. It concludes that a review by the ECtHR would be compatible with the autonomy. However, the procedure before the ECtHR provided for in the draft agreement raises serious problems. Both the co-respondent mechanism and the prior involvement of the ECJ are well intended but may not pass the hurdles erected by the ECJ in its case law on the autonomy.

I. Introduction

The ongoing negotiations on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR or Convention) prove to be a difficult task for the negotiators. Since it involves the unusual occurrence of a supranational organisation signing up to a sophisticated system of human rights protection, this does not come as a surprise. Apart from the political difficulties of obtaining the consent of forty-seven signatories to the Convention and of the EU's institutions and Member States, the requirements of two very

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different legal orders need to be brought in line. From the point of view of European Union law, the most prominent obstacle to an integration of the EU into the external supervision mechanism of the Convention is the autonomy of the EU legal order. From the very start of the negotiations it has been clear that that autonomy, which is jealously policed by the Court of Justice of the European Union (ECJ), would be a major issue for the negotiators. This contribution is therefore dedicated to the intricacies which the negotiators, and potentially the ECJ, face in this respect. It is based on the latest version of a draft agreement published by the informal working group on accession.¹ It contains a critical analysis of the draft with regard to the autonomy of the EU's legal order but also makes more general comments on whether the proposed solutions would be workable.

II. Background: EU Accession to the ECHR

The EU is currently not a party to the ECHR. As a consequence, it is not directly bound by the human rights guaranteed therein. An accession of the EU to the Convention has been on the agenda for over thirty years², but the technical hurdles to it have only recently been removed. The ECHR is now explicitly open to an accession by the EU.³ And the new Article 6 (2) TEU gives the EU not only the competence to sign up to it but at the same time places it under an obligation to do so by stating that 'the Union shall accede to the ECHR'.

Negotiations between the Council of Europe and the EU commenced promptly in the summer of 2010.⁴ An 'informal working group' presented a first draft agreement in February 2011⁵ and a revised version in March 2011⁶.

An accession would end the peculiar situation in which the EU finds itself at the moment. The EU has become a major actor on the international stage and takes pride in its human rights policy.⁷ Furthermore, respect for human rights is one of the conditions for EU

¹ Revised draft agreement on the accession of the EU to the Convention, CDDH-UE(2011)06.

² Heribert Golsong, Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften, Europäische Grundrechtezeitschrift 1978, 346; European Commission, Memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bulletin of the European Communities, Supplement 2/79.

³ Article 59 (2) ECHR as amended by Protocol 14 to the Convention, which entered into force on 1 June 2010.

⁴ Council of Europe, press release 545(2010), 7 July 2010; the Council gave the Commission a mandate for negotiation on 4 June 2010 with negotiation directives (Document 9689/10), which remain classified.

⁵ CDDH-UE(2011)04.

⁶ CDDH-UE(2011)06.

⁷ On the EU's human rights policy in general cf. Eeckhout, *External Relations of the European Union*, (Oxford 2004), p. 465.

membership.⁸ Thus the fact that the EU itself is not a signatory to any human rights instrument at the moment seriously undermines its credibility internationally. By signing up to the ECHR the EU would subject itself to the very standards it requires of others and its own legitimacy would be enhanced. More importantly, an accession of the EU to the ECHR would close an important gap in the external control exercised by the European Court of Human Rights (ECtHR or Human Rights Court or Strasbourg Court). It is well known that under certain circumstances individuals can hold the Member States of the EU responsible for violations of the ECHR before the ECtHR. The leading cases in this respect are *Matthews* and *Bosphorus*.⁹ In *Matthews*, the Court of Human Rights held that the Convention generally allowed the Member States to transfer sovereignty onto the EU. But where they do so, they are responsible to ensure that Convention rights are 'secured'. This means that where EU law violates the Convention, an individual can hold a Member State to account. This stance was generally confirmed in *Bosphorus*, albeit with a twist. *Bosphorus* concerned the impoundment by Irish authorities of an aircraft owned by the National Yugoslav Airline but operated by a Turkish airline. An EU Regulation aiming at transposing an embargo against Yugoslavia imposed by the UN Security Council required the impoundment of Yugoslav aircraft. In its decision, the ECtHR confirmed its holding in *Matthews* but introduced an important distinction. While *Matthews* concerned a violation of the ECHR contained in EU primary law, the alleged violation in *Bosphorus* had its origin in a Regulation, i.e. EU secondary law. The ECtHR went on to state its famous presumption that as long as an international organisation 'is considered to protect fundamental rights [...] in a manner which can be considered at least equivalent to that for which the Convention provides' the Court would presume that a State has acted in compliance with the Convention where the state had no discretion in implementing the legal obligations flowing from its membership of the organisation.¹⁰ That presumption is, however, rebuttable if the protection in the particular case is regarded as 'manifestly deficient'.¹¹ The ECtHR considered that the human rights protection offered by the European Union was equivalent to what the Convention requires. Since Ireland had impounded the aircraft on its territory, the ECtHR had no

⁸ So-called Copenhagen criteria, cf. Conclusions of the Presidency, European Council 21-22 June 1993 SN 180/1/93 REV 1. The criteria are now contained in Article 49 TEU.

⁹ *Matthews v United Kingdom* [GC], no 24833/94, ECHR 1999-I; *Bosphorus v Ireland* [GC], no 45036/98, ECHR 2005-VI.

¹⁰ *Bosphorus*, paras. 155 and 156.

¹¹ *Bosphorus*, para. 156.

difficulty finding that *Bosphorus* airlines were within its jurisdiction as required by Article 1 ECHR. This case law shows that the Member States can already be held responsible in lieu of the EU for violations of the Convention which have their origin in EU law. But where the alleged violation of the Convention did not occur within the jurisdiction of one of the Member States, the responsibility does not arise. This gap in the external supervision by the ECtHR became obvious in the case of *Connolly*.¹² *Connolly* was an employee of the European Commission who had been made redundant. He instigated labour proceedings before the Court of First Instance and then appealed to the ECJ. His request to submit written observations to the Opinion of the ECJ's Advocate General was denied. This denial, he argued before the ECtHR, constituted a violation of his right to a fair trial guaranteed by Article 6 ECHR. The ECtHR distinguished the case from *Bosphorus* arguing that the respondent Member States had not intervened any time. Thus the violation did not occur within their jurisdiction and they could not be held responsible.

The accession by the EU to the ECHR would close this gap in the human rights protection. It would be possible for an applicant such as *Connolly* to hold the EU directly responsible in such cases. Furthermore, the accession would ensure that the case law of the two European Courts would keep on evolving in step.¹³ Where the Court of Justice deviates from the case law of the Court of Human Rights, an applicant would have the opportunity to challenge this before the ECtHR.

III. The Autonomy of the EU Legal Order

An accession treaty would have to be compatible with the EU's founding Treaties and will probably be the subject of an Opinion by the ECJ requested under Article 218 (11) TFEU. The most prominent obstacle for international agreements is the autonomy of the European Union's legal order, which some past draft agreements have failed to pass. The ECJ has had a chance to flesh out what the autonomy of EU law means in a number of Opinions and contentious cases. Since the accession will subject the EU's legal order to an external scrutiny by the ECtHR, the autonomy of EU law is likely to take centre stage in the accession

¹² *Connolly v 15 Member States of the European Union*, no 73274/01, 9 December 2008; confirmed in: *Beygo v 46 Member States of the Council of Europe* no 36099/06, 16 June 2009; *Rambus Inc. v Germany*, no 40382/04, 16 June 2009.

¹³ In the words of former Advocate General Jacobs: 'The ECJ [...] has followed scrupulously the case-law of the European Court of Human Rights', Jacobs, *The Sovereignty of Law* (Cambridge 2007), pp. 54-55; on past and current developments cf. Callewaert, "The European Convention on Human Rights and European Union law: a long way to harmony", *European Human Rights Law Review* (2009), 768.

negotiations and before the ECJ. The following short evaluation of the most important decisions on autonomy provides the background for the remainder of this contribution.

The ECJ's case law on autonomy reveals that a distinction needs to be drawn between two dimensions of that autonomy: an internal dimension, of relevance to the relationship between the EU's legal order and the domestic legal orders of the Member States, and an external dimension dealing with the relationship between the EU legal order and international law. The former relationship was addressed very early on in the Court's case law when it held in the landmark decision of *Costa v ENEL* that the (then) EEC Treaty constituted 'le droit né du traité issu d'une source autonome' which was later translated into English as 'the law stemming from the treaty, an independent source of law'.¹⁴ In that case the autonomy of the EU's legal order was employed as an argument for the primacy of EU law over domestic law. Moreover it meant that its binding force and primacy are not dependent on the domestic law of the Member States, but flow from the Treaties themselves.¹⁵ It is remarkable that the ECJ did not elaborate on the concept of autonomy by providing a definition but seemed to take it as given. With regard to an accession of the EU to the ECHR, the external dimension of autonomy is of greater relevance. Its first mention can be found in Opinion 1/91 on the first draft agreement on the European Economic Area (EEA). In that Opinion the ECJ declared the first EEA draft agreement to be incompatible with the autonomy of the EU's legal order. The ECJ identified three distinct reasons why the agreement violated the autonomy of EU law.

First, the ECJ criticized the jurisdiction of the EEA Court envisaged by the agreement. That Court was to have jurisdiction over disputes between the parties to the EEA treaty. The term 'party to the treaty', however, had not been clearly defined since the EEA agreement was to be concluded as a mixed agreement, i.e. by both the EU and its Member States as parties. Thus in each of the proceedings before it, the EEA Court would have had to determine who was the correct 'party to the agreement'. There were three possibilities: the EU, a Member State or the EU and the Member States together. This assessment would have been based on the distribution of responsibility between the EU and its Member States under EU law. Thus the EEA Court would have had to interpret the EU's treaties. This would

¹⁴ ECJ, Case 6/64 [1964] ECR 585 (*Costa/ENEL*).

¹⁵ Pernice, "Costa v ENEL and Simmenthal: Primacy of European Law", in: Maduro/Azoulai (eds.), *The Past and Future of EU Law*, (Oxford 2010), p. 47 (48); on the development of the Court's case law regarding the internal dimension of autonomy: Barents, *The Autonomy of Community Law*, (The Hague 2004), pp. 239 et seq.

have been 'likely adversely to affect the distribution of responsibilities defined in the Treaties, and hence the autonomy of EU law' and consequently the exclusive jurisdiction of the ECJ.¹⁶

The second reason was very much related to the first. The EEA Court would have been given the jurisdiction to interpret the substantive rules of the EEA agreement. Many of the provisions in the EEA agreement had the same wording as similar rules in the EEC Treaty and had been drafted according to them. From the point of view of the autonomy of EU law, this alone would not have been problematic.¹⁷ The ECJ acknowledged that they would not necessarily have to be interpreted in the same way since the aim and object of the EEA agreement was different to that of the EU Treaties. While the former was concerned with free trade and competition in economic relations between the parties, the latter's objectives went further by creating a legal order of its own.¹⁸ However, it was the intention of the drafters that the provisions should be interpreted uniformly. Thus, the ECJ concluded, any interpretation of these identically worded provisions in the EEA Treaty would necessarily prejudice the interpretation of the provisions of the EU's Treaties. The ECJ did not consider it sufficient that the EEA Court was obliged to follow the ECJ's case law on these provisions since the agreement only provided for the EEA Court to follow the case law existent on the day of signature of the EEA agreement. Any new developments in the ECJ's case law would not have been included.¹⁹

Third, the agreement foresaw a possibility for the domestic courts of the EFTA States to make a request for a preliminary reference to the ECJ regarding the interpretation of the EEA agreement. The ECJ held that an agreement concluded by the EU could transfer new functions on the EU's institutions. However, the autonomy of EU law meant that such a transfer could not lead to a *de facto* amendment of the Treaties. The problem in the case of the first EEA agreement was that the ECJ's answers to the requests by the EFTA states' domestic courts would not have been binding on them. This, the ECJ held, would have changed the nature of the preliminary reference procedure since under EU law any answer given by the ECJ binds the domestic court making the reference. Such a change in the

¹⁶ ECJ, Opinion 1/91 [1991] ECR I-6079, para 35.

¹⁷ *Ibid*, para 40.

¹⁸ *Ibid*, paras 14-16.

¹⁹ *Ibid*, paras 41-46; in the eyes of the Court, the problem was even aggravated by the agreement providing for ECJ judges to sit on the EEA Court.

nature of the functions of an EU institution could only be brought about by way of Treaty amendment according to Article 48 TEU.²⁰ In Opinion 1/00 the ECJ took the opportunity to restate in its own words what the autonomy of EU law meant. It identified the following two aspects of the external dimension of autonomy:

Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered [...]

Second, it requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement.²¹

Thus an international court must not interpret the Treaties in an internally binding fashion. In light of the Opinions rendered, the threshold for this seems to be rather low: it suffices if there is a danger that an international court prejudices the interpretation of the Treaties. Furthermore, the EU and its Member States must not circumvent the amendment procedure laid down in Article 48 TEU by way of an international agreement with third parties. In *Kadi* the Court confirmed this to mean that an international agreement equally could not prejudice the constitutional principles of the Treaties, especially fundamental rights.²² This conclusion added an additional twist to the ECJ's jurisprudence on the external dimension of the EU legal order's autonomy. An agreement must neither constitute a hidden amendment to the Treaties nor may it touch upon other constitutional principles in primary EU law, including fundamental rights, which at the time the *Kadi* decision was handed down were only protected as unwritten general principles of EU law. The autonomy of EU law in its external guise is therefore of a constitutional quality. Similar to its internal dimension, the external autonomy of the EU legal order means that it is not dependent on the rules of another legal order, in this case international law.²³ EU law is therefore self-referential.²⁴ It ensures that the Treaties cannot be amended through the backdoor without sticking to the amendment procedure laid down in Article 48 TEU. Treaty amendments are only possible in so far as EU law provides for them. Furthermore, it guarantees that the

²⁰ Ibid, para 61.

²¹ Ibid, paras 12 and 13; this was re-affirmed in the *Mox Plant* decision, Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paras 123 and 124.

²² ECJ, Case C-402/05 P *Kadi v Council and Commission* [2008] ECR I-6351, para 285.

²³ Barents, n 15, 172 and 259.

²⁴ Barents, n 15, 259.

content of the EU's internal rules are not determined by the interpretations of an outside body but only by the EU's own institutions, most notably the Court of Justice.

The concept's relevance has again become apparent in the Court's recent Opinion 1/09²⁵ on the Draft Agreement on the European and Community Patents Court, which the ECJ declared to be incompatible with the Treaties. The ECJ distinguished the agreement before it from the agreements in the Opinions discussed above. The Patents Court would not only have been given jurisdiction to interpret the provisions of an international agreement but also to interpret EU law²⁶, which the Court had on previous occasions considered incompatible with the autonomy of EU law. The Court did not regard the built-in guarantees for the involvement of the ECJ to be sufficient even though they were closely modelled on the preliminary reference procedure contained in Article 267 TFEU. It based its arguments mainly on the effect this would have on the courts of the Member States since under the Patent Agreement they would have been divested of their jurisdiction to decide disputes on EU patents.²⁷ The agreement envisaged that their jurisdiction should be replaced by an exclusive jurisdiction of the Patents Court on actions relating to patents²⁸ leaving the national courts only with residual jurisdiction in these matters. This, the ECJ argued, would also strip them of their powers in relation to the interpretation and application of EU law.²⁹ While the Patents Court was given the right, and in its guise as an appeal court the duty, to make a preliminary reference to the ECJ, the ECJ concluded that there were not sufficient guarantees for its own involvement.³⁰ The ECJ identified the problem that there was no possibility to enforce the duty to ask the ECJ for a reference. In contrast, where a national court violates its duty to make a reference to the ECJ, there are two possibilities to remedy this: either the Commission or another Member State can instigate infringement proceedings under Articles 258 and 260 TFEU.³¹ Alternatively, an individual can bring a state liability case against the Member State.³² Since the Patents Court would have been given jurisdiction to interpret European Union legislation and primary law, the Court regarded this deprivation of the national courts as a threat to the autonomy of EU

²⁵ Opinion 1/09 of 8 March 2011, nyr.

²⁶ Ibid, para 77.

²⁷ Ibid, para 64.

²⁸ Article 15 of the draft agreement.

²⁹ Opinion 1/09, of 8 March 2011, nyr, para 89.

³⁰ Ibid.

³¹ Ibid, para 87.

³² Ibid, para 86.

law as it would consequently divest the ECJ of its jurisdiction, too. This Opinion adds a new dimension to the ECJ's case law on the autonomy of the EU legal order. Not only does the Court regard the EU's own institutions to be protected from being affected by EU agreements but also institutions of the Member States which carry out obligations under EU law. The autonomy of the EU's legal order therefore permeates the national legal orders and partly incorporates them.

The preceding analysis provides the background for the following discussion. It is axiomatic that agreements which provide for the jurisdiction of a court outside the EU legal system are likely to come into conflict with the autonomy of EU law. Since the draft accession agreement is largely concerned with the procedure before the ECtHR, the autonomy of EU law will be an issue. This has been foreseen by the Lisbon Treaty, which in Protocol 8 states that the accession treaty 'shall make provision for preserving the specific characteristics of the Union and Union law', which is a reference to the preservation of the autonomy of EU law. The remainder of this contribution will therefore assess whether the provisions of the draft accession treaty would pass the hurdle of compatibility with the autonomy of EU law or whether further safeguards would be required. Furthermore, I will provide more general comments on the expedience of the proposal.

IV. Autonomy and the accession agreement

The accession of the EU to the ECHR is a rather unusual step in the EU's treaty practice. One major difference between the agreements subject to the Opinions discussed above and the accession treaty is that the accession treaty does not envisage a transfer of the *acquis communautaire* to third states. To the contrary, the situation is such that the EU is to join an established treaty regime, which will lead to a degree of adaptation on part of the EU. The EU will thus not be the sole dominant party at the negotiating table and might therefore find it harder to push through all of its wishes.³³ All this makes it a truly Herculean task for the negotiators. They have to devise a draft agreement which satisfies political demands, improves (or at the very least does not hinder) the protection of human rights and stays within the strict limits set by the autonomy of the EU legal order.

³³ Brandtner likened the situation of the EFTA states in the negotiations of the EEA agreements to that of a 'powerless audience' being frustrated by an important actor, Brandtner, "The 'Drama' of the EEA", 3 *European Journal of International Law* (1992), 300 (328).

Since a final accession treaty is not yet available, the following analysis is based on the revised draft released in March 2011³⁴ but also on other official documents available at the time of writing. These are documents produced by the informal working group, statements made by experts at a hearing before the European Parliament and documents produced by other national or EU institutions. I shall address four points. First, findings of violations by the Court of Human Rights. Second, the possible exclusion of primary law from the scrutiny of the ECtHR. Third, the co-respondent mechanism to be introduced by the accession treaty. Fourth, the plan to introduce a procedure to guarantee a prior involvement of the ECJ.

1. External Control by the Court of Human Rights

After an accession individual applicants will have the opportunity to address applications for violations of the ECHR directly against the European Union. Such violations can potentially be found in primary law, in secondary law, in executive actions or omissions and in decisions of the Union's courts. The question of concern for this contribution is whether such applications would be compatible with the autonomy of EU law. Two problems arise. The first is whether the ECtHR would have to interpret EU law in a binding manner. The second is whether a pronouncement by the ECtHR that EU legislation was in violation of the Convention would be compatible with the autonomy of EU law.

When deciding upon an alleged violation of the Convention, the Court of Human Rights must take relevant domestic law into account. Thus at first glance, there is a danger of the Court interpreting EU law. However, this is not the case. Just like other international courts, the ECtHR regards the domestic law of the parties to the Convention as part of the facts. This is reflected in the case of *Huvig* where the Court stated:

[I]t is primarily for the national authorities, notably the courts, to interpret and apply domestic law [...]. It is therefore not for the Court to express an opinion contrary to theirs [...].³⁵

Thus the ECtHR would not undertake a binding interpretation of the content of EU law. However, *de Schutter* rightly pointed out that there seem to be instances where the ECtHR

³⁴ CDDH-UE(2011)06.

³⁵ *Huvig v France*, no 11105/84, Series A no 176-B, para 28.

cannot merely accept the domestic law of the respondent party before it as facts.³⁶ These are situations where the Court's determination of a violation necessarily forces it to assess provisions of domestic law. For instance, the question whether a remedy is effective according to Article 13 ECHR necessitates an assessment of certain domestic legal provisions. The same goes for judgments on whether a restriction of a human right was 'prescribed by law'³⁷ or whether someone was deprived of their liberty 'in accordance with a procedure prescribed by law'³⁸. A recent example of a case where a similar assessment had to be made on the basis of EU law is the case of *Kokkelvisserij*.³⁹ Like *Connolly*, the applicant cooperative complained that it had not been given the chance to respond to the submissions of the Advocate General arguing that its right to a fair trial guaranteed by Article 6 ECHR had been infringed. In contrast to *Connolly*, the ECtHR addressed the substantive question. It accepted the ECJ's argument in the preceding case where it had pointed to Article 61 of its Rules of Procedure, which allows for the reopening of the oral procedure after the Opinion of the Advocate General has been rendered.⁴⁰ In view of that provision and an Opinion by Advocate General *Sharpston* in another case where she had explicitly referred to the possibility of reopening the proceedings according to that article⁴¹, the Court came to the conclusion that this was a realistic option. The example shows that the ECtHR occasionally has to look closely at provisions of domestic law. The autonomy of EU law would however only be affected if this led to an internally binding determination of their content, which would not be the case. The ECtHR only decides whether there was a violation of the Convention in a concrete scenario after proceedings at the domestic level have been completed. The Court then takes into consideration the relevant national law and the practice of the domestic courts in interpreting and applying this law. The Court's take on this question is reflected in the case of *Kemmache*:

The Court reiterates that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the

³⁶ de Schutter, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation", 83 *Revue Trimestrielle des droits de l'homme* [2010], 551-552.

³⁷ Cf. Art 8 (2), 9 (2), 10 (2), 11 (2) ECHR.

³⁸ Article 5 ECHR.

³⁹ *Kokkelvisserij v Netherlands*, no 13645/05, 20 January 2009.

⁴⁰ ECJ, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405; the ECJ's order has not been published, but an excerpt appears in the ECtHR's decision.

⁴¹ Opinion of AG Sharpston in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, para 157.

domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. [...]

Although it is not normally the Court's task to review the observance of domestic law by the national authorities, it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review. However, the logic of the system of safeguard established by the Convention sets limits on the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection.⁴²

In a case like this the ECtHR would therefore not be the first court to decide on the interpretation of domestic law. Its decision cannot prejudice that interpretation since the decision of the ECtHR is limited to two possible outcomes. Either it accepts the interpretative practice of a domestic provision by a domestic court as compliant with the Convention, in which case the Court would not need to interpret the domestic law itself but merely apply it as a fact. The interpretation of the provision would thus not be affected. Alternatively, the Court does not accept the domestic practice as sufficient. It could for instance come to the conclusion that a measure was not prescribed by domestic law or that there was no effective domestic remedy. The respondent party would then have to introduce new legislation in order to remove the violation. But it would not perform an original interpretation of domestic law. In neither scenario would the Court therefore determine the interpretation of existing domestic law in an internally binding manner. Thus the possibility of an external review does not endanger the autonomy of EU law.

The other issue regarding the autonomy of EU law would be situations where the European Court of Human Rights finds a piece of secondary law to have violated the Convention. Would such a finding be compatible with the autonomy of EU law? After all, the European Court of Justice has a monopoly on declaring European Union law invalid⁴³ and any such declaration by an international court would be incompatible with the autonomy of EU law. However, this is not what the Court of Human Rights would do.⁴⁴ Its decisions have no automatic direct effect in the legal orders of the parties to the Convention. This is evident from the wording of the Convention, which states in Article 46 that the 'High Contracting parties undertake to abide by the final judgment of the Court in any case to

⁴² *Kemmache v France*, no 17621/91, Series A no 296-C.

⁴³ ECJ, Case 314/87 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15.

⁴⁴ *W v Netherlands*, no 20689/08, 20 January 2009. The Court stated: '[I]t is not for the Court to rule on the validity of national laws in the hierarchy of domestic legislation.'

which they are parties'. The judgments of the ECtHR are of a declaratory nature and only binding under international law. Their effect in domestic legal orders depends on the individual parties. Yet as regards the EU's legal order, the ECJ's own case law suggests that the decisions of the ECtHR might become directly applicable. The Court held in Opinion 1/91:

Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice.⁴⁵

This does not mean, however, that the piece of EU legislation considered to be incompatible with the Convention would be invalid as soon as the ECtHR has spoken. Rather this excerpt from Opinion 1/91 suggests that the applicant would still need to seek a declaration of invalidity by the ECJ, which would be bound in its findings by the judgment of the Court of Human Rights. Alternatively, the other institutions of the EU could of course amend or revoke the provisions found to be in violation of the ECHR. Under international law, they would even be bound to do so in order to comply with their obligations under Article 46 ECHR. But this cannot lead to an incompatibility with the autonomy of EU law since the reason for the receptiveness towards the decisions of the ECtHR lies in the EU's own constitution as interpreted by the ECJ and would not be imposed upon it by the accession treaty. There is a further argument why a finding that an external control of EU actions and omissions by the Strasbourg Court would be compatible with the autonomy of the EU legal order. After all, Article 6 (2) TEU explicitly provides for the EU's accession to the ECHR. When drafting this provision, the Member States clearly anticipated that by signing up to the ECHR, the EU would subject itself to the jurisdiction of the ECtHR. Since the autonomy of the EU's legal order stems from the Treaties, explicit provisions in the Treaties cannot be in contradiction to it.

2. Exclusion of Primary Law

⁴⁵ Opinion 1/91 [1991] ECR I-6079, para 39.

In the discussions around the accession a proposal was made that primary EU law, i.e. mainly the Treaties, should be excluded from the ECtHR's review.⁴⁶ The reason behind it appears to be that the EU cannot itself amend its own primary law. Therefore, it should not be responsible for it.⁴⁷ This proposal does not appear to have been included into the draft agreement. The revised draft agreement allows only for reservations to be made under its Article 3 'in respect of any particular of the Convention to the extent that any law of the European Union then in force is not in conformity with the Convention'.⁴⁸ This would allow for primary law to be excluded. However, another provision dealing with the so-called co-respondent mechanism, which is discussed in greater detail below, suggests that such exclusion is not intended. The provision states that a Member State can be designated as a co-respondent 'if it appears that an act or omission underlying the alleged violation could only have been avoided by the [EU] disregarding an obligation upon it under European Union law which cannot be modified by its institutions alone.' This only applies to primary law. Were a complete exclusion of primary law intended, this provision would be redundant.

But be that as it may, it is submitted here that such exclusion would in fact endanger the autonomy of the EU's legal order. If a case were brought to the ECtHR, that Court would be forced to make an assessment as to whether the violation occurred in the EU's primary law (as it did in *Matthews*) or whether it could be found in secondary law or executive or judicial action. This assessment would have to be made on the basis of the Treaties. This means that the ECtHR would have to interpret them in a binding fashion, which would constitute a violation of the external autonomy of the EU legal order. Thus it would not be possible to exclude parts of EU law from a review by the ECtHR.

3. The co-respondent mechanism

After an accession by the EU to the ECHR, it will become crucial for an individual applicant to know who they should hold responsible in the Strasbourg Court for violations of the Convention originating in EU law. The reason is that it is usually the Member States who implement European Union law, so that from the point of view of an individual applicant the

⁴⁶ This seemed to be the opinion of the French government, cf. French Senate, Communication de M. Robert Badinter sur le mandat de négociation (E 5248) May 25, 2010, at: <http://www.senat.fr/europe/r25052010.html#toc1> (last visited 30 March 2011).

⁴⁷ Königeter, "Völkerrechtliche und innerstaatliche Probleme eines Beitritts der Europäischen Union zur EMRK" in J. Bast (ed), *Die Europäische Verfassung, Verfassungen in Europa* (Baden-Baden, 2005), pp.230, 245.

⁴⁸ Revised draft agreement, CDDH-UE(2011)06.

Member State acted. Thus such an applicant might be tempted to hold the Member State responsible even where that Member State had no discretion when it came to the implementation of EU law. The *Bosphorus* case provides an example. Ireland had no discretion in implementing the EU Regulation which demanded that Yugoslav aircraft should be impounded. Yet Ireland could be held responsible since her authorities had acted. Had the EU already been a party to the ECHR, *Bosphorus* might have chosen to hold the EU responsible since the alleged violation of its right to property was situated in the Regulation itself. However, since an applicant in a comparable situation might not be aware of the intricacies surrounding the implementation of EU law, she might equally hold the Member States responsible since she had only ever been in contact with that Member State's authorities and not with the EU.

Due to this difficulty in locating where exactly the alleged violation of the Convention happened, the negotiators of the EU's accession suggest introducing a co-respondent mechanism.⁴⁹ This mechanism would allow the EU and a Member State to be joined as co-respondents so that both could be held responsible for an alleged violation.⁵⁰ The co-respondent mechanism would be different to the already existing possibility of naming multiple respondents from the outset. The working group on accession identified the difference to lie in the fact that the EU and the Member States are not entirely autonomous from each other⁵¹ and that it would avoid gaps in accountability under the Convention system.⁵² The revised draft agreement provides that the mechanism would be triggered in two situations.⁵³ The first would be where the EU and one or more Member States are held responsible from the outset. The second situation would occur where either the EU or a Member State is nominated as the original respondent and a potential co-respondent joins at a later stage.⁵⁴ The status of co-respondent would be conferred on a party by decision of

⁴⁹ This mechanism was first introduced by the Council of Europe's Steering Committee for Human Rights in its 2002 study on the Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights, CDDH(2002)010 Addendum2.

⁵⁰ It is still undecided whether the mechanism should be extended to non-EU Member States in cases where they apply EU law through separate agreements, cf. CDDH-UE(2011)06, para 7.

⁵¹ CDDH-UE(2010)14, Informal Working Group on the accession of the EU to the ECHR, Meeting Report of the 3rd Working Meeting, 22 October 2010, para 9.

⁵² CDDH-UE(2011), para 37.

⁵³ Article 4 (2-4) of the revised draft agreement, CDDH-UE(2011)06.

⁵⁴ CDDH-UE(2010)16, Informal Working Group on the accession of the EU to the ECHR, Draft Revised Elements Prepared by the Secretariat on the Introduction of a co-respondent mechanism.

the Court.⁵⁵ It is not entirely clear how exactly a co-respondent would be designated. The explanatory report on the first draft reveals that a party would become co-respondent either on its own application with leave of the Court or by the Court inviting the co-respondent to join. Where the Court decides to invite a co-respondent to join, the potential co-respondent would be free to accept the invitation or not.⁵⁶ To this author it is not quite clear why this should be so. It is undisputed that where both are nominated as co-respondents by the applicant, they have no choice but to partake in the proceedings. There is arguably no difference in the situation where they are later joined by decision of the Court. As will become evident later, not compelling the co-respondent to join the proceedings leads to problems.

At first glance these proposals raise no serious objections with view to the autonomy of the EU's legal order. It is particularly noteworthy that the decision to join the EU and a Member State as co-respondents would not necessitate a determination of the competences between the EU and the Member States, which would be one possibility of deciding who is responsible under the Convention.⁵⁷ In that sense, the co-respondent mechanism is to be understood as a way of avoiding a situation in which a respondent, say a Member State, would claim not be responsible for the violation maintaining that the violation was in the responsibility of the EU, and vice versa. This makes the co-respondent mechanism a viable tool for avoiding interferences with the autonomy of the EU legal order. However, this would only be the case if it were made clear that the defendants in such proceedings would not have a right to raise the defence just mentioned. Such a defence would for instance be conceivable in a scenario like *Bosphorus*. If the EU refused to join the respondent Member State as co-respondent, that Member State should not be able to argue that responsibility in reality lies with the EU. This implies that the Member States' responsibility for EU law as expounded in *Matthews* would in principle have to continue. Otherwise the ECtHR would be forced to decide who was actually responsible for a violation of the Convention under EU law. Such an assessment would involve an interpretation of the Treaties in an internally binding manner and would thus violate the autonomy of the EU's

⁵⁵ Article 4 (1) of the revised draft agreement, CDDH-UE(2011)06.

⁵⁶ Cf. Explanatory report to the draft agreement on accession, CDDH-UE(2011)05, paras 45-52.

⁵⁷ Cf. Lock, "EU Accession to the ECHR: Implications for Judicial Review in Strasbourg", *European Law Review* (2010), 777.

legal order.⁵⁸ Arguably, in some cases such a situation could be avoided.⁵⁹ Again the *Bosphorus* scenario might provide an example. There the situation was relatively clear and easy to understand. Ireland's decision to impound the aircraft was based on one legal basis, which was a directly applicable EU Regulation. Thus there would have been no problem for the ECtHR to identify the location of the alleged violation without having to interpret EU law. However, one can conceive of cases where a similar assessment would be very difficult to make, for instance, the case of an EU Directive, which had been transposed into national law. A Member State might raise the defence that the alleged violation occurred because it did not have any discretion in transposing the relevant part of the Directive. If the ECtHR had to make an assessment of such a situation, it would be forced to interpret the Directive as to how much discretion was left to the Member State in the concrete case, which would be incompatible with the autonomy of the EU legal order. In order to avoid this, the draft should make it clear that such a defence was inadmissible.

According to the revised draft the EU may become co-respondent in proceedings against a Member State where it appears that the Member State could only have avoided an alleged violation by disregarding an obligation under EU law⁶⁰, which presupposes the existence of a normative conflict. This would only be the case where the Member State had no discretion in implementing its obligations or where there is discretion, all options would lead to a conflict with EU obligations. The earlier (first) draft agreement contained the requirement of a substantive link with EU law⁶¹, compared with which the new requirement is clearer and more certain. However, the new requirement also forces the ECtHR to make an assessment whether it appears that the respondent could only have avoided a violation of the Convention by violating an obligation under EU law. In order to make this assessment, the ECtHR has to define what the obligations of the respondent Member State are under EU law and whether EU law gave the Member State a degree of discretion, which would have allowed it to avoid the conflict. This may require quite a detailed interpretation of EU

⁵⁸ Cf. Opinion 1/91 [1991] ECR I-6079, para 34.

⁵⁹ These might be the cases for which the explanatory report on the draft agreement provides that 'the ECtHR is free to develop its own practice as regards the allocation of responsibility between respondents' but at the same time predicts that the ECtHR would not do so where there would be a risk of assessing the distribution of competences between the EU and its Member States, CDDH-UE(2011)05, paras 56.

⁶⁰ Article 4 (1) of the revised draft agreement, CDDH-UE(2011)06.

⁶¹ Article 4 (1) of the first draft agreement, CDDH-UE(2011)04.

primary and secondary law and is therefore potentially in conflict with the autonomy of the EU legal order.

A related issue would be whether the ECtHR should designate the precise origin of a violation it has found in proceedings brought against co-respondents. Such designation would raise the same objection just made: it would potentially involve an interpretation of EU law. The informal working group seems to be aware of this problem when stating that the 'Court would not acquire any power to rule on the distribution of competencies between the EU and its member states'.⁶² Nonetheless the working group considers that in some cases 'there may be an interest in precisely indicating the origin of the violation'.⁶³ Human rights organisations have also argued for such determination by the Court of Human Rights.⁶⁴ They rightly contend that this would allow for an effective execution of judgments and swift redress for the applicant. However, it is hard to see how such a demand could be squared with the need to preserve the autonomy of EU law. Instead of an allocation of responsibility by the Court of Human Rights, it would make sense to create a mechanism at EU level for this purpose instead.

Even more problematic cases might arise in connection with alleged violations of the ECHR by omission. A decision of such a case might involve a determination of who was under an obligation to act in the concrete case: the Member State or the EU. Such assessment could only be made on the basis of the division of competence within the EU and would violate the autonomy of the EU's legal order. If both EU and Member State are co-respondents this could be avoided if a defence of not being internally responsible were impossible. In that sense the discussion is very similar to the discussion on active violations of the Convention. A proposed amendment to Article 59 ECHR contained in the revised draft agreement, however, causes concern. It states that 'nothing in the Convention [...] shall require the European Union to perform an act or adopt a measure for which it has no competence'.⁶⁵ The explanatory report reveals that this provision reflects the requirement in Art 6 (2) TEU according to which the accession shall not affect the competences of the

⁶² CDDH-UE(2010)17, Informal Working Group on the accession of the EU to the ECHR, Meeting Report of the 4th Working Meeting, 8 December 2010, para 14.

⁶³ Ibid.

⁶⁴ Views of the European Group of National Human Rights Institutions to the CDDH-UE Working Group, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_EG_NHRI_Submission_9_March_2011.pdf (last visited 30 March 2011).

⁶⁵ Article 1 (2) of the revised draft agreement, CDDH-UE(2011)06.

EU.⁶⁶ The danger is, however, that this provision would be invoked as a defence in proceedings before the ECtHR, which then would have to decide on the allocation of competences based on the Treaties. This would not be in accordance with the autonomy of EU law and constitutes a weakness in the proposal by the informal working group, which does not seem to have been addressed yet. It would be better if in case of an omission no such defence could be raised and if the question were resolved internally by the EU and its institutions, most notably the ECJ. For this very reason, it is not necessary to include this provision into the agreement since an internal resolution of a violation of the Convention would have to be in accordance with Article 6 (2) ECHR anyway.

It follows from the above discussion that in order to comply with the requirements of the autonomy of EU law, the current legal situation whereby a Member State is generally held responsible for all actions and omissions associated with the implementation of its obligations under EU law would have to be retained. Neither the drafters nor the ECtHR should accept a defence raised by a Member State arguing that it had only acted in strict compliance with its obligations under EU law and was therefore not responsible. Furthermore, giving the ECtHR jurisdiction to define the obligations of the Member States under EU law as a preliminary requirement for the applicability of the co-respondent mechanism constitutes a violation of the autonomy of EU law. It is therefore suggested that the co-respondent mechanism should be re-defined. A co-respondent should only be joined to the proceedings at the request of the original respondent. In that case it would be the original respondent's responsibility to assess the situation. It would arguably be best placed to do so since in preparing a defence for its case it would have to consider whether the true responsibility for the violation lies with the EU or within its own jurisdiction. Should the designated co-respondent object to its involvement, it would have to do so under EU law but it should be impossible to raise an objection before the ECtHR. This solution would avoid an interpretation of EU law and an analysis of exact responsibilities of the Member States under the Treaties and would therefore help preserve the autonomy of EU law.

4. Prior involvement of the ECJ

As has been demonstrated, despite the envisaged co-respondent mechanism the Member States would remain responsible for violations originating in EU law. The main difference to

⁶⁶ CDDH-UE(2011)05, para 26.

the situation pre-accession would be that the EU could also be held responsible, be it as the sole respondent or as a co-respondent alongside one or more Member States. Where the EU is held responsible as a sole respondent, the only domestic remedy available to an individual at EU level is the procedure found in Article 263 (4) TFEU. Thus an applicant would have to go down that route in order to satisfy the requirement of Article 35 (1) ECHR according to which she must exhaust all domestic remedies and file the application within six months of the final decision.

Where the applicant chooses to hold a Member State responsible, the remedy to be exhausted is found in that Member State's legal order. Since the Member States implement the bulk of European Union legislation, an applicant will normally choose to take legal action in that Member State. There are two main reasons for this. First, the applicant may not be aware that the Member State's action was based on EU legislation and therefore may not be aware of the choice he has. Second, it may be tactically wiser to hold the Member State responsible since the national courts (and eventually the ECtHR) would also review whether the implementing actions of the Member State's authorities were in accordance with the Convention. Thus the ECtHR would not be restricted to examine the legal basis only, which would be the case if the application were directed against the EU.

Where the Member State is designated as the respondent, the problem arises that the ECJ may not have made any decision as to the compatibility of the EU legislative act with fundamental rights and would thus not have been given the chance to remedy the violation. This is because the only way of involving the ECJ would have been through the preliminary reference procedure under Article 267 TFEU. Of course, Member State courts are under an obligation to make such a reference either if they are a court of last instance⁶⁷ or where they are convinced that a piece of EU legislation is invalid.⁶⁸ But there is no guarantee for the applicant that a reference is actually made and they cannot enforce the obligation. A domestic court may fail to refer a case either because it was not aware of the duty under Article 267 TFEU or because it came to the conclusion that one of the exceptions to the duty to make a reference applied. Such exceptions are found in the ECJ's *CILFIT* decision. According to that decision a national court of last instance need not make a reference where the question raised is irrelevant to the outcome of the case, where the EU law provision has

⁶⁷ Article 267 (3) TFEU.

⁶⁸ ECJ, Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15.

already been interpreted by the ECJ (*acte éclairé*) or where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte claire*).⁶⁹

For such cases it has been suggested by a number of contributors to the recent discussion on accession that there would have to be a mechanism to involve the ECJ after proceedings before the ECtHR have been instigated. In a joint communication, the presidents of the ECJ and the ECtHR stated:

In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review.⁷⁰

Proposals on how to ensure a prior internal review include a preliminary reference by the ECtHR to the ECJ⁷¹, an involvement of the ECJ by means of an opinion⁷², a right of the Commission to instigate proceedings before the ECJ while proceedings before the ECtHR are temporarily suspended⁷³ and even a preliminary reference from the ECJ to the ECtHR in lieu of the individual application⁷⁴.

Before addressing the proposal contained in the revised draft agreement, an initial question should be answered: is such involvement required in order to preserve the autonomy of EU law? This would be so if the ECtHR were given jurisdiction to interpret the Treaties in a binding fashion in the absence of a procedure ensuring the prior involvement of

⁶⁹ ECJ, Case 283/81 *CILFIT* [1982] ECR 3415, para 21.

⁷⁰ Joint communication from Presidents Costa and Skouris, available at: http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf (last visited 30 March 2011); a similar argument had previously been made by the ECJ: Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf (last visited 30 March 2011); the (classified) negotiation directives issued by the Council of the EU also contain a reference to it, which can be found in a working document from the EU Commission, Document Number DS 1930/10.

⁷¹ R. Badinter, *Adhésion de l'Union européenne à la convention européenne de sauvegarde des droits de l'Homme*, French Senate, available at: <http://www.senat.fr/europe/r25052010.html#toc1> (last visited 30 March 2011).

⁷² Informal Working Group on accession, Draft additional elements prepared by the Secretariat on procedural means guaranteeing the prior involvement of the Court of Justice of the EU in cases in which it has not been able to pronounce on compatibility of an EU act with fundamental rights, CDDH-UE(2011)02.

⁷³ (former) ECJ Judge Timmermans made that proposal at a hearing before the European Parliament's Committee on Constitutional Affairs on 18 March 2010, available at: <http://www.europarl.europa.eu/activities/committees/eventsCom.do?language=EN&body=AFCO> (last visited 30 March 2011).

⁷⁴ Steering Committee for Human Rights, Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights, CDDH(2002)010 Addendum2 paras 75-77.

the ECJ. As explained above, this would not be the case. A finding by the ECtHR of a violation of the Convention would not directly lead to an invalidation of the EU act in question. Therefore, the involvement of the ECJ is not required in order to preserve the autonomy of EU law.

There is, however, a danger that the introduction of such a mechanism could itself be incompatible with the autonomy of the EU legal order as it might constitute a hidden amendment to the Treaties. Opinion 1/91 showed that a Union agreement may provide the Union's institutions with new functions. However, it must not change the nature of their function. This means that the ECJ must not be given a role which it currently does not have under the Treaties. If the mechanism foresaw a new procedure before the ECJ, which would not be based upon one of the currently existing procedures, the autonomy of the EU legal order could consequently be violated. This would certainly be the case if a procedure were introduced which allowed for a preliminary reference from the ECJ to the ECtHR since the ECJ does not normally make such references.

In light of Opinion 1/09 enabling the ECtHR to make a preliminary reference to the ECJ provided might also prove problematic. It is recalled that the ECJ regarded the existence of a possibility of enforcing the duty to make a reference indispensable.⁷⁵ This hurdle would be hard to overcome since the ECtHR is a court operating outside the EU's legal system and outside the reach of the infringement procedures under Articles 258 and 260 TFEU. However, since the prior involvement of the ECJ is not necessitated by the autonomy of EU law, the enforceability of a duty on part of the ECtHR would not be of relevance. This is the difference to the situation in Opinion 1/09. Moreover, considering that the ECtHR would not interpret EU law but merely treat it as part of the facts, it appears that such a mechanism, albeit permissible, would have little point.

The informal working group on accession also considered the question of a prior involvement of the ECJ and generally seemed to be in agreement that in cases where the EU is a co-respondent and where the Court of Justice has not yet had an opportunity to rule on

⁷⁵ Opinion 1/09, of 8 March 2011, nyr, para 89.

the conformity with fundamental rights of the EU act in question, there should be such involvement.⁷⁶ It came up with the following draft provision:

Where the European Union is a co-respondent to the proceedings and where the Court of Justice of the European Union has not yet ruled on whether the act of the European Union [...] conforms with the fundamental rights at issue, the Court of Justice of the European Union shall have the opportunity to do so [prior to the decision of the European Court of Human Rights on the merits of the case // during the examination of the case before the European Court of Human Rights]. The European Union shall ensure that such ruling is delivered quickly so that the proceedings before the European Court of Human Rights are not unduly delayed. The procedure of the European Court of Human Rights shall take into account the proceedings before the Court of Justice of the European Union.⁷⁷

It is noteworthy that the procedure only applies to the ECJ and not to the courts of Member States where a Member State is a co-respondent. The question is why the informal working group does not foresee the prior involvement of those courts. It is submitted that such involvement would not be necessary. Where the EU is the original respondent, the applicant would have exhausted his domestic remedies in the EU courts. The complaint would therefore be limited to a violation of the applicant's rights by EU actions or omissions and not by the law of the Member States. For such cases an involvement of the national courts would not be necessary since they do not have jurisdiction over the validity of EU measures. However, the main reason for the involvement of Member States as co-respondents would be violations found in primary law.⁷⁸ In such cases all (currently) twenty-seven Member States would be equally responsible for the violation and could thus be invited as co-respondents. Some highest courts of the Member States claim jurisdiction over the compatibility of the Treaties with their national constitutional requirements, so that a prior involvement of these courts would be possible.⁷⁹ Yet there are good reasons not to involve them in the same manner as the ECJ. First, there is the practical dimension: if twenty-seven highest courts had to deliver an opinion on the matter before the ECtHR could decide the case, the complaint would remain unresolved for a very long time. Second, the introduction of such a procedure would be an implicit acknowledgement of the superiority of national constitutional law over the Treaties, thereby contradicting the ECJ's case law on the primacy of EU law.⁸⁰ Third, one main reason for the ECJ's prior involvement is to give the EU a

⁷⁶ Meeting report, 5th working meeting of the informal working group, CDDH-UE(2011)03.

⁷⁷ Article 4 (6) of the revised draft agreement, CDDH-UE(2011)06.

⁷⁸ *Supra*.

⁷⁹ Most famously the German Federal Constitutional Court, cf. its latest decisions on the Lisbon Treaty (30 June 2009), joined cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 and in the Honeywell case 2 BvR 2661/06 (10 July 2010).

⁸⁰ Case 6/64 *Costa/ENEL* [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

chance to solve the issue internally without the embarrassment of being reprimanded by an external institution. This would not be avoided if one of the highest national courts were to find an infringement. Therefore, there are good reasons not to introduce a similar prior involvement of national courts.

The draft raises three main questions: (1) What are the circumstances which trigger the procedure? (2) What would be the procedure before the Court of Justice? (3) And finally, what would be the consequence of a decision by the ECJ?

a. Circumstances which trigger the procedure

The procedure is limited to cases in which the EU is a co-respondent. Where the EU is the main respondent, such a procedure would not be necessary since the remedies to be exhausted are those before the ECJ. Yet the proposal makes no allowance for an involvement of the ECJ in the unlikely situation in which the EU decides not to join the proceedings as a co-respondent even where the case raises issues of EU law. This would mean that there would be no prior pronouncement by the ECJ while the ECtHR might find that EU legislation has violated the Convention. But it would be wrong to regard this as a deficit in the procedure on the prior involvement of the ECJ. Rather it is a consequence of the EU's freedom to choose whether it wishes to join proceedings as a co-respondent.⁸¹ Arguably, if the EU chooses not to join the proceedings, it implicitly waives its right to have the EU measure reviewed internally.

Turning to more substantive questions, one practical issue arising from the draft is whether the ECtHR would have to formally request the ECJ to make a ruling or whether the EU's institutions would decide independently of the ECtHR. The wording of the draft is open in this respect in that it only speaks of the ECJ being given the opportunity to rule. It is not entirely clear whether a formal court order by the ECtHR would be needed in order to give the ECJ the opportunity to make a pronouncement. From the point of view of the Convention, the EU's institutions (including the ECJ) are free to examine the validity of EU legislation at any time. Thus the first sentence of the draft would not have an independent meaning if it were only to be read as a re-statement of the ECJ's competence to review EU legislation. But it is unlikely that this was the intention of the drafters. It is therefore

⁸¹ Cf. the criticism voiced supra.

suggested to regard it at least as an internal instruction to the ECtHR to allow time for the ECJ to decide. This would require the ECtHR to at least inform the parties that it would give the ECJ such an opportunity. Further support for this argument can be found in the third sentence, which attaches legal consequences to the involvement of the ECJ by providing that that the procedure before the ECtHR must take into account the proceedings before the ECJ. It seems that this consequence must be triggered by a decision of the ECtHR to give the ECJ the opportunity to make a ruling.

But the question remains under which circumstances the ECtHR should make such a decision. It is clear from the wording of the draft that this should either be the case before the ECtHR addresses the merits or while the ECtHR examines the case. This implies that the ECJ would only get involved where the ECtHR has found the case admissible. This is a sensible solution as it would avoid unnecessary proceedings before the ECJ, e.g. in cases where the ECtHR finds the application manifestly ill-founded. It is suggested here that the ECtHR should open up the opportunity to involve the ECJ in every admissible case, which the EU has joined as a co-respondent. It would then be up to the EU's institutions to decide whether they should instigate such a review. They might, for instance, decide not to do so where the ECJ has already found in unrelated proceedings that a piece of legislation is compatible with the EU's fundamental rights. This would avoid a complicated assessment by the ECtHR as to whether the ECJ has already pronounced on a question. This assessment would not always be easy to make since even where the ECJ has made a pronouncement in the case, it may not have addressed the violation of fundamental rights. Or it may have addressed fundamental rights but not all rights the violation of which is argued before the ECtHR.

b. The procedure before the Court of Justice

The draft does not reveal anything about how and by whom the review before the ECJ is to be initiated. The previous first draft provided explicitly that it was to be conducted in accordance with internal rules of the EU.⁸² There is nothing to suggest that the revised draft is meant to change this. The reference to internal rules of the Union was intended to avoid a violation of the autonomy of EU law, which remains a valid objective. If the draft provided for a specific procedure, this would potentially involve a hidden Treaty amendment and fall

⁸² Article 4 (3) of the first draft, CDDH-UE(2011)04.

foul of the requirements for preserving the autonomy of EU law. Thus the determination of the procedure before the Court of Justice has been left to the European Union. This contribution assumes that the EU wants to avoid having to amend the Treaties. Not only would an amendment potentially trigger referenda in some Member States with an uncertain outcome but it would hardly be limited to the rather specific technical questions surrounding an accession of the EU to the ECHR and might thus open a Pandora's box by allowing the Member States to re-negotiate the Treaties as a whole.

The question for the EU is therefore which options it has on the basis of the current Treaties and within the constraints imposed by the autonomy of EU law. In a working document, the Commission argues that the procedure for the prior involvement of the ECJ should be similar to the procedure governing the preliminary reference procedure.⁸³ It is envisaged that such a procedure would be included in the Council decision concluding the accession treaty.⁸⁴ The question is whether the introduction of such a procedure would be in accordance with the autonomy of EU law. The Commission argues that this would be so pointing to Article 19 TEU, which states that the ECJ ensures 'that in the interpretation and application of the Treaties the law is observed'.⁸⁵ Yet Article 19 TEU does not provide for a specific procedure before the ECJ, but merely defines the overall role and function of the ECJ. This means that any procedure suggested would still have to be in accordance with the procedures existent at the moment.

The most plausible solution would be to allow the European Commission to have a case reviewed by the ECJ. The European Commission would be the natural institution to be in charge of this since it would be the institution representing the EU before the ECtHR and would thus be familiar with the case. The initiation of judicial review would be a power which the Commission already has under Article 263 (2) TFEU. Thus an extension of this power would at first glance not conflict with the autonomy of EU law. But closer scrutiny reveals that this question cannot be answered that easily.

The first issue is whether the Commission should be under an obligation to instigate such proceedings. This would necessitate a Treaty amendment since the instigation of

⁸³ European Commission Working Document DS 1930/10, para 5.

⁸⁴ Ibid para 10.

⁸⁵ Ibid para 12.

proceedings under Article 263 TFEU is within the discretion of the Commission.⁸⁶ Thus as far as EU law is concerned the initiation of proceedings would have to remain in the discretion of the Commission. This would have the advantage of giving the Commission an opportunity to assess whether such proceedings are necessary. Where the Court of Justice has already made pronouncements on the compatibility with fundamental rights, the Commission could choose not to instigate them. The Commission would thus be in a position to exercise a filter function, which would chime with its role as the guardian of the Treaties. If the Commission failed to bring the case before the ECJ, the ECtHR would decide without a prior involvement of that Court. This would not be problematic since, as already indicated, the prior involvement of the ECJ is not necessary in order to preserve the autonomy of EU law. The main reason for it is to give the EU courts a possibility to remedy a violation and thus to avoid a conviction. Where the EU Commission decides not to introduce proceedings, one can assume that the EU does not have an interest in being given the opportunity to remedy the violation and thus the ECtHR would be able to find such violation without prior involvement of the ECJ.

There is, however, the problem of the strict time limit contained in Article 263 (6) TFEU, which provides that proceedings must be instituted within two months of the publication of the legal act in question. By the time proceedings have reached the ECtHR, this two month period will inevitably have expired. The question would therefore be whether the accession agreement could rely on the procedure under Article 263 TFEU in spite of the time limit. The autonomy of EU law would only be an obstacle if the nature of the ECJ's functions were affected. Thus one needs to ask whether this would constitute an alteration of the competence of the Court, which is comparable to the extension of the preliminary reference procedure to the courts of the EFTA states in Opinion 1/91. It is recalled that the Court did not accept this because the answer provided by the ECJ was not to be binding.⁸⁷ It is argued here that the dispensation with the time limit contained in Article 263 TFEU would not lead to a comparable change in the nature of the function of the ECJ. The main reason for the time limit in Article 263 (6) TFEU is legal certainty. Acts by the Union's institutions should not be subject to judicial review after a certain amount of time has passed. The provision is best understood when read in conjunction with applications

⁸⁶ ECJ, Case 247/87 *Star Fruit v Commission* [1989] ECR 291.

⁸⁷ Opinion 1/91, para 61.

under Article 263 (4) TFEU concerning acts addressed to the individual claimant. It is recalled that the Lisbon Treaty amended the wording of Article 263 (4) TFEU. Previously, an applicant was only able to challenge decisions. Acts formally passed as regulations were only challengeable if they were of direct and individual concern to the applicant and in substance had to be deemed decisions.⁸⁸ Decisions are executive acts which are confined to a specific situation and only affect the addressee. A time limit is justifiable in such situations since the applicant was personally informed of the decision. There is an interest on part of the EU and in the name of legal certainty that an act of this kind is not forever challengeable so that the demand for legal certainty in such situations prevails over the individual's interest in legality.

The same time limit is in principle applicable in preliminary reference procedures concerning the validity of such acts.⁸⁹ The leading decision is *Textilwerke Deggendorf*.⁹⁰ The case concerned a Commission decision addressed to the Federal Republic of Germany declaring that state aid granted to *Textilwerke Deggendorf* was unlawful under the Treaties. The national court made a preliminary reference concerning the legality of the Commission's decision after the time limit for an individual application had long expired. The ECJ argued that a decision not challenged under Article 263 TFEU becomes definite against the addressee.⁹¹ The reason was to safeguard legal certainty.⁹² Despite having been pointed to the possibility of challenging the Commission's decision by the national authorities under Article 263 (4) TFEU, *Textilwerke Deggendorf* failed to do so and challenged domestic decisions revoking the aid in the domestic courts instead. Its challenge was unsuccessful since the time limit contained in Article 263 (6) TFEU had expired. The *Nachi* case confirms these findings with regard to anti-dumping regulations.⁹³ The Court's reasoning in this respect is convincing when it points to the dual nature of anti-dumping regulations. They are not only formally legislative acts but at the same time affect an individual directly and individually. For the individual they are therefore equivalent to decisions so that the application of the time limit is justified.⁹⁴ At the same time it can be deduced from *Nachi*

⁸⁸ Article 230 (4) TEC.

⁸⁹ Wegener in: Calliess/Ruffert, EUV/EGV, 3rd edn., Art. 234 EGV, para 14.

⁹⁰ Case C-188/92 *Textilwerke Deggendorf* [1994] ECR I-833.

⁹¹ *Ibid*, para 13.

⁹² *Ibid*, para 16.

⁹³ Case C-239/99 *Nachi Europe* [2001] ECR I-1197.

⁹⁴ *Ibid*, paras 36-37.

that where 'normal' legislation is concerned, i.e. an act of general application only, this rationale would not apply. The Court emphasised that the time limit could only preclude a review under Article 267 TFEU where the individual had a possibility of challenging an act under Article 263 (4) TFEU. As *Arnull* argues, it seems unlikely that the rule would normally extend to measures of general application.⁹⁵ This is correct since the situation is different when it comes to legislative acts. Such acts are applicable *erga omnes* and are normally of an unlimited duration. If these acts are incompatible with fundamental rights (or have been adopted illegally for other reasons) they violate the rights of individuals each time they are implemented. If they were not challengeable for more than two months after their adoption, an illegal situation would be perpetuated. Thus the interests involved differ from those involved when dealing with decisions and there is thus no room for legal certainty to prevail over legality. This finding is confirmed by the more recent case law of the ECJ which allows challenges to be brought under Article 267 TFEU where the applicant did not have standing to bring a case under Article 263 (4) TFEU.⁹⁶

It follows that the limit in Article 263 (6) TFEU is only applicable to individual challenges of decisions or regulations in the guise of decisions but not to genuine EU legislation. The European Court of Justice thus has jurisdiction to review the validity of EU legislative acts in the absence of a time limit. The introduction of a procedure providing for review of legislative acts would therefore be possible without a Treaty amendment.

A further point which might prove to be problematic with regard to the autonomy of EU law is that the draft provides for the EU to ensure that the ruling is delivered quickly. This clearly addresses a question internal to EU law and might thus constitute a hidden amendment to the Treaties and be in violation of the autonomy of EU law. However, Article 23 a of the Statute of the Court already provides for an accelerated procedure before the Court of Justice. The Statute has the legal status of a Protocol to the Treaties and is therefore part of EU primary law.⁹⁷ Thus an accelerated procedure is not alien to the Treaties as they currently stand. Its introduction in cases envisaged by the draft provision, would therefore be possible without amending the Treaties, so that the provision would not

⁹⁵ *Arnull, The European Union and its Court of Justice*, 2nd ed. (Oxford 2006), p. 129.

⁹⁶ E.g. Case C-241/95 *Accrington Beef* [1996] ECR I-6699; Joined Cases C-346/03 and 529/03 *Atzeni and others* [2006] ECR I-1875; in great detail Broberg/Fenger, *Preliminary References to the European Court of Justice*, (Oxford, 2010) pp. 213-222.

⁹⁷ Cf. Art 281 TFEU and Statute of the Court, OJ 2010 C 83, 210.

constitute a hidden Treaty amendment. The ECJ would merely have to amend its Rules of Procedure which in Art 104 a and 104 b allow for an accelerated procedure.

The final question then is whether the ECJ's review should be limited to violations of fundamental rights. According to the draft proposal the ECJ is to be given the opportunity to rule on the conformity of an act with fundamental rights where it has not already done so. It seems to be the intention of the European Commission to have the ECJ perform a strictly limited review of the Union act on account of the relevant fundamental right.⁹⁸ The Commission's aim is clear: such a limited review would allow the ECJ to decide quickly so that proceedings before the ECtHR would not be unduly delayed. A further argument for restricting the ECJ's jurisdiction would be that the proceedings before it would mirror the test to be carried out by the ECtHR. However, there is currently no purely fundamental rights review under EU law. Articles 263 and 267 TFEU are not limited to a review of compatibility with fundamental rights but are more general reviews of legality. The content of the questions is not limited so long as they concern the compatibility of EU legislation with primary law. The wording of Article 267 TFEU limits the ECJ to answering the questions referred to it. This would suggest that the Commission could limit its request, too. But this would alter the nature of the Commission's right to have legislation reviewed by the ECJ and would thus be incompatible with the autonomy of the EU legal order. Under Article 263 TFEU such a limitation is not possible. The Commission would therefore be granted a new right of limiting the ECJ's jurisdiction on the matter, which would amount to a Treaty amendment. It is moreover suggested that in light of the ECJ's practice of re-formulating the questions posed under Article 267 TFEU and its practice of deciding the questions on the basis of other provision than those referred to it by the national court⁹⁹, a limitation of its jurisdiction might not have great effect. Moreover, if the ECJ found that the act was invalid for other reasons, this would still help to remove the alleged violation of fundamental rights and make a review by the ECtHR superfluous. It would therefore be within the purpose of the prior involvement of the ECJ, which is to highlight the subsidiarity of the review carried out by the ECtHR.

⁹⁸ European Commission Working Document DS 1930/10, para 9.

⁹⁹ E.g. Cases C-280/91 *Viessmann* [1993] ECR I-973, para 17; C-234/01 *Gerritse* [2003] ECR I-5933, paras 23-24. On this case law in general: Broberg/Fenger, *Preliminary References to the European Court of Justice*, (Oxford 2010) pp. 403 et seq.

c. Consequences of a decision by the ECJ

The third sentence of the draft provides that the procedure before the ECtHR takes into account the proceedings before the ECJ. This provision refers to the procedural effect of proceedings being instigated in the ECJ. The ECtHR would normally wait for the ECJ to have decided in the matter before rendering its own decision.¹⁰⁰ Apart from that the draft avoids any further pronouncements on what consequences the ECJ's involvement might have on the case pending before the ECtHR. Proceedings before the ECJ on the validity of legislation can have two possible outcomes. Either the ECJ declares the act not to be in conformity with fundamental rights, which renders it invalid, or the ECJ does not find a violation and the act continues to be good law. Where the ECJ does not find a violation, the ECtHR will have to engage with the case and proceed to make a pronouncement on its merits.

Where an act is declared invalid, the legal basis for the implementing action by the national authorities of the respondent Member State must be deemed to never have existed,¹⁰¹ which renders their implementing action illegal (unless there are national rules in place to the same effect). The question is whether the ECtHR may take this into account as depriving the applicant of her victim status. According to Article 34 ECHR only persons claiming to be the victim of a violation of the Convention can file an admissible application. In proceedings before the ECtHR an applicant loses their victim status where the violation is removed.¹⁰² However, the situation would be more complicated here since the ECJ's declaration does not in principle affect the decisions of the domestic courts, which are now *res judicata* and can therefore be enforced in the Member State. An instructive parallel can be drawn to a situation where a provision of national law has been revoked after an applicant has been convicted on its basis. This was the case before the European Commission of Human Rights,¹⁰³ which decided that the applicant had lost his victim status not simply because the legislation had been revoked but because the court decisions had been quashed, too. In line with this reasoning I would argue that the applicant would remain a victim for as long as the decision affecting her has not officially been annulled by

¹⁰⁰ Cf. explanatory report, CDDH-UE(2011)05, para 68.

¹⁰¹ The ECJ's declaration has retroactive effect, cf. ECJ joined cases 97, 193, 99 and 215/86 *Asteris* [1988] ECR 2181, para 30.

¹⁰² Frowein/Peukert, *Europäische Menschenrechtskonvention*, Art. 34, 3rd ed., (Kehl 2010), para 32.

¹⁰³ *Sert v Turkey*, no 17598/90, 1 April 1992.

the national authorities.¹⁰⁴ If the national authorities do not react, the proceedings before the Court of Human Rights would have to be continued. The question then would be whether the ECtHR should be allowed to find a violation of the Convention without further investigation, which would in effect lead to the ECtHR being bound by the decision of the ECJ. This, however, might challenge the ECtHR's role as the ultimate interpreter of the Convention. In addition, it must be borne in mind that the ECJ would not only apply the fundamental rights found in the ECHR but it would apply the EU's fundamental rights as laid down in the Charter of Fundamental Rights and as they exist as general principles of EU law. This is affirmed by Article 52 (3) of the Charter of Fundamental Rights, which provides that the Union may provide more extensive protection than that required by the ECHR. If the ECtHR were simply to follow the ECJ's assessment, it would risk overstepping its own jurisdiction as it is limited to decide on violations of the rights laid down in the Convention and in the Protocols by which the parties to the dispute are bound. Furthermore, there would be a danger of creating new case law, which domestic courts of parties to the Convention and even the ECtHR itself might rely upon in the future even though that case law is not fully attributable to the ECtHR. Thus the ECtHR should come to an independent decision.

V. Conclusion

This contribution shows that the accession of the EU to the ECHR raises fundamental questions of constitutional significance. The task of drafting an accession agreement which would get a green light from the ECJ requires a difficult balancing act between the task of preserving the autonomy of the EU legal order and practical and political demands, which might conflict with it. The introduction of the co-respondent mechanism is to be welcomed as a way of avoiding such conflict. However, the danger is that this mechanism is becoming so complex that well-intended solutions create new problems in this respect. The prior involvement of the ECJ, which in the eyes of this author is not required by the autonomy of the EU's legal order, is a case in point. Equally importantly, the drafters ought to bear in mind that the overall aim of the accession is to improve the fundamental rights protection for individuals. This implies that any solution found must not render this protection too difficult to obtain. There is a danger that a political compromise might obstruct a legally

¹⁰⁴ A similar argument is made in the explanatory report, CDDH-UE(2011)05, para 66.

clear solution, which would allow for an effective and speedy protection of individual fundamental rights.