ACCESSION OF THE EUROPEAN UNION TO THE
EUROPEAN CONVENTION FOR THE PROTECTION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

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<tr>
<td>CDDH</td>
<td>Steering Committee for Human Rights, Council of Europe</td>
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<td>EC</td>
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<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>PACE</td>
<td>Parliamentary Assembly of the Council of Europe</td>
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<td>TEC</td>
<td>Treaty establishing the European Community</td>
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I. INTRODUCTION.

The idea of commitment of the European Union (‘EU’) to a common European system for human rights protection under the authority of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’)\(^1\) has been discussed for many years now. However, at present the EU and its institutions are still not directly and formally bound by the ECHR and by the case-law of the European Court of Human Rights (‘ECtHR’). Nevertheless, this does not mean that human rights have been without any recognition and legal protection in the European Economic Community (‘EEC’\(^2\)) and later on in the EU. On the contrary, the Court of Justice of the European Union in Luxembourg (‘CJEU’\(^3\)) has gradually introduced human rights standards among the sources of EU law, and the ECHR has become indirectly integrated in the EU legal order. In addition to that, the subsequent Treaty amendments and the promotion of human rights standards by the EU both as pre- and post-accession criteria and in bilateral agreements with non-European states demonstrate the evident commitment of the EU to human rights protection. Despite this, EU accession to the ECHR with all the substantive and procedural consequences thereof was not legally possible before the last Treaty amendment. In this regard the Treaty of Lisbon\(^4\) constitutes a major novelty and a breakthrough by granting the EU legal personality (Article 47 TEU), by giving the Charter of Fundamental Rights of the European Union\(^5\) the same legal value as the Treaties (Article 6(1) TEU), and by providing the legal basis for the accession of the EU to the ECHR (Article 6(2) TEU). On the Council of Europe part, the legal basis for EU accession was created with the entry into force of Protocol No.14 to the ECHR.\(^6\) The accession is to be conducted by means of an accession agreement, which has been the subject of negotiations for some time now, since it should address a number of institutional, substantive, and procedural matters necessary to accommodate accession and to preserve the autonomy and characteristics of the legal orders of the EU and the ECHR. At the same time, with the entry into force of the accession agreement the EU legal order will be subjected to an independent external review with regard to compliance with human rights standards as established under the ECHR system. However, the specificities of the EU and ECHR have made the task of the drafters of the accession agreement a challenging one. This paper will focus on analysing the results achieved by the accession agreement and on providing a critical understanding of their subject-matter. Nevertheless, one cannot understand the solutions provided without discussing certain relevant aspects of the EU legal order and the ECHR system. Therefore, some specificities of the two legal orders will also be analysed with a view to clarifying the reasons for accession and the problems which had to be dealt with by the accession agreement. The interaction between the two systems during the years and the different steps which have made EU accession to the ECHR look feasible today will also be dwelled upon, since they also provide important explanations with regard to the solutions in the accession agreement.

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2 Succeeded by the European Community with the Treaty of Maastricht (Treaty establishing the European Community [1992] OJ C 224/01), which was ultimately succeeded by the EU with the Treaty of Lisbon.
3 Strictly speaking at the time it was called the European Court of Justice (‘ECJ’). However, with the Treaty of Lisbon the name is Court of Justice of the EU (‘CJEU’). The general reference in this paper will be to the CJEU, unless the historical context requires the reference to be to the ECJ.
II. LEGAL ANALYSIS OF THE ACCESSION OF THE EU TO THE ECHR.

1. The systems of judicial control established under the ECHR and by the EU.

The creation of the Council of Europe with the basic task of defending human rights and its ‘crowning achievement’ - the signature of the ECHR, and the founding of the EEC were among the major initiatives, which in the aftermath of the Second World War, contributed to overcoming nationalism and safeguarding human rights and peace on the European continent. The protection of rights in each of the two legal orders is guaranteed by the establishment of judicial systems with their own tasks, autonomy and specificities.

The protection of human rights is one of the basic tasks of the Council of Europe. By signing the ECHR, which represents an international treaty, and the additional protocols thereto, the 47 member states of the Council of Europe have entered into the obligation to ‘secure to everyone within their jurisdiction’ the human rights and freedoms defined therein. On the other hand, the ECHR has also established an international system for the protection of human rights through the European Court of Human Rights (‘ECtHR’), with its seat in Strasbourg. This system of judicial protection is characterized by the direct applicability of the provisions of the ECHR, which any individual within the jurisdiction of one of the state parties can invoke before its national courts. The ECtHR may receive applications from individuals and ‘may only deal with the matter after all domestic remedies have been exhausted’. Therefore, the system of protection and control before the ECtHR is subsidiary to the national systems for safeguarding human rights. With regard to this, the task of ensuring the application of the ECHR falls primarily on the state parties to it. The ECtHR will only intervene where states have failed to fulfill their obligations. Thus, access for individuals seeking protection of human rights is secured firstly before the national courts of the state parties, and only if states fail to grant them proper judicial protection – before the ECtHR. In addition to that, any High Contracting Party to the ECHR may refer to the ECtHR any alleged breach of the provisions of the ECHR and the Protocols thereto by another High Contracting Party. The ECtHR delivers binding judgments on alleged violations of the ECHR, which judgments must be executed by the parties to a case by taking all the necessary measures (for e.g. by states amending their legislation to avoid future violations, or by taking individual measures to erase the consequences of the violation for the individuals concerned). The Committee of Ministers of the Council of Europe supervises the execution of the judgments.

The system of judicial control established in the EU is characterized by the existence of the national courts or tribunals of the Member States, which were given the status of EU

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8 Not all additional protocols are binding on all member states. Reservations to the ECHR and/or to the Protocols are always possible (Article 57 ECHR).
9 See Article 1 ECHR.
10 In fact ‘from any person, non-governmental organization or group of individuals claiming to be the victim of a violation’ (Article 34 ECHR).
11 See Article 35 ECHR.
12 Handyside v. the United Kingdom, ECtHR 1976 - 24, para 48.
13 See Article 33 ECHR.
15 See Article 46 ECHR.
courts through the preliminary ruling procedure, on the one hand, and by the existence of the CJEU, on the other hand, which assumes the functions of different jurisdictions (an international court, a constitutional jurisdiction, an administrative jurisdiction or a Supreme Court). Since the very creation of the EEC and subsequently in the EU, the CJEU has been entrusted with the task to ensure that ‘in the interpretation and application of the Treaties the law is observed’. It has been thereby stipulated that the EEC/EU is based on the rule of law and that the CJEU has a central role in the system of judicial protection. Furthermore, the CJEU has been granted an exclusive jurisdiction in ensuring that the rule of law will be the same in all Member States, which ‘undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’.

Under the EU system of judicial protection individuals can invoke EU law and seek protection of their rights either before national courts of the Members States, or directly before the General Court/CJEU, when certain conditions are met. Before national courts individuals can call into question the legality of a national measure implementing EU law, and whereas issues of interpretation and/or validity of EU law arise, national courts or tribunals may or in certain cases must refer the question for a preliminary ruling to the CJEU. On the other hand, individuals can call into question the legality of general or individual EU acts or omissions directly before the General Court/CJEU by means of an action for annulment or an action for failure to act. This system of judicial protection would not have been possible without the elaboration by the CJEU (ECJ at the time) of the basic principles of direct effect and primacy (supremacy) of EU law. The CJEU acknowledged that an individual could invoke a provision of primary law before a national court in order to oppose the application of a national legal provision in the famous Van Gend en Loos case. The reasoning in that regard is as follows:

The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

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16 Now Article 267 TFEU.
17 See Article 19 TEU: ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts’.
19 See now Article 19 TEU.
20 See Article 344 TFEU.
21 See Article 263, para 4 TFEU.
22 The notion of individuals includes natural persons and legal entities, as well as associations under certain conditions; See Case T-585/93 Greenpeace v Commission [1995] ECR II-02205.
23 See Article 263, para 4 TFEU.
24 See Article 265 TFEU.
26 Ibid.
Therefore, when a provision of the Treaty is sufficiently clear and unconditional, it has direct effect – it could be invoked by individuals before national courts in order to protect their rights. Furthermore, under the principle of primacy of EU law all national provisions which are incompatible with EU law, regardless of whether they have been adopted prior or after the corresponding EU provision, become inapplicable, because as the CJEU (ECJ at the time) clarified in the Costa v E.N.E.L. case: ‘The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail’.  

With the elaboration of the principles of direct effect and primacy of EU and with the possibility indirectly or directly to access the CJEU individuals can play a crucial role in the legality control within the EU legal order. Moreover, it has been acknowledged that the EU (EEC at the time) is based on the rule of law, inasmuch as ‘neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’. Thus the CJEU has established the highest norm, the ‘constitutional charter’ against which each rule of law should be checked, be it secondary law or national laws of the Member States, including their constitutional laws.

Furthermore, the CJEU can declare acts of the EU institutions void, respectively failures to act contrary to the Treaties, and the EU institutions are required to take the necessary measures to comply with the judgment of the CJEU. In addition to that, the EU shall make good any damage caused by its institutions or by its servants in the performance of their duties. The CJEU controls the validity of EU actions and/or omissions both in directs actions proceedings and in the preliminary ruling procedure. On the other hand, the CJEU does not directly rule on the validity of national measures, i.e. national measures are not declared void by judgments of the CJEU. However, the CJEU interprets the Treaties and as a consequence of this a provision of national law can be found incompatible with EU law. Following the principle of supremacy of EU law in such cases the national court or other competent authorities of the Member State will be under the obligation to take the necessary measures to redress the situation. Furthermore, since EU law grants individuals rights, if these rights are infringed by a breach of EU law for which a Member State can be held responsible, the CJEU recognized the principle of State liability for harm caused to individuals under certain conditions.

This short overview of the ECHR system and the EEC/EU legal order provides the basic principles under which individuals can seek protection of their rights in the two legal orders. It also demonstrates that, while it is obvious that human rights protection is the main purpose under the ECHR system, it is less apparent whether human rights were among the

27 Subsequently direct effect was recognized by the CJEU also with regard to Regulations, Directives (under certain conditions), Agreements concluded with third countries and even Decisions of bodies under such Agreements.
30 See Articles 264(1) and 266(1) TFEU.
31 See Article 340(2) TFEU.
32 See Articles 263, 265 and 267 TFEU.
primary concerns of the drafters of the founding Treaties,\textsuperscript{34} and whether they had any place among the sources of EU law and in the EU system of judicial protection as developed during the years. On the other hand, certain differences between the two systems become apparent. The ECHR is an international treaty to which only state entities could become parties. The EEC/EU represents a new legal order of international law, which is neither a federal state, nor a simple international organization, and which has specific relations with its Member States and peoples. It functions through its own institutions that can adopt acts which are binding for the Member States. However, the legaility of these acts is subject to the control exercised by the CJEU.

On the basis of these introductory characteristics, one can doubt whether these two legal orders could have anything in common and whether the question of any eventual interaction or integration between them could ever arise. Nevertheless, the fact that under certain conditions individuals can seek protection of their human or other granted rights within the ECHR or EEC/EU systems is a major achievement, which also provides for the possibility of an interaction or even conflicts between them. With regard to this, one could wonder whether human rights had any place and enjoyed any protection within the EEC/EU legal order.

2. The place of human rights in the hierarchy of norms in the EU and their meaning.

The position of human rights within the hierarchy of norms in the EU has improved greatly as part of the legal evolution since the Communities were founded in the 1950s. It is interesting to observe that the draft European Political Community Treaty in 1953 provided that the ECHR would be part of the law of the new Communities,\textsuperscript{35} but this Treaty was never adopted due to France’s rejection of the closely-related Defense Community Treaty in 1954. On the other hand, the EEC was primarily concerned with economic integration and the EEC and Euratom Treaties in 1957 did not include any references to human rights. Another possible explanation for the lack of human rights protection at EEC level is the fact that in the original perception of the Member States the EEC Treaty was just a treaty under international law. Therefore, the legality control was to be exercised by the national courts applying national laws, which included human rights standards. However, the EEC went beyond a simple international organization and the lack of comprehensive provisions in the Treaties for the protection of human rights did not prove to be a reason for the ECJ at the time to neglect them and not to grant them any protection in the EEC legal order. The ECJ had the uneasy task to decide whether in the absence of formal legal basis in the Treaties human rights had any place in the hierarchy of norms in the EEC, and how the content of human rights should be determined. This issue was undoubtedly of great importance for individuals, since a possible inclusion of human rights in the EEC legal order would mean that individuals could possibly invoke human rights when calling into question the legality of national measures implementing EU law or of EU acts or omissions.

From the very beginning the ECJ has adopted a purposive approach, a teleological method of interpretation\textsuperscript{36}, interpreting the EEC Treaty in the light of its objectives, looking at its spirit, general scheme and wording.\textsuperscript{37} The first time when the ECJ recognized the place of

\textsuperscript{34} Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on 18 April 1951, Treaty establishing the European Economic Community (EEC), signed in Rome on 25 March 1957 and Treaty establishing the European Atomic Energy Community (Euratom), signed in Rome on 25 March 1957.

\textsuperscript{35} See Article 3 of the draft Treaty embodying the Statute of the European Community <http://aei.pitt.edu/991/1/political_union_draft_treaty_1.pdf> accessed 5 April 2012.

\textsuperscript{36} Govaere (n 18).

\textsuperscript{37} Van Gend en Loos (n 25).
fundamental rights in the catalogue of EU (EEC at the time) norms was in the *Stauder* case of 1969 by stating that ‘fundamental human rights (are) enshrined in the general principles of Community law and protected by the Court’.

This meant not only that fundamental rights were included among the sources of EEC law, but that they were placed on top in the hierarchy of norms in the EEC, just below the founding Treaties. In addition to that, in the *Les Verts* case the legality control was clearly defined by the ECJ to include fundamental rights and democratic freedoms, as a consequence of which individuals could invoke them when calling into question the legality of national measures implementing EU law or of EU acts or omissions.

The hierarchy of norms in the EU is one of the starting points for the performance of the legality control within the EU legal order. As already clarified, the Treaty is the highest norm, the ‘constitutional charter’ against which each rule of law should be checked for compliance, be it secondary law or national laws of the Member States, including their constitutional laws. The second category in the hierarchy of norms is the so-called general principles of EU law, which rank below the constituent Treaties, but above international agreements and secondary legislation. This category is less obvious than the others, because it has been gradually elaborated by the ECJ, which has used it when interpreting particular Treaty articles. By declaring that fundamental rights are enshrined in the general principles and are protected the ECJ actually provided for the opportunity that all legal provisions ranking below the general principles (for e.g. international agreements and secondary legislation) and all national laws, as well as acts and actions/omissions in implementation thereof, could be checked for violations of human rights.

Although the ECJ established the place of fundamental rights in the hierarchy of norms, it was still unclear how the concept of fundamental rights should be understood and interpreted, i.e. what their essence and content was. This was probably due to the absence of any legal basis in the Treaties at EEC level and to the fact that fundamental rights are not universal and there might be a different interpretation and level of respect of fundamental rights in the different Member States, which could furthermore enjoy some margin of appreciation in certain cases. Since the Treaty at the time did not provide any direct guidance in this respect, in 1970 the ECJ declared that the protection of fundamental rights would be guided and ‘inspired by the constitutional traditions common to the Member States’.

At the time the Member States of the EEC were all parties to the ECHR, which thus formed part of their legal orders and the ECHR standards were applied within their territories. The respect for human rights, on the other hand, is normally proclaimed in their constitutions. In this context it is not surprising that in the absence of EEC own human rights catalogue, the ECJ sought inspiration in what was commonly accepted in Member States. However, constitutional traditions of the different Member States were not uniform and deciding which of the possibly conflicting constitutional values it would uphold could be a delicate matter for the ECJ. Therefore, additional criteria were needed and they were elaborated in 1974 in the *Nold* case, in which the ECJ held that not just the constitutional traditions common to the Member States, but also ‘international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories’ may be the source of guidance and inspiration when clarifying the concept of fundamental rights. Although the ECHR was not expressly referred to in the *Nold* case, it was certainly included in the notion

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39 *Les Verts* (n 29).
40 Now the TEU and the TFEU.
of international treaties for the protection of human rights as specified therein, being the major one of them for the EEC Member States. Despite the fact that in the absence of formal accession of the EEC/EU to the ECHR, the latter was not itself part of EU law, with that line of case-law the ECJ has integrated the provisions of the ECHR indirectly in the EU legal order without making them formally binding to the EU. In addition to that, since the early 1990s the ECJ has stated that the ECHR has a ‘special significance’\(^{43}\) and has been openly referring not only to it but also to the case-law of the ECtHR. This clearly shows the recognition by the ECJ of the importance of the ECHR system and the fact that the ECJ regarded the case-law of the ECtHR as something which could complement the EU legal order when establishing the concept of fundamental rights.

On the other hand, the fact that the provisions of the ECHR were indirectly integrated in the EU legal order in the way described above did not mean that the ECJ will turn into a full human rights court, thereby exercising extensive control over the legality of acts of the Member States with respect to violations of fundamental rights. These measures were also under the control of national courts and the ECtHR. In 1985 in the Cinéthique case the ECJ reaffirmed its duty to ‘ensure observance of fundamental rights in the field of Community law’, but nevertheless stated that it had ‘no power to examine the compatibility with the European Convention [ECHR] of national legislation which concerns (...) an area which falls within the jurisdiction of the national legislator’.\(^{44}\) Thus, the ECJ claimed jurisdiction only to check the validity of national laws with respect to fundamental rights standards to the extent that national law comes within the ambit of EU law, i.e. to the extent that it is within the scope of the Treaty, and on the other hand, the ECJ asserted that it ‘has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law’.\(^{45}\) This decision is very important from a procedural point of view. The ECJ not only demonstrated respect to the case-law under the ECHR, but also tried to avoid clashes between the competences of the ECJ and the ECtHR, since both courts were vested with exclusive jurisdiction within their respective spheres.

It could therefore be observed that, in the absence of formal accession to the ECHR and clear references to human rights in the Treaties, the ECJ has used its creative method of interpretation of EU law and has managed to indirectly include human rights in the EU legal order and system of judicial control, while at the same time preserving the autonomy of the independently existing system under the ECHR. However, this indirect integration of the ECHR in the EU legal order is not a formal one. It does not entail all the consequences of EU accession to the ECHR, since the EU cannot be brought as a respondent before the ECtHR. Thus, the ECHR standards are applied only internally in the EU, to the extent to which the ECJ decides and without the external dimension of an eventual accession – without the possibility to bring the EU before the ECtHR for violations of the ECHR. However, this line of case-law of the ECJ probably served as a signal to the Member States that formal commitments to human rights promotion and protection should also be introduced by means of future Treaty amendments.

Therefore, starting with the Single European Act\(^{46}\) and the Treaty of Maastricht the Member States have gradually introduced different provisions in the Treaties, which clearly refer to human rights. The Single European Act refers in its preamble to respect for the fundamental rights recognized in the constitutions and laws of the Member States, in the

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\(^{44}\) Case 60 and 61/84 Cinéthique v Fédération Nationale des Cinémas Français [1985] ECR 2605, para 26.


ECHR and in the European Social Charter. The attachment to the principle of respect for human rights and fundamental freedoms was proclaimed in the Preamble of the Maastricht TEU as well, but in addition to that Article F of the Maastricht TEU stipulates that ‘the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law’, thereby codifying the case-law of the ECJ cited above. In addition to that, the fifth indent of Article J.1(2) refers to respect for human rights and fundamental freedoms, while Article K.2(1) of the Maastricht TEU contains an express reference to compliance with the ECHR in cooperation in the fields of justice and home affairs. With the Treaty of Lisbon this provision represents Article 6, para 3 of the TEU, and the protection of human rights is additionally promoted in a number of fields, including in the relations of the EU with ‘the wider world’. Article 2 of the Lisbon TEU has a central place by stipulating that the EU is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. Furthermore, if a serious and persistent breach by a Member State of these values is determined, certain rights of a Member State may be suspended, including its voting rights in the Council. In this way, without having its own formal catalogue of human rights, and in the absence of accession to the ECHR, the EU has subjected its Member States to a very strict, although general, standard of respect for human rights with a serious consequence – suspension of rights. The EU has thus proclaimed the respect for human rights internally and with regard to its Member States. It has also included it as part of its pre-accession criteria and externally, in its relations with non-European States by including it in bilateral agreements. However, one external dimension was still missing. The EU was still not subjected to the independent external review under the ECHR system.

Among the Treaty amendments with significance for the protection of human rights Article 6, para 2 the Lisbon TEU is a major breakthrough. As a result of more than fifty years of legal evolution and different commitments in the field of human rights protection, it provides that the EU shall accede to the ECHR. Before examining in detail the current issues related with the accession, the situation existing before the Treaty of Lisbon will be analysed to verify whether such an amendment was necessary.

3. Necessity and possibility of EC/EU accession to the ECHR prior to the introduction of Article 6, paragraph 2 of the Lisbon TEU.

The necessity and the possibility for the EC/EU to accede to the ECHR before the introduction of Article 6, paragraph 2 of the Lisbon TEU have been the subject of a political and legal debate for quite some time. This issue is closely related with the questions what kind of legal entity the EC/EU was, did it have its own legal personality and competence in order to accede to the ECHR before the Treaty of Lisbon and was accession necessary in view of the scope of the jurisdictions of the ECJ and the ECtHR.

47 See Article 3, para 5 of the Lisbon TEU.
48 See Article 7 of the Lisbon TEU.
49 It is interesting to observe that this provision is not a way of excluding a Member State from the EU. It also only concerns suspension of Member States’ rights, while they will continue to be bound by their obligations.
As explained above the ECJ has clarified that the EEC is a *sui generis* entity, a new legal order of international law, in which a full system of judicial control is established and fundamental rights standards are included in the legality control. On the other hand, before they created the EEC the Member States had already signed the ECHR with definite obligations arising thereof and with the ECtHR which has its own role and jurisdiction with regard to human rights protection. For those of the Member States which subsequently acceded to the EEC/EU respect for human rights and signature of the ECHR was a precondition for accession. It seems that certain clashes between these two jurisdictions were possible, since to some extent both courts claimed they would observe the respect of fundamental rights. In that regard one can argue that by introducing fundamental rights among the sources of EEC/EU law and by including them in the legality control, the ECJ touches upon the jurisdiction of the ECtHR.

Moreover, by signing the EEC Treaty Member States have transferred part of their sovereignty to a special kind of international organization which was not party to the ECHR itself, since the ECHR was originally only open to states. It follows from the *Van Gend en Loos* and *Costa v E.N.E.L.* cases that the new legal order sets aside Public International Law and national laws, and has primacy over them. Consequently, the EEC has its own competence to adopt measures which were previously adopted by the Member States and which would be binding for the Member States. It appears that new EEC rules would be applicable in the Member States, which were not created by the latter but by the EEC and which can be controlled by the ECJ but not by the ECtHR, since the EEC was not a party to the ECHR. Thus part of the jurisdiction of the ECtHR to observe the protection of human rights in Member States seems to be taken away. In addition to that, with the deepening and the widening of European integration, the transfer of competence to the EEC (later the EC and the EU – ‘EC/EU’) might have had a further effect to the scope of control of the ECtHR.

Furthermore, there seems to be another risk that the human rights protected under the national constitutions of the Member States might be undermined, since EC/EU law has primacy even over these constitutional norms. In that way EC/EU law which is not subject to review for violations under the ECHR, since the EC/EU is not a party to the ECHR, has precedence over the national constitutions of the Member States which proclaim human rights protection. However, the constitutional courts of the Member States very clearly stated that they will accept the concept of supremacy of EC/EU law only as long as the EC/EU respects the fundamental rights and constitutional traditions. In particular, the German Constitutional Court stated that, if there is an open conflict between EU law and the protection of fundamental rights in the German Constitutional law, the latter will prevail.

Thus, the relation between the substantive and procedural rules relating to human rights protection appears to be a complex one, involving the legal orders of the EC/EU, the Member States and the system under the ECHR. It is not surprising that in this complex legal situation the question of accession of the EC/EU to the ECHR has been raised on the side of the EEC as early as the 1970s. Formal accession was first proposed by the Commission to the Council by the Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 April 1979. That proposal was renewed by the Commission in the 1990s. On the other hand, the European

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52 See the Copenhagen criteria (n 50).
54 Bulletin of the European Communities, Supplement 2/79.
Parliament has on several occasions made statements in favour of accession, including in a Resolution in 1994.\(^{55}\)

It was in this context that the ECJ was asked by the Council to deliver an advisory opinion\(^{56}\) on the theoretical question\(^{57}\) if the accession of the EC to the ECHR would be compatible with the Treaty establishing the European Community (‘TEC’) in force at the time. In Opinion 2/94\(^{58}\) the ECJ noted the importance of respect for human rights, emphasized by the Member States and by the Institutions of the EC and further pointed out that the EC is founded on the principles for respect for human rights, which constitute general principles of EC law, and whose observance the Court ensures.\(^{59}\) However, according to the principle of attribution of competence, the EC was still considered only an international organization with conferred powers, and in the objectives of the Treaties nothing was mentioned about human rights or accession of the EC to the ECHR. Therefore, the Treaty has not conferred a positive competence to the ECJ in the field of human rights, including the EC did not have the competence to accede to the ECHR.\(^{60}\) The ECJ has made it clear that accession would entail a substantial change in the EC system for the protection of human rights and if the EC/EU wants to accede to the ECHR, an amendment of the Treaties was necessary.

Opinion 2/94 shows that although the ECJ has used a creative interpretation of the Treaties during the years, this interpretation has definitely not been random, but rather purposive and based on what is indeed provided for in the Treaties. This means that the ECJ did not want to replace the Member States in their decisions on how further the EU integration should go and at what pace, where there was no actual legal basis for this in the Treaties. Thus, the ultimate decision whether the EC/EU legal order would be subjected to the independent external review by the ECtHR with regard to violations of human rights was in the hands of the Member States, and this decision was formally taken with the last Treaty amendment, as it will be discussed below. However, in the absence of accession, the EU and the Member States were not the only parties concerned with the situation. The ECtHR had the task to ensure the protection of human rights in the EU Member States, which were all parties to the ECHR, and had to find a way in dealing with cases brought before it alleging violations of human rights by the EU or its Member States when implementing EU law.

4. Indirect review over EU acts by the ECtHR prior to accession.

Prior to EU accession to the ECHR, the question if the ECtHR will claim jurisdiction to examine certain EU provisions or acts for violations under the ECHR depends, in the first place, on whether a complaint has been brought against the EU, or against an EU Member State. Secondly, the case-law of the ECtHR reveals different approaches depending on whether a Member States has been brought before the ECtHR for measures within its own margin of action and discretion, or for measures in implementing EU law with regard to which the Member State was under an obligation to pursue a particular course of conduct. It has been clarified that, as long as the EU has not acceded to the ECHR, complaints against acts of the EU as such cannot be brought directly before the ECtHR and such complaints will be considered inadmissible, because the EU is not a contracting party to the ECHR.\(^{61}\)


\(^{56}\) Under Article 228, para 6 of the Maastricht TEC; now Article 218, para 11 TFEU.

\(^{57}\) Since the ECHR was still open only to states and there was no draft of an accession agreement.


\(^{59}\) Ibid, paras 32-33.

\(^{60}\) Ibid, paras 34-36.

\(^{61}\) Matthews v UK App no 24833/94 (ECHR, 19 February 1999).
However, it can be observed that under certain circumstances indirect review of EU acts for violations of human rights could be exercised by the ECtHR, when complaints are brought not directly against the EU, but against one of the EU Member States for acts implementing EU measures. On the other hand, it could be the case that the ECtHR might claim jurisdiction to exercise control over international agreements freely entered into by the state parties to the ECHR, including over EU primary law, even if such agreements/acts cannot be challenged before the ECJ. These special situations provided for interesting developments in the case-law of the ECtHR which illustrate its approach towards the EC/EU legal order. These cases reveal a creative approach on behalf of the ECtHR as it will be explained below, and should be differentiated from the simple, jurisdictionally speaking, cases when an EU Member State has been brought before the ECtHR for measures within its own margin of action and discretion - cases in which the corresponding EU Member State will be responsible for its actions like any other contracting party under the ECHR.

A clear indication about the approach of the ECtHR towards the EC/EU was given in the Matthews case, in which a complaint was brought against the United Kingdom (‘UK’) alleging a violation of the rights of Mrs. Matthews to vote at elections for the European Parliament, because such elections were not at all organized in Gibraltar by the UK. The source of the alleged violation of human rights was not strictly speaking an EC/EU act (act or measure adopted by the EC/EU institutions), but an international agreement entered into by the EU (EEC at the time) Member States, in which it was provided for that the UK will not organize elections for the European Parliament in Gibraltar. This could have proved to be a delicate situation where a potential conflict between the two legal orders was possible. However, the ECtHR observed in the first place that complaints against acts of the EC as such cannot be brought directly before the ECtHR, because the EC is not a contracting party. This is an important clarification from a procedural point of view and it serves as guidance that the ECtHR will not examine complaints brought directly against the EC/EU, but will rather consider such complaints inadmissible ratione personae, since the alleged violations cannot be attributed to a contracting party to the ECHR in the face of the EC/EU. The ECtHR further asserted in the Matthews case that the ECHR does not exclude the transfer of competences to international organizations, provided that the rights under the ECHR continue to be ‘secured’. Therefore, the responsibility of the Member States to secure these rights continues even after such a transfer of competences. This can be seen as a clear signal from the ECtHR that EU membership will not be an excuse for the Member States to violate human rights under the ECHR and that the jurisdiction of the ECtHR will not be circumvented.

However, in the particular case, a conflict between the two jurisdictions was avoided because as indicated above the source of the alleged violation of human rights was an international agreement within the Community legal order which was considered part of primary EC/EU law. Therefore, the ECJ did not have competence to review this piece of primary law and strictly speaking by claiming jurisdiction to exercise control over it the ECtHR did not encroach upon ECJ’s exclusive jurisdiction. From the point of view of the

62 Ibid.
63 While under Art. 3 of Protocol 1 to the ECHR the contracting parties have an obligation to hold free elections under the conditions specified therein.
64 It should be noted that initially when this agreement was concluded in 1973 the role of the European Parliament was only advisory, but it has increased substantially with the successive Treaty amendments.
66 Matthews (n 61) para 32.
ECtHR, this was simply an agreement freely entered into by EU Member States for which they will continue to be responsible. In this context, it should be reminded that the EU founding treaties, which are international agreements, are the highest norm in the EU legal order against which all other norms are checked and cannot be subject to legality control or review by the ECJ, because they are presumed valid. Nevertheless, as clearly indicated in the Matthews case the ECtHR will claim jurisdiction to review primary EU law for alleged violations of the ECHR.

The Matthews case is an example of the balanced, but at the same time firm approach of the ECtHR when it comes to the sovereignty of the contracting states, on one hand, and the observance of their obligations under the ECHR, on the other. The transfer of competences to international organizations is directly related to the sovereignty of the contracting parties in international relations and cannot be limited by the ECHR. However, if such a transfer, and the subsequent performance of obligations linked with membership to an international organization, could be used as an excuse to violate rights under the ECHR or to circumvent the jurisdiction of the ECtHR, the purpose and the practical effect of the protection offered by the ECHR would be greatly undermined. It is not surprising that in these circumstances the ECtHR claimed jurisdiction to review international agreements for alleged violations of the ECHR and thus it precluded the possibility of the contracting parties to evade their responsibility under the ECHR.

A further important development concerning the question whether the ECtHR is willing to claim jurisdiction to directly or indirectly review EU acts for alleged violations of the ECHR is the Bosphorus case67 dating from 2005. The complaint before the ECtHR was brought by a Turkish company against Ireland for the impounding, without compensation, of an aircraft which the company had leased from the national airline of the former Yugoslavia. The aircraft was impounded by the Irish authorities in compliance with an EU Regulation, which implemented a UN economic sanctions regime against Yugoslavia. It was, therefore, a real case of an alleged breach by a Member State of the ECHR, because it had to comply with an obligation arising from a directly applicable secondary legislation EU act.

The ECtHR had to decide whether an EU Member State can in principle be held responsible for such alleged violations of the ECHR in the situations, when the Member State was under an obligation stemming from EU law to pursue a particular conduct, and it had no margin of discretion in that regard. After recognizing the importance of compliance with the legal obligations flowing from the Irish State’s membership of the EC at the time, the ECtHR recalled its position as elaborated in the Matthews case that the ECHR does not prohibit the transfer of sovereign powers by contracting parties to an international organization, which would not itself be held responsible under the ECHR for decisions of its organs, as long as it is not a contracting party to the ECHR.68 The ECtHR also confirmed that absolving contracting states completely from their responsibility under the ECHR in the areas covered by such a transfer would be incompatible with the purpose and the object of the ECHR and that states are considered to ‘retain liability under the ECHR in respect of treaty commitments subsequent to the entry into force of the ECHR’.69 Thus the principle position of the ECtHR remains firm and clear – EU Member States will be held responsible in such situations.

The next important issue to be resolved by the ECtHR was how to assess the alleged violation. The normal practice would be to make a case-by-case analysis and to review the

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67 Bosphorus v Ireland App no 45036/98 (ECHR, 30 June 2005).
68 Ibid, para 152.
69 Ibid, para 154.
EC/EU act in question for violations of the ECHR. However, the ECtHR adopted a creative approach by elaborating a rebuttable legal presumption which will be applied when such transfer of sovereign powers has occurred, i.e. by stating when the ECtHR will consider that the rights under the ECHR continue to be ‘secured’. Thus, states action taken in compliance with legal obligations arising from membership to an international organization is justified ‘as long as the relevant organization 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 [ECHR] provides’. 70 Therefore, when a state only implements legal obligations flowing from its membership of the organization and if such equivalent protection is considered to be provided by the organization, the presumption will be that a state has not departed from the requirements of the ECHR, i.e. there is no violation of rights under the ECHR. However, the presumption can be rebutted and the ECtHR reserves its right to step in, if in a particular case it is considered that the protection of ECHR rights is ‘manifestly deficient’. Nevertheless, if a Member State has acted within its margin of discretion for e.g. under a Directive (‘acts falling outside its strict international legal obligations’), that state would be fully responsible and then its actions will be reviewed by the ECtHR without application of the so called Bosphorus presumption described above. In this particular case the ECtHR found that the protection of fundamental rights in the EC legal order can be considered to be ‘equivalent’ in general and also at the relevant time of the alleged violation. Therefore, the presumption was applicable that Ireland has not departed from the requirements of the ECHR and furthermore, it was not rebutted, since the ECtHR considered that ‘there was no dysfunction of the mechanisms of control of the observance of Convention rights’. 73

One could argue that the Bosphorus presumption is an artificial one, since it has no legal basis in the ECHR and it is clearly the result of the creativity of the Strasbourg judges. Its starting point is not the case-by-case analysis of the alleged violations of the ECHR arising as a result of compliance with EU acts. On the contrary, it rests on the premises that the EU has provided ‘equivalent protection’, which makes it more difficult to prove a violation of the ECHR by establishing before the ECtHR that the protection of ECHR rights in the EU in a particular case is manifestly deficient. It has been seen as a ‘largely abstract review of the organization’s general system of “equivalent protection” for human rights.’ 74 However, it is undoubtedly a convenient approach which first of all demonstrates the respect of the ECtHR judges for the EC legal order and judicial system, and secondly, makes it easy for them to indirectly review the EU acts for violations of the ECHR by starting from the premise that such acts don’t violate the ECHR, while at the same providing for the possibility to rebut the presumption in cases of possible real violations of human rights.

In addition, a further precision of the Bosphorus presumption can be made. The ECtHR referred to ‘the Community’ which had an equivalent protection, because at the time the ECJ was competent under the first pillar, and had almost no role under the second and the third pillars. For these two pillars the Treaty did not secure an ‘equivalent protection’ and the presumption would not be applicable. In that regard in the recent case of MSS v Belgium and

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70 Ibid, para 155.
71 Ibid, para 156.
72 It should be noted that the ECtHR refers to the Community which had an equivalent protection, because at the time the ECJ was competent under the first pillar, and not under the second and the third pillars. For these two pillars the Treaty did not secure an equivalent protection.
73 Bosphorus (n 67), para 166.
74 Craig and De Búrca (n 53) p. 405.
Greece the ECtHR found these states to be in violation of Article 3 ECHR on account of Greece’s conditions and procedures for dealing with asylum-seekers. However, the ECtHR has established that it was an act attributable to the Member States – within their margin of discretion on how to implement measures under the third pillar. But even if it was considered an EU act, the presumption would not be applicable, because in *Bosphorus* the ECtHR has taken care to state that the presumption was applicable only under the Community pillar.

The *Bosphorus* case probably gives reasons to argue that since 2005 the EU does not need an accession to the ECHR, because the ECtHR has accepted that the ECJ at the time takes due account of human rights and the EC/EU has an equivalent system of protection. In addition to that, the CJEU and the ECtHR have managed to set into place a sound system that ECHR rights are respected – a system of complementary jurisdictions and not one of clashes and conflicts. However, despite the *Bosphorus* presumption, in the absence of accession certain disadvantages can be observed in cases brought against EU Member States measures implementing EU acts. First of all, it can be argued that applying a general presumption of equivalent protection of human rights in fact lowers the level of review of the ECtHR. Moreover, even if the presumption is rebutted and a violation of the ECHR is found, the EC/EU will not be bound by the judgment of the ECtHR. Such judgment will only be binding to the Member State party to the proceedings, which could be placed in a difficult situation – to comply with the judgment of the ECtHR, and at the same time to pursue the conduct determined by the EU act, which was actually found to be in violation of the ECHR. In addition to these concerns, a number of different reasons have been advanced in favour of the accession of the EU to the ECHR which ultimately led to a major novelty in the system of human rights protection in the EU brought up by the last reform treaty which will be discussed below.

5. Reasons for EU accession to the ECHR.

A variety of political and legal reasons for EU accession to the ECHR have been given during the years both by the Council of Europe and by the EC/EU to highlight the advantages of such accession. The political will for accession was clearly and formally demonstrated within the framework of the European Convention and culminated in Article 7(2) of the draft Treaty establishing a Constitution for Europe which provides for the accession of the EU to the ECHR and which was later on incorporated in Article 6 of the Lisbon TEU.

First of all, accession is regarded as a way for the EU to once again demonstrate its position for clear commitment to human rights protection as developed during the years in the case-law of the CJEU and in the context of the subsequent Treaty amendments. It is moreover seen as a ‘strong political signal of the coherence between the Union and the “greater

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75 *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).
76 Craig and De Búrca (n 53) p. 405.
Europe”, reflected in the [CoE] and its pan-European human rights system’. 80 This means that the commitment will no longer be only within the borders and the legal system of the EU, but will be within the context of the ‘greater Europe’ by recognising the authority and the achievements of the ECHR, and by formally subjecting the EU to the common independent external system of human rights protection under the ECHR. In the absence of accession there seem to be certain dividing lines and borders between the EU and the ECHR, which are the result of the specificities and of the autonomy of their legal systems and which cannot be dealt with by means of the creativity of the ECJ and the EChTR.

In addition to these dividing lines between the EU and the ECHR, there is some imbalance with regard to human rights standards within the EU itself, which can be avoided after eventual accession. While the EU Member States are parties to the ECHR and are obliged to secure the rights and freedoms defined therein, the EU and its institutions are not formally bound by the ECHR, which can lead to discrepancies between what is protected at Member State level, on the one hand, and on EU level, on the other. Therefore, ensuring consistency in human rights protection in Europe is regarded as a reason for EU accession which is of ‘crucial importance’. 81 Such consistency will be beneficial for the EU citizens, since they will enjoy the same standard of human rights protection both with regard to their national institutions and States, and with regard to the EU and its institutions, thereby benefiting from a higher level of legal certainty. In addition to that, EU citizens will be able to bring complaints under the ECHR directly against the EU for alleged violations of their human rights by the EU institutions with all the procedural consequences as explained below.

Furthermore, the fact that the institutions of the EU, to which the Member States have transferred significant competence are not subject to the ECHR, is seen as ‘a considerable gap in the human rights protection system in Europe’. 82 This means that Member States transfer more and more competences to the EU and its institutions, which will be able to adopt binding decisions in fields which interfere with human rights protection under the ECHR system. At the same time, the EU and its institutions are not yet formally bound by the ECHR and their acts, measures and omissions are not subject to the review of the EChTR. Thus, the EU Member States might find themselves in a position where they have to comply with two divergent sets of obligations – one stemming from EU membership and the other – from their obligation to secure the rights and freedoms as defined in the ECHR. Although as explained above, the EChTR has managed to a certain extent to fill in this gap by a creative interpretation of the ECHR, while respecting the EU legal order and the Member States’ right to transfer sovereignty to an international organisation, as illustrated in the Matthews and Bosphorus cases, an accession of the EU to the ECHR would subject the EU itself to the same obligations under the ECHR as the EU Member States.

Discrepancies in protection and promotion of human rights can be observed not only internally in the EU, but also with regard to the EU external relations and relations with its Member States. Firstly, as specified in the Copenhagen criteria of 1993 accession to the ECHR is a pre-condition for EU membership. Respect for human rights is furthermore a post-accession requirement for all EU Member States, whereas a serious and persistent breach thereof may lead to suspension of certain rights under Article 7(3) TEU. Despite the imposition of the foregoing pre- and post-accession conditions, the EU has itself not acceded to the ECHR. This ‘apparent contradiction’ 83 will be eliminated by EC accession to the

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80 See European Convention, Final report (n 78).
81 Ibid.
82 See Council of Europe, Doc. 11533, 18 March 2008, (n 77) para 10.
83 Ibid, para 11.
ECHR. Secondly, the EU promotes human rights standards in its relations with non-European Union states (for e.g. in the context of different bilateral agreements),\(^84\) which it does not formally impose upon itself. The accession of the EU to the ECHR will also eliminate this discrepancy.

There are also some good procedural reasons for EU accession to the ECHR. As EU citizens will be able to bring complaints under the ECHR directly against the EU for alleged violations of their human rights by the EU institutions, the EU will be a party to the proceedings before the ECtHR with all the relevant consequences of this. The EU will thus have the opportunity to defend its position and to explain the contested acts or provisions. The EU will then be bound by any judgment of the ECtHR and will be subject to the supervision of the Committee of Ministers of the Council of Europe with regard to its execution. This is also highly beneficial for the individuals - parties to the proceedings before the ECtHR, since some violations of ECHR rights can only be remedied by the EU itself and not by the Member States, as explained below.

Therefore, after accession the CJEU will no longer be the final authority with regard to the lawfulness of EU actions which allegedly violate human rights, but will join a wider common system of human rights protection under the ECHR, which moreover enjoys international recognition and has expertise developed during the years. All these reasons and the desire of the EU to further increase its credibility and legitimacy with regard to human rights protection have led to two major novelties in the field of EU human rights protection brought up by the Treaty of Lisbon, which will be discussed in detail below.

6. Legal developments in the field of EU human rights protection brought up by the Treaty of Lisbon.

The Treaty of Lisbon,\(^85\) which entered into force on 1 December 2009, provides for an answer of the long debated question whether the EU should accede to the ECHR. In addition to the legal personality granted to the EU, which replaces and succeeds the European Community,\(^86\) the amendment to Article 6(2) TEU sets out the obligation that the EU shall accede to the ECHR. Right after stipulating this obligation, the article further clarifies that such accession ‘shall not affect the Union’s competences as defined in the Treaties’.\(^87\) This means that EU primary law provides for an important limitation of the effects of EU accession to the ECHR, which can be seen as an explicit signal by the Member States that they do not intend to confer to the EU any positive competences in human rights protection. But it also means that accession of the EU to the ECHR should not take away competences which the EU has already acquired. Thus, an important guideline is provided by the Member States which also serves as a guarantee against possible unexpected and undesirable side effects of EU accession. Similarly, Article 1 of Protocol No. 8,\(^88\) which is annexed to the Treaties and therefore has the same legal value as them, states that the agreement on accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’ in particular


\(^{86}\) See Article 47 and Article 1 TEU.

\(^{87}\) See Article 6(2) second sentence TEU.

\(^{88}\) Protocol No. 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (‘Protocol No. 8 annexed to the Treaties’).
with regard to the participation of the EU in the control bodies of the ECHR, and with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applicants are correctly addressed to Member States and/or the EU. This means not only that the EU should not expand its competences after accession, but the EU and its specific legal order should be preserved and any modifications to the existing institutional and legal order in the EU are forbidden. Furthermore, without affecting the existing system internally, several specific goals are defined for the drafters of the accession agreement. The accession agreement has to provide for the participation of the EU in the ECHR institutional system and control bodies, and the procedural aspects of accession should be taken into account by creating rules which will ensure that the correct respondent(s) and co-respondent(s) are brought before the ECtHR. On the other hand, as stipulated in Article 2 of Protocol No. 8 the situation of the EU Member States in relation to the ECHR should not be affected, in particular regarding the Protocols to the ECHR, the derogations and the reservations made by the EU Member States. This provision is designed to meet the concerns that the EU might accede to the ECHR and all the Protocols thereto, which could eventually lead to all the EU Member States being bound by all the ECHR Protocols.89 From a legal perspective, such a concern seems to a certain degree unlikely, since in principle international treaties and the protocols thereto are binding only for the parties which have formally acceded to them, which will not be the case as to the EU Member States and all the Protocols to the ECHR. However, due to the special relationship between the EU and its Member States and the fact that EU institutions can adopt binding decisions, such an effect cannot be fully excluded.

By means of Article 6(2) TEU and Protocol No. 8 annexed to the Treaties EU Member States have provided some of the most important principles which the drafters of the accession agreement should follow. The accession agreement and any other instruments necessary for EU accession to the ECHR should not affect the competences of the EU, should provide for solutions for certain institutional and procedural concerns, and should not affect EU Member States situation with regard to the ECHR system, and in particular as to the Protocols, reservations and derogation thereto. Moreover the observance of these principles would be subject to the strict control by the Member States and the EU institutions at several levels.

The control for observance of these principles and for addressing any additional concerns connected with EU accession to the ECHR can be best examined by following the different stages which will eventually lead to accession. In this regard the accession of the EU to the ECHR is not just an automatic consequence of the entry into force of the Treaty of Lisbon. A number of additional steps need to be taken both by the EU and its Member States, and by the 47 member states of the Council of Europe. Therefore the ‘rapid’ accession of the EU to the ECHR envisaged by the Stockholm Programme adopted by the European Council on 11 December 200990 might in fact take some time. In addition to the legal basis provided for in the Treaty of Lisbon, the accession of the EU to the ECHR requires the amendment of the ECHR by the 47 member states of the Council of Europe91 and the negotiation of an accession agreement to be eventually concluded by the Committee of Ministers of the Council of Europe and ratified by all 47 contracting parties to the ECHR, including those which are

89 Currently not all EU Member States are bound by all the Protocols to the ECHR. For reference see <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG> accessed 1 May 2012.
91 Since the ECHR was originally open only to states.
EU Member States. On EU part, the accession agreement should be voted unanimously by the Council of the EU, the consent of the European Parliament will also be required, and the decision of the Council of the EU concluding this agreement will enter into force only after it has been approved by the EU Member States in accordance with their respective constitutional requirements. In addition to that, the possibility exists that a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice under Article 218, para 11 TFEU as to whether the agreement is compatible with the Treaties. This elaborate procedure certainly illustrates the opportunities Member States could have to block the accession process, provided that their guidelines have not been followed and the limitations they imposed have not been complied with.

However, the legal basis for EU accession to the ECHR is not the only major novelty provided for in Article 6 of the Lisbon TEU with regard to EU human rights protection. Paragraph 1 of this Article stipulates that the EU recognises 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 (‘The Charter’), but which at the same time is not incorporated in the treaties. Although by this reference the Charter has the same value as primary law, it appeared that it is not legally binding for all the EU Member States, since the UK and Poland negotiated Protocol No. 30 to the Treaties which is designed to limit the impact of the Charter to those states. It is clear from the two articles of this Protocol that Poland and the UK wanted to opt-out from the Charter and to exclude its application with regard to them. One can argue that this Protocol seriously undermines the importance of the Charter, since two of the biggest EU Member States have limited its application with regard to them. Nevertheless, it has been observed that this ‘opt-out’ from the Charter is unlikely to have any significant effect in practice, because the Protocol doesn’t opt-out of the earlier case-law of the ECJ and the contents of the Charter are largely based on the instruments the ECJ has cited for some years as the inspiration for EU general principles.

On the other hand, after the introduction of the Charter being a major novelty and a serious commitment to human rights protection, a limitation is provided for in the Treaties, which is intended to guarantee that the provisions of the Charter ‘shall not extend in any way the competences of the Union as defined in the Treaties’ and that the Charter ‘does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’. This means that the Charter is not designed to create by itself positive competences for the EU in the field of human rights, just like accession to the ECHR cannot produce such effects. The Charter can rather be seen as an internal instrument for the EU, similar to the national constitutions of the contracting parties to the ECHR. It can therefore be regarded as a demonstration of EU’s political will to further commit itself to the protection of human rights not only externally by subjecting itself to the control system under the ECHR, but also internally, by developing its own catalogue of human rights.

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92 See Article 218, para 8 TFEU.
93 See Article 218, para 6(a)(ii) TFEU.
94 See Article 218, para 8 TFEU.
95 Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.
96 Craig and De Búrca (n 53) p. 395.
97 See Article 6(1) second sentence TEU.
98 See Article 51(2) of the Charter.
Although the Charter is not as such incorporated in the Treaties, by means of Article 6(1) TEU it is made binding, and moreover it is given the status of primary law by stipulating that it ‘shall have the same legal value as the Treaties’. On the one hand, this provision increases the legitimacy of the Charter and puts it on top in the hierarchy of EU norms. On the other hand, this could also be seen as a kind of confusion introduced with the Lisbon Treaty, because it would mean that from a theoretical point of view after the eventual accession of the EU to the ECHR the Charter will stay higher than the ECHR in the hierarchy of EU norms, since primary law is the highest norm with which international agreements such as the ECHR should conform. However, this issue has more theoretical than practical importance because one can argue that it is very unlikely that a conflict between the Charter and the ECHR can lead to the CJEU checking the compliance of the ECHR with the Charter. Moreover, the principles of application and interpretation introduced in Article 6 TEU in connection with Title VII of the Charter provide for additional guarantees that clashes between the Charter and the ECHR will be avoided.

In this regard Article 6(1) third subparagraph TEU provides that the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. Thus, a number of important principles concerning the interpretation and application of the Charter can be observed. First of all, the scope of the Charter is defined in Art. 51 thereof, stipulating that the provisions of the Charter are addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. The field of application of the Charter is thereby limited. On the one hand, it is not addressed to individuals and therefore the Charter cannot be invoked against individuals, i.e. it will not be given a horizontal direct effect by the CJEU. On the other hand, the addressees of the Charter are bound by it only when they are implementing EU law, and not in all their activities, which might be seen as introducing double human rights protection standards. This means that, is the Charter is binding and applicable only when they are implementing EU law, conversely, it can be argued that it is non-binding for all the other activities of the institutions and Member States, which practically means that the latter could be bound by other human rights protection norms. Despite this seemingly limited application of the Charter, the CJEU has clearly declared that ‘from now on the Court of Justice and the national courts have an instrument available which will be the principal basis on which they carry out their task of ensuring that in the interpretation and application of the law of the Union fundamental rights are observed.’ It has been observed that the Charter has swiftly become of primary importance in the recent case-law of the CJEU and since 1 December 2009 it has been cited in a constantly growing number of judgments. The opt-out of the UK and Poland from the Charter, and the fact that it is not addressed to individuals can be regarded as serious shortcomings. In this regard one can criticize the approach of the CJEU to refer so often to the Charter and not to the ECHR, which is undoubtedly the instrument of primary importance with regard to human rights protection.

The relation between the Charter and the ECHR is further on reflected in the principles provided for in Article 52(3) of the Charter which stipulates that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Although his Article does not

99 Discussion document (n 90).
specifically address the question of the relationship between the ECtHR and the CJEU, it is clear that the CJEU will have to observe the case-law of the ECtHR when dealing with rights already guaranteed under the ECHR and this will probably have the practical effect that the CJEU will not resort to its own purposive method of interpretation in such cases. This provision is also important in two aspects: first of all, it proclaims the principle of parallel interpretation of the Charter with the case-law of the ECtHR ensuring a level of legal certainty and uniformity; in the second place, it clarifies that the EU can give more extensive protection than the protection already offered by the provisions of the ECHR. Another important interpretative rule concerns the fundamental rights recognized in the Charter as they result from the constitutional traditions common to the Member States – ‘those rights shall be interpreted in harmony with those traditions’.

The legal basis for accession of the EU to the ECHR and the introduction of the Charter with the same rank as primary law are definitely major novelties which demonstrate the desire of the EU for further commitment in the field of human rights. The political decision in favor of accession taken by the EU Member States is however accompanied by a number of limitations, which should serve as guidelines for the drafters of the accession agreement. Their observance is further guaranteed by the multiple opportunities Member States and EU institutions could have to block the accession process. On the other hand, with regard to the Charter one can ask the question why does the EU need both the Charter and accession to the ECHR? It might seem that accession to the ECHR alone would serve the same purpose without having to deal with two catalogues of similar rights under the Charter and the ECHR and consequently complex rules of interpretation and application between them. The answer to this question is certainly not an easy one and it could probably be found in the idea that the EU wanted to introduce the Charter as an internal instrument, which is similar in significance to the constitutions in the Member States, and at the same time the EU has made a clear commitment to the external control for violations of human rights under the ECHR, being the most important human rights instrument at least Europe-wide. Furthermore, the substantive provisions of the Charter provide a wider protection than the ECHR, which can be a basis for additional developments in the field of human rights, independently of the ECHR system. That is why the Charter and the accession of the EU to the ECHR have not been regarded as alternatives, but rather as ‘complementary steps ensuring full respect of fundamental rights by the Union’.

7. Discussions and contentious issues to be dealt with by the accession agreement.

Provided with the legal basis for EU accession to the ECHR and with the limitations defined by the Member States described above, the drafters of the accession agreement were certainly faced with a number of contentious institutional and legal issues, which had to be resolved in the accession agreement so that ‘the specific characteristics of the Union and Union law’ are preserved, the accession does not affect the competences of the EU and the powers of its institutions, and the principles of application of the ECHR continue to be observed, in particular the principle of exhaustion of domestic remedies and the principle of

102 Article 52(3), second sentence of the Charter.
103 Article 52(4) of the Charter.
104 See European Convention, Final report (n 78).
105 See Article 1 of Protocol No. 8 (n 88).
106 See Article 2 of Protocol No. 8 (n 88).
subsidiarity. These contentious issues have been theoretically divided into three groups: institutional, substantive and procedural.  

The institutional aspects discussed concern the issues about the status and duties of the EU judge in the ECtHR and the possibility of EU participation in the Committee of Ministers of the Council of Europe. The questions of whether or not there should be a judge elected in respect of the EU, and if so, whether the judge should participate on an equal footing with the other judges in the work of the ECtHR, were discussed already in 2002. Different arguments were given that there would be no need for an EU judge to be elected; that an EU judge can be appointed on an ad-hoc basis for the cases involving EU law; that a full-time EU judge can be appointed with limited participation only in cases involving EU law; and finally that a full-time EU judge can be appointed participating on an equal footing with the other judges. With regard to the possibility of EU participation in the meetings of the Committee of Ministers, which monitors respect of commitments by the contracting parties and supervises the executions of the judgments of the ECtHR, the question was whether the Statute of the Council of Europe should be amended to allow the EU to participate with the right to vote in these meetings, and whether this right to vote should be limited only to the supervision of judgments involving EU law.

The group of substantive issues includes the questions whether the ECtHR should be allowed to review primary EU law for violations of rights protected under the ECHR (a normal consequence of the EU accession to the ECHR), or the accession agreement should explicitly exclude this possibility; whether the Bosphorus test should be abandoned after the accession, since the EU is supposed to accede to the ECHR on an equal footing with the other contracting parties (and a similar presumption has not been used by the ECtHR with regard to the latter); and whether the EU should accede only to the ECHR or also to all or some of its Protocols.

The procedural aspects concern the questions about exhaustion of domestic remedies and the preliminary ruling procedure; the elaboration of a mechanism allowing the CJEU to deliver a ruling prior to the ECtHR; the need for a co-respondent mechanism and the question whether the autonomy of the EU legal order and the exclusive jurisdiction of the CJEU under Article 344 TFEU could be affected after accession.

In this regard, as early as May 2010 in a rare discussion document the CJEU submitted its reflections on particular aspects linked to the way in which the EU’s judicial system functions, namely that it should be ensured that the ECtHR does not rule on the compatibility of an EU act with the ECHR before the CJEU has first ruled on the matter, and that ‘external review by the Convention [ECHR] can be preceded by effective internal review

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111 Groussot, Lock and Pech, (n 107), p. 4 and 5.
112 Discussion document (n 90).
by the courts of the Member States and/or of the Union.\(^\text{113}\) This aspect concerns the judicial system of the EU and the opportunities individuals have in order to challenge EU acts. It should be recalled that there are two alternative paths\(^\text{114}\) for individuals to do so: through the direct action for annulment under Article 263, para 4 TFEU, and before the national courts of the Member States and then indirectly – through a reference for preliminary ruling under Article 267 TFEU. While in the first case the CJEU will be in the position to rule on the compatibility of an EU act with the ECHR and to perform effective internal review before the case is eventually brought before the ECtHR, the second situation is more complex.

More specifically, where a case is brought before them all national courts of the Member States have jurisdiction to consider the validity of acts adopted by institutions of the EU, but national courts, whether or not there is a judicial remedy against their decisions in national law, do not have jurisdiction themselves to declare such acts invalid.\(^\text{115}\) To maintain uniformity in the application of EU law and to guarantee the necessary coherence of the Union’s system of judicial protection, it is therefore for the CJEU alone, in an appropriate case, to declare an act of the Union invalid.\(^\text{116}\) In addition to that, it is not certain that a reference for preliminary ruling will be made to the CJEU in every case in which the conformity of EU action with fundamental rights could be challenged. While national courts may, and some of them must, make a reference to the CJEU for a preliminary ruling, for it to rule on the interpretation and, if need be, the validity of acts of the EU, it is not possible for the parties to set this procedure in motion.\(^\text{117}\) Therefore, the CJEU expressed its view that the preliminary ruling procedure should not be regarded as a remedy which must have been exhausted prior to bringing a case before the ECtHR. On the other hand, the CJEU asserted that the possibility must be avoided of the ECtHR being called on to decide on the conformity of an act of the Union with the ECHR without the CJEU first having had an opportunity to give a definitive ruling on the point. The solution the CJEU has proposed is that a new mechanism is provided for, which would allow that the question of the validity of a Union act can be brought effectively before the CJEU before the ECtHR rules on the compatibility of that act with the ECHR.\(^\text{118}\)

These issues are further addressed in another interesting document, dated 24 January 2011 – a joint communication from the presidents of the CJEU and the ECtHR,\(^\text{119}\) which is addressed to the general public, but also has particular importance in the context of the ongoing negotiations on accession between the Council of Europe and the EU. As a first important point, it is asserted, that the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before bringing the matter before the ECtHR, because ‘the preliminary ruling procedure may be launched only by national courts and tribunals, to the exclusion of the parties, who are in a position to suggest a reference for a preliminary ruling, but do not have the power to require it’.\(^\text{120}\) Secondly, the two presidents confirm that a procedure should be put in place, which is ‘flexible and would ensure that the

\(^{113}\) This is linked with the principle of subsidiarity in the system of the ECHR, and the fact that it is primarily for the national authorities and the national courts to prevent or, in default of prevention, examine and penalize breaches of the ECHR - Discussion document (n 90), p. 3.

\(^{114}\) See Case C-188/92 Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland [1994] ECR I 00833.

\(^{115}\) Discussion document (n 90), p. 4.


\(^{117}\) Discussion document (n 90), p. 4.

\(^{118}\) Ibid, pages 4 and 5.

\(^{119}\) Joint communication (n 100). This joint communication can be characterized as an exceptional document also because the CJEU and the ECtHR have no formal and legal institutional relations so far.

\(^{120}\) Ibid, p. 2.
CJEU may carry out an internal review before the ECHR carries out external review.’ 121 This document is intended to provide guidance to the drafters of the accession agreement by giving solutions for two of the most important contentious procedural issues that needed to be resolved.

The question of elaboration of a special co-respondent (or co-defendant) mechanism was addressed already in 2002 in a study of the technical and legal issues of a possible EU accession to the ECHR carried out within the Council of Europe. 122 Such a mechanism would allow the EU to participate in the proceedings whenever issues of EU law are at stake in a case before the ECtHR, taking into consideration, in particular, the ‘desirability of giving an opportunity to the EU to defend itself in such a case as well as the fact that with a view to a possible execution of a judgment, it might be useful to ensure the co-operation of the EU (enforceability)’. 123 The study further reflects that this mechanism would perhaps be useful in cases concerning an alleged violation of the ECHR by an EU Member State on account of a measure taken by that State in implementation of EU law, and that there might even be a need to oblige the EU to intervene in such a delicate situation. 124 The possibility for the inverse situation is also discussed, i.e. giving an EU Member State the possibility to seek leave to join the proceedings as a co-respondent/co-defendant where the case has been brought against the EU. 125 Finally the study covers the question whether possibilities should be created for an individual applicant to seek to have the EU (in case the application was brought against an EU Member State) or an EU Member State (in case the application was brought against the EU) joined to the proceedings as co-respondent/co-defendant, 126 i.e. to oblige them to join the proceedings as co-respondents.

The figure of the co-respondent is therefore necessitated by the specificities of the EU legal order – by the fact that two groups of actors (the EU through its institutions and the Member States) can implement EU law and adopt acts touching upon the legal sphere of individuals, which acts can be ultimately checked for violations of human rights under the ECHR by the ECtHR. On the other hand, the actions of the EU and the Member States are interrelated. The Member States have the constituent power to amend the Treaties and play a decisive role in the work (including adoption of acts) of the intergovernmental institutions of the EU. The EU has its own competence and can adopt binding rules which Member States are obliged to implement. It seems logical that individuals are provided with the opportunity to bring the co-respondent(s) together with the main respondent, which will both be bound by the judgment of the ECtHR and will have the power eventually to take all the necessary steps to remedy the violation of the ECHR. In this context it is also important to provide all the stakeholders with an opportunity to defend their acts or actions by granting them the status co-respondent(s).

The contentious issues described certainly represented a real challenge for the drafters of the accession agreement, because the latter had to make sure that the competencies, the autonomy and the principles of functioning of the EU and the ECHR are preserved, that all legal requirements in the Treaties and the Protocols thereto are complied with, and that the guidance provided by the CJEU and the ECtHR is followed, which is certainly a complex

121 Ibid, p. 3.
122 Council of Europe, Study (25-28 June 2002), (n 108).
123 Ibid, para 57.
124 Ibid.
125 Ibid, para 60.
126 Ibid, para 61.
task. The solutions of these issues provided for by the draft accession agreement will be discussed in the following parts of this paper.

8. Draft Agreement on the Accession of the EU to the ECHR.

Several important steps have been taken since the entry into force of the Treaty of Lisbon which made accession of the EU to the ECHR seem more realistic and feasible today. Following the ratification of Protocol No. 14 to the ECHR, the provision of Article 59(2) ECHR permitting the EU to accede to the ECHR came into force in 2010. This amendment of the ECHR demonstrates the political will of the contracting parties to the ECHR to allow for a non-state entity to accede thereto, which is moreover not a member of the Council of Europe and will not become such as a condition to accede. In addition to that, the Committee of Ministers of the Council of Europe assigned the Steering Committee for Human Rights (‘CDDH’) with the task to elaborate a legal instrument, or instruments, setting out the modalities of accession of the EU to the ECHR, including its participation in the ECHR system. The CDDH on its part decided to entrust an informal group of experts with the task of drafting such legal instrument(s) and, in this context, to examine all related issues in co-operation with the European Commission, which was formally given a mandate by the Council of Ministers to negotiate the EU accession to the ECHR. The informal group which was composed of 14 members (7 coming from member States of the EU and 7 coming from States which are not members of the EU) held in total eight working meetings with the European Commission between July 2010 and June 2011. The final drafts of the instruments were discussed at an extraordinary meeting held on 12-14 October 2011 with a view to their adoption, as a result of which the draft legal instruments became a reality and were transmitted to the CDDH with a view to their examination and adoption.

The draft legal instruments on the accession of the EU to the ECHR consist of a Draft Agreement on the Accession of the EU to the ECHR (‘the draft Agreement’), of a 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 and of a Draft Explanatory report to the Agreement. The aim of the draft Agreement, which consists of 12 articles, is to preserve the equal rights of all individuals under the ECHR, the rights of applicants in the ECHR procedures and of a Draft Explanatory report to the Agreement. It has been declared that the EU would, as a matter of principle, accede to the ECHR on an equal footing with the other Contracting Parties, that is, with the same rights and obligations. Some amendments or adaptations of the existing system would be necessary, because the EU is not a state like all the other contracting parties to the ECHR and because of the special relation between the EU and its Member States. In addition to that, the negotiators of the draft Agreement had the uneasy task to address all the contentious issues discussed prior to accession, to comply with

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131 Council of Europe, Report, 14 October 2011, (n 129), para 3 and 4.
132 Ibid, para 7.
133 Ibid, para 8.
134 Ibid, para 8.
the limitations and guidance provided by the stakeholders and in particular the EU Member States and to take into account the discussion document of the CJEU and the communication from the presidents of the CJEU and the ECtHR. The analysis below aims at describing and assessing the solutions provided in the draft instruments, and in particular in the draft Agreement. The situations where the draft Agreement doesn’t provide a specific solution by means of an amendment or a particular provision are also addressed, since the ‘lack’ of specific provisions very often proves to be a solution by itself.

8.1. Solutions provided for the institutional issues.

a) Status, duties and election of the EU judge at the ECtHR:

Disregarding the different proposals that the status and duties of the EU judge at the ECtHR should be limited, the draft Agreement does not provide any special rules in that regard. This means that Article 20 of the ECHR has not been amended and as a High Contracting Party, acceding to the ECHR on an equal footing, the EU will have a full-time judge elected, who will participate in the work of the ECtHR just like any other judge, i.e. the future EU judge will not be with limited participation only in cases involving EU law. This is an important solution guaranteeing full rights of institutional participation of the EU in the ECtHR and providing for the opportunity of the EU judge to contribute with his/her expertise to the work of the ECtHR. Furthermore, the procedure for the election of judges envisaged in Article 22 ECHR has not been amended by the draft Agreement either, which means that the future EU judge will be elected by the Parliamentary Assembly of the Council of Europe (‘PACE’) by a majority of the votes cast from a list of three candidates nominated by the EU.

However, the EU will only accede to the ECHR, but it will not become a party to the Council of Europe, which means that it will not be automatically represented in the PACE. That is why the draft Agreement provides in its Article 6 that a delegation of the European Parliament will be entitled to participate, with the right to vote, in the sittings of the PACE whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the ECHR. The number of representatives of the European Parliament will be the same as the highest number of representatives sent to the PACE by the largest states. Therefore, Article 6 of the draft Agreement once again reflects the idea of EU accession to the ECHR on an equal footing with the other contracting parties by providing for EU institutional participation in a body of the Council of Europe to which the EU itself will not become a party. One can argue that this is an exceptional solution, since as a principle non-member entities are normally not allowed to vote, even if they can attend the meetings of such institutions or organizations. However, the delegation of the European Parliament will have the right to vote in PACE only when the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the ECHR. On the other hand, once the EU judge is elected, it has rightly been observed that since the EU judge will most probably have the nationality of an EU Member State, that Member State will have two of its nationals represented on the ECtHR. This compromises to some extent the idea of EU accession on an equal footing and balance in the ECHR system, and it may necessitate an amendment of the internal procedures of the ECtHR to avoid a situation where two judges of the same nationality sit on the same case.

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135 See Article 22 ECHR.
136 Groussot, Lock and Pech, (n 107), page 8.
137 Ibid.
b) Participation of the EU in the Committee of Ministers of the Council of Europe:

Another institutional concern is addressed in Article 7 of the draft Agreement and it has to do with the participation of the EU in the Committee of Ministers of the Council of Europe, which has a number of functions conferred upon by the ECHR, the main one being the supervision of the execution of judgments the ECtHR under Article 46 of the ECHR and of the terms of friendly settlements under Article 39 of the ECHR. Under Article 7 of the draft Agreement the EU will be allowed to participate in the Committee of Ministers, with the right to vote when, generally speaking, decisions concerning the ECHR are taken. One could easily argue that this will place the EU and its Member States in a very powerful position in the Council of Ministers, since they will have twenty-eight out of forty-eight votes when decisions concerning the ECHR are taken. Therefore, the negotiators have included several rules in Article 7 (2) of the draft Agreement which aim to ensure the ‘effective exercise by the Committee of Ministers of its supervisory functions’ and thus try to avoid situations in which the EU and its Member States might vote in a co-ordinated manner, where the Committee of Ministers supervises the fulfillment of obligations either by the EU alone, or by the EU and one or more of its Member States jointly, or only by a Member State of the EU. That is also why the second draft instrument has been proposed - 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. It provides that certain decisions concerning the supervision of the fulfilment of the obligations of the EU and/or its Member States will be adopted by different majorities only of the representatives of those High Contracting Parties which are not Member States of the EU. This is certainly a solution to the issue of possible coordinated voting regarding the supervision of the obligations of the EU and/or its Member States. However, one can argue that such coordinated voting is still possible when it comes to a decision concerning the supervision of the fulfilment of the obligations of another High Contracting Party to the ECHR.

c) EU contributions to the ECHR budget:

An additional institutional question is addressed in Article 8 of the draft Agreement, concerning the participation of the EU in the expenditure related to the ECHR. The EU will thus have to pay an annual contribution whose amount will be equal to 34% of the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe. In the context of the Council of Europe Programme and Budget 2012-2013, this means that if the EU accedes to the ECHR and has to contribute to the expenditure in 2013, the EU will have to pay a bit more than EUR 9.2 million, which is a negligible amount in comparison to an EU budget of EUR 129.1 billion in 2012.

These institutional novelties represent positive solutions of the contentious issues and successfully reflect the idea of accession of the EU to the ECHR on an equal footing, without affecting the specific characteristics of the EU and without changing unnecessarily the system under the ECHR. On the one hand, with its fully-fledged ECtHR judge, and its participation in the PACE and in the Committee of Ministers, the EU will have similar rights of institutional participation in the ECHR system as the other High Contracting Parties to the ECHR. On the other hand, the EU will bear the relevant obligations as well, by contributing to

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138 See Article 7 (2) of the draft Agreement.
139 See Article 8, para 1 of the draft Agreement.
the ECHR related expenditure and by being subjected to the supervision of the Committee of Ministers, excluding the possibility of co-ordinated voting with the EU Member States. In that regard it could be observed that one of the major requirements stipulated in Protocol No. 8 annexed to the Treaties, namely that the agreement on accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’ in particular with regard to the participation of the EU in the control bodies of the ECHR, has been successfully accomplished by the drafters. However, one can argue that the possibility of coordinated voting between the EU and its Member States exists when it comes to a decision concerning the supervision of the fulfilment of the obligations of another High Contracting Party to the ECHR.

8.2. Solutions provided for the substantive issues.

a) ECHR review of EU Primary law:

Since it is not explicitly excluded by the draft Agreement, the normal consequence of EU accession to the ECHR is that the ECtHR will have jurisdiction to perform review for compliance with the ECHR of EU primary law, i.e. the ECtHR will have the competence to assess whether primary EU law is in violation of human rights under the ECHR. It is interesting to observe that in the EU legal order the CJEU cannot check the validity of provisions of the EU treaties (EU primary law), since the EU treaties are the highest norm, ‘the basic constitutional charter’ and there is a non-rebuttable presumption that they are valid. Once the EU accedes to the ECHR, as an international agreement the ECHR will sit below the EU Treaties in the hierarchy of norms in the EU legal order, and theoretically the CJEU can check the validity of the ECHR with the EU treaties. On the other hand, under the system of the ECHR the ECtHR will be able to review provisions of EU primary law for compatibility with the ECHR. The fact is that the co-respondent mechanism introduced with the draft Accession treaty presupposes such a review in the hypothesis when the EU is the respondent and the Member States are entitled to become co-respondents. In this case, provisions of EU primary law agreed upon by the Member States and implemented by the EU institutions might be the reason to bring a case against the EU before the ECtHR, in which situation the EU Member States will be allowed to become co-respondents as explained in detail below.

On the other hand, one can argue that the possibility that the ECtHR will have jurisdiction to perform review for compliance with the ECHR of EU primary law reflects the idea of EU accession to the ECHR on an equal footing, since the national constitutions of the other High Contracting Parties to the ECHR are not immune to such a review. In addition to that, this can be seen as an issue with more theoretical than practical importance, since it seems to a certain extent unlikely that EU primary law might be found to be in violation of the ECHR. However, only a future case before the ECtHR with such subject will reveal the approach to the adopted by the ECtHR.

b) Application of the Bosphorus presumption after accession:

The draft Agreement does not explicitly exclude the possibility of application of the Bosphorus presumption after EU accession to the ECHR. It means that it is for the ECtHR to decide whether the presumption will be abandoned, or it will continue to be applied with regard to situations where Member States merely implement obligations stemming from

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142 *Les Verts* (n 29), para 23.
143 Groussot, Lock and Pech, (n 107), page 9.
membership to the EU. It could be the case that the Bosphorus presumption will be applied when the EU has joined a Member State as a co-respondent, or only in the cases when the EU has not joined as a co-respondent, although the prerequisites for this were at hand (such a case will basically be identical to the current situation when EU Member State(s) are brought before the E CtHR for alleged violations of the ECHR in merely implementing EU measures). It is also possible that Bosphorus presumption will even be extended to all cases related to EU law. Such an extension would have as a consequence that even when a complaint is brought directly against the EU, the E CtHR would not examine compliance with the ECHR on a case-by-case basis, but would rather start from the premise that the EU offers an equivalent legal protection which excludes a finding of violation of the ECHR, unless it is proven that this protection is manifestly deficient. One can argue that such an extension is rather unlikely, because the EU is supposed to accede to the ECHR on an equal footing with the other contracting parties, none of which benefits from a similar presumption. With regard to the Bosphorus presumption it has rightly been observed that it ‘privileges the EU legal order by subjecting it to a lower level of scrutiny than the legal orders of its Member States’, and that hopefully the E CtHR ‘will do away with the Bosphorus approach as it cannot be reconciled with the overall and advertised aim of the draft agreement to treat the EU like any other party to the ECHR.’ However, since the co-respondent mechanism is a voluntary one (as it will be explained in detail below), the EU can decide not join a case as a co-respondent, although the prerequisites for this were at hand, and it might appear that in such situations the Bosphorus approach would be a convenient tool at the disposal of the E CtHR and might still be applied.

c) Accession of the EU to the ECHR and Protocols No. 1 and No. 6 thereto:

Article 1(1) of the draft Agreement stipulates that the EU shall accede to the ECHR and Protocol No. 1 and Protocol No. 6 to the ECHR. Subsequent accession by the EU to other Protocols would require the deposit of separate accession instruments. This solution is understandable, since currently only Protocol No. 1 and Protocol No. 6 are binding to all EU Member States. The eventual accession of the EU to all the protocols to the ECHR could have possibly had the consequence that different sets of substantive rules and human rights standards are applicable for the EU and for each of its Member States, which could have potentially caused serious confusion, especially when the co-respondent mechanism is applied, under which the EU and the Member States are supposed to be bound by the same judgment for the same violation of the ECHR. In addition to that, concerns have been expressed by the UK that ‘EU accession may lead the EU Member States to be automatically bound by all the ECHR Protocols regardless of whether they have ratified them or not’, which, it has been alleged, would contravene Protocol No. 8 to the EU Treaties, requiring that accession should not affect the situation of the EU Member States in relation to the ECHR, in particular regarding the Protocols to the ECHR. From a legal point of view, such a concern seems to a certain degree unlikely, since in principle international treaties and the protocols thereto are binding only for the parties which have formally acceded to them. However, due to the special relation between the EU and its Member States and the fact that EU institutions can adopt binding decisions, such an effect cannot be fully excluded. Probably to avoid potential discrepancies and to take into account the concerns expressed a safe approach has been chosen – that the EU shall accede only to the ECHR and to the two protocols binding to

144 Ibid.
145 Ibid.
146 Council of Europe, Report, 14 October 2011, (n 129), para 16.
147 Groussot, Lock and Pech, (n 107), page 4.
all EU Member States. This solution fully reflects the strict requirement stipulated in Article 2 of Protocol No. 8 annexed to the Treaties, and will certainly not give reasons in that regard to the Member States to block the accession process.

8.3. Solutions provided for the procedural issues.

a) Interpretative autonomy and exclusive jurisdiction of the CJEU:

It should be recalled that under Article 19 TEU and Article 344 TFEU, which form the legal basis for the autonomy of the EU legal order, the CJEU has the task to ensure that in the interpretation and application of the Treaties the law is observed and that the CJEU has been granted an exclusive jurisdiction in ensuring that the rule of law will be observed in all Member States, which undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. Therefore, no other jurisdiction can be granted the right to interpret EU law or to resolve the disputes specified. Furthermore, the CJEU has also declared that ‘an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order’. The accession agreement is undoubtedly an international agreement which could potentially have an adverse effect on the autonomy of the EU legal order. Therefore, it is interesting to observe whether an explicit guarantee or provision in the draft Agreement in that regard were necessary.

First of all, the draft Agreement does not provide the ECtHR with any interpretative powers with regard to EU law. The review of the ECtHR will cover the questions whether a provision of EU law is compatible with the ECHR, and whether an act or omission of the EU institutions is in violation of the ECHR. This type of review does not require the binding interpretation by the ECtHR of EU law. In such cases the ECtHR will probably base its findings on the interpretation of EU law already given by the CJEU. Furthermore, under the draft Agreement no powers are given to the ECtHR to declare an EU law provision invalid (similarly the ECtHR cannot declare provisions of national law of its contracting states invalid). Even if such a provision is found incompatible with the ECHR, the judgment of the ECtHR will have a declaratory character and it will be for the EU to take the appropriate measures to comply with the judgment. From this point of view, the interpretative autonomy and the exclusive jurisdiction of the CJEU are to a great extent preserved.

On the other hand, Article 344 TFEU might seem to be in conflict with Article 55 ECHR, which provides for the exclusive jurisdiction of the ECtHR over the interpretation or application of the ECHR. At the same time, the CJEU is exclusively competent to examine disputes between EU Member States under Article 259 TFEU. If such disputes touch upon the application of ECHR provisions, this might be seen as a means of dispute settlement within the meaning of the ECHR and thus in violation of its Article 55. That is why, Article 5 of the draft Agreement stipulates that proceedings before the CJEU will not be understood as constituting means of dispute settlement within the meaning of Article 55 of the ECHR. Therefore, Article 55 of the ECHR does not prevent the operation of the rule set out in Article 344 TFEU and the exclusive jurisdiction of the CJEU to examine disputes between EU Member States is not affected from this point of view. Article 5 of the draft Agreement is an important sign that the negotiators have tried to make sure that all potential conflicts and clashes between the two jurisdictions will be avoided.

149 Since the ECHR will be formally part of the EU legal order after accession.
Another jurisdictional conflict could potentially arise, when an EU Member State brings another EU Member State before the ECtHR for an alleged breach of the provisions of the ECHR and the Protocols thereto under Article 33 of the ECHR. Could this be considered a dispute concerning the interpretation or application of the Treaties submitted to any method of settlement other than those provided for in the Treaties within the meaning of Article 344 TFEU? It is not surprising that the draft Agreement does not address this issue, since it is not a consequence of the EU accession to the ECHR. This potential jurisdictional conflict exists today prior to the EU accession, but it does not seem to represent a real problem, probably because it is clear that the subject matter of disputes brought before the ECtHR can hardly be regarded as such concerning the interpretation or application of the Treaties. Moreover, since accession to the ECHR is one of the EU pre-accession criteria, it seems obvious that the EU does not regard the ECHR system as one which can affect the exclusive jurisdiction of the CJEU.

Following these clarifications one can argue that the interpretive autonomy and the exclusive jurisdiction of the CJEU will not be affected by EU accession to the ECHR. An EU Member States will be able to bring another Member States for failure to fulfil an obligation under the Treaties before the CJEU under Article 259 TFEU without infringing Article 55 of the ECHR. On the other hand, in their capacity as High Contracting Parties under the ECHR EU Member States can raise against each other inter-state complaints under Article 33 for an alleged breach of the provisions of the ECHR and the Protocols thereto, without infringing Article 344 TFEU. Furthermore, the interpretative autonomy of the CJEU is preserved, since no new powers are granted to the ECtHR to interpret EU law, and with the new mechanism of prior involvement of the CJEU in cases in which the EU is a co-respondent, which will be discussed below.

b) The co-respondent mechanism:

i) Reasons for the introduction of the mechanism:

A major novelty is introduced by Article 3 of the draft Agreement which amends Article 36 of the ECHR and provides for a new co-respondent mechanism which will allow the EU to become a co-respondent in proceedings before the ECtHR instituted against one or more of its Member States and, similarly, it will allow the EU Member States to become co-respondents to proceedings instituted against the EU. This mechanism was considered ‘necessary to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the ECHR alongside its own Member States’. As already discussed the EU is a new order of international law, in which acts adopted by EU institutions may be implemented by its Member States and, conversely, provisions of the EU founding treaties agreed upon by its Member States may be implemented by institutions, bodies, offices or agencies of the EU.

Therefore, a potential problem has been identified that after accession of the EU to the ECHR, ‘the unique situation in the ECHR system could arise, in which a legal act is enacted by one High Contracting Party and implemented by another’. In the absence of a co-respondent mechanism, an individual can direct its action against the implementing measures of the Member State at national level and subsequently before the ECtHR, but if the ECtHR finds a violation of the ECHR the Member States would have been placed under two possibly divergent obligations – to implement the EU measures adopted by the institutions, on one

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150 Council of Europe, Report, 14 October 2011, (n 129), para 32.
151 Ibid.
hand, and to comply with the judgment of the ECtHR finding that the adopted measures are in violation of the ECHR, on the other hand. It could be the case that in such a situation only the EU is in a position of removing the violation by amending its own law. Similarly an action can be brought against the EU for measures of its institutions implementing the EU founding treaties (firstly before the CJEU and subsequently before the ECtHR), and following a judgment of the ECtHR, the EU could have to comply with the Treaties and with a judgment of the ECtHR imposing possibly divergent obligations. Consequently, such a violation could only be remedied by the EU Member State through a Treaty amendment. By the introduction of the new co-respondent mechanism the draft Agreement addresses namely these concerns and the requirement in Protocol No. 8 annexed to the Treaties that it should preserve the specific characteristics of the EU and EU law in particular with regard to ‘the mechanisms necessary to ensure that proceedings by non-Member States and individual applicants are correctly addressed to Member States and/or the EU as appropriate’.

Therefore, the newly introduced paragraph 4 of Article 36 of the ECHR provides a solution in this delicate situation, by stipulating that a co-respondent is a party to the case. This means for e.g. that if an action is brought before the ECtHR against a Member State of the EU, this Member State will become a respondent and thereby a party to the case. However, under the conditions of Article 3 of the draft Agreement, in such a case the EU is granted the procedural opportunity to join the case as a co-respondent and thus to become a party to the case, which will be able to participate in the case with the full rights of a party and will be bound by the judgment of the ECtHR. On the other hand, the same opportunity exists for the EU Member States, when an action is brought before the ECtHR against the EU for implementing provisions of the EU founding treaties. That is why the co-respondent mechanism is not seen as a procedural privilege for the EU or its Member States, but as ‘a way to avoid gaps in participation, accountability and enforceability in the ECHR system, which corresponds to the very purpose of EU accession and serves the proper administration of justice’.

However, in similar situations the position of the applicant will not be more cumbersome in terms of admissibility requirements before the ECtHR, since the new Article 36, para 4 of the ECHR stipulates that the admissibility of an application will be assessed ‘without regard to the participation of a co-respondent in the proceedings’. This means that only the admissibility requirements with regard to the respondent should be complied with, and for e.g. the application will not be considered inadmissible, if it is directed against an EU Member State (respondent) and the domestic remedies of the EU (co-respondent) have not been exhausted. This solution reflects one of the differences between bringing only an EU Member State as a respondent and the EU as a co-respondent (and vice-versa), and bringing both the EU and a Member State as main respondents (in which case both the domestic remedies in the EU and the Member State should be exhausted).

As described above, the co-respondent mechanism is designed to accommodate the specific relation between the EU and its Member States when adopting and implementing acts, which can be found in violation of the ECHR. Therefore, the application of the co-respondent mechanism is limited to the hypotheses specified in Article 3 of the draft Agreement, which means that other contracting parties to the ECHR cannot fall within the ambit of this article and cannot be placed in the position of co-respondents.

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152 See Article 1 (b) of Protocol No. 8 (n 88).
153 Council of Europe, Report, 14 October 2011, (n 129), para 33.
ii) Cases involving EU law in which the co-respondent mechanism could be applied:

It should be observed that the co-respondent mechanism is not designed to be applied in all cases against the EU or the EU Member States involving any allegations of EU law/acts concerning EU law, being in violation of the ECHR. In that regard Article 3, paras 2 and 3 of the draft Agreement establish the conditions for the application of the mechanism.

On the one hand, under Article 3, para 2 of the draft Agreement when an application is directed against one or more EU Member States, the EU may become a co-respondent to the proceedings in respect of an alleged violation notified by the ECtHR ‘if it appears that such allegation calls into question the compatibility with the ECHR rights at issue of a provision of EU law, notably where that violation could have been avoided only by disregarding an obligation under EU law’ (i.e. Member States allegedly have violated the ECHR by implementing acts adopted by the EU). It follows from this provision that the co-respondent mechanism cannot be applied, firstly, if the allegation does not concern a provision of EU law, and secondly, if it concerns a provision of EU law, but the violation could have been avoided by the Member State without disregarding an obligation under EU law (for e.g. if the Member State has acted within its margin of discretion in implementing EU law at national level). This provision reflects the idea that EU participation is not necessary, where a Member State is accountable for its own acts, which it can amend following a judgment of the ECtHR.

On the other hand, under Article 3, para 3 of the draft Agreement when an application is directed against the EU, EU Member State(s) may become co-respondent(s) to the proceedings in respect of an alleged violation notified by the ECtHR ‘if it appears that such allegation calls into question the compatibility with the ECHR rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments’. It is therefore clear that the co-respondent mechanism cannot be applied when the allegation calls into question the compatibility with the ECHR of a provision of EU secondary law for example, or any other provision of EU law with different legal value than the TEU and the TFEU. This is logical, because Member States participation is not necessary when the EU is accountable for its own acts, which it can amend following a judgment of the ECtHR.

Furthermore, Article 3, para 4 of the draft Agreement provides for another hypothesis in which the co-respondent mechanism could be applied, namely when an application is directed against and notified to both the EU and one or more of its Member States. This would mean and both the EU and the Member State(s) will initially be brought before the ECtHR as respondents, but the status of any respondent may be changed to that of a co-respondent, if the conditions of Article 3, para 2 or 3 are met, i.e. ‘upon a finding that the EU or its Member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission’. In this case, the co-respondent mechanism would allow the application not to be declared inadmissible in respect of that party on the basis that it is incompatible ratione personae, but that party’s status can be changed from a respondent to that of a co-respondent.

154 Ibid, para 37.
155 Ibid.
In cases in which the applicant alleges different violations by the EU and one or more of its Member States separately, the co-respondent mechanism will not apply. These will be treated by the ECtHR as two separate cases, with different grounds and allegations, and consequently two separate judgments of the ECtHR will be pronounced. Therefore, admissibility will be assessed with regard to each of the respondents, including the requirement for exhaustion of domestic remedies. Furthermore, these ordinary respondents will be obliged to answer the cases brought against them, unlike the co-respondent procedure which is voluntary and triggered by the request of the EU or its Member State(s).

**iii) Procedural prerequisites to become a co-respondent:**

Article 3, para 5 of the draft Agreement outlines the procedural prerequisites to trigger the mechanism, by stipulating that ‘a High Contracting Party becomes a co-respondent only at its own request and by decision of the ECtHR’. These two prerequisites show that the co-respondent mechanism is a purely voluntary one, whereby neither the EU, nor the Member States can be obliged against their will to assume the position of a co-respondent, since the request on their behalf is an absolute procedural prerequisite in order to become a co-respondent. The logic behind this prerequisite reflects the fact that the initial application was not addressed against the potential co-respondent, and that ‘no High Contracting Party can be forced to become a party to a case where it was not named in the original application’. However, the simple request is not sufficient and will not automatically lead to assuming the position of a co-respondent. A decision of the ECtHR is the second important procedural prerequisite. It is from the moment this decision is adopted, that the EU or the EU Member State(s) become co-respondent(s). Furthermore, before taking a decision, Article 3, para 5 of the draft Agreement provides that the ECtHR will seek the views of all parties to the proceedings (the applicant and the respondent), and when determining a request of this nature the ECtHR will assess whether, in the light of the reasons given by the High Contracting Party concerned (which has requested to become a co-respondent), it is plausible that the conditions in paragraph 2 or paragraph 3 of Article 3 are met. It follows from this provision that the request from a High Contracting Party to become a co-respondent should include reasons why it considers that the material conditions to become a co-respondent are met. Nevertheless, in this assessment it seems that the ECtHR is limited only to ‘the plausibility that the conditions specified are met, and will not perform any evaluation of the merits of the case’. Therefore, the decision of the ECtHR under Article 3, para 5 of the draft Agreement is indeed of a purely procedural nature, ‘in the interest of the proper administration of justice’. After the mechanism has been set into motion, the respondent and the co-respondent will appear jointly in the proceedings before the ECtHR, and will both be considered parties to the case.

**iv) Co-respondent and third party intervention:**

The procedural figure of a co-respondent should be distinguished from that of a third party intervening in a case under Article 36, paragraph 2, of the ECHR. While the co-respondent becomes a full party to the proceedings with all the rights and obligations flowing thereof, which will therefore be bound by the judgment, the third party intervening in a case only has the opportunity to submit written comments and participate in the hearing in a case

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156 Ibid, para 38.
157 Ibid, para 47.
158 Ibid, para 48.
159 Council of Europe, Study (25-28 June 2002), (n 108), para 59.
160 Article 3, para 7 of the draft Agreement.
before the ECtHR, but it does not become a party to the case and is not bound by the judgment. Another procedural difference lies in the fact that the ECtHR is obliged to make a party co-respondent where the conditions are fulfilled whereas the admission of an intervening party is in some circumstances within its discretion. However, the introduction of the co-respondent mechanism does not preclude the EU from participating in the proceedings as a third party intervener, where the conditions for becoming a co-respondent are not met. In this regard one can wonder whether, where the conditions for becoming a co-respondent are met and the EU has decided not to join the proceedings in this capacity (since the co-respondent mechanism is a purely voluntary one), the ECtHR would allow the EU to participate in the proceedings as a third party intervener. Although this is still a hypothetical situation, if the ECtHR would allow the EU to participate in such proceedings as a third party intervener, one can argue that this could greatly undermine the idea of the co-respondent mechanism.

v) Effects of the co-respondent mechanism:

The most important consequence of the application of the co-respondent mechanism is the fact that, since both the respondent and the co-respondent(s) are parties to the proceedings, they will both be bound by the judgment of the ECtHR. Upon finding of a violation of the ECHR when the co-respondent mechanism has been applied (meaning that all the material and the procedural conditions have been fulfilled), it is expected that the ECtHR would ordinarily do so jointly against the respondent and the co-respondent(s) together, because there would ‘otherwise be a risk that the ECtHR would assess the distribution of competences between the EU and its Member States’. The respondent and the co-respondent(s) may, however, in any given case make joint submissions to the ECtHR that responsibility for any given alleged violation should be attributed only to one of them. It should also be recalled that the ECtHR in its judgments rules on whether there has been a violation of the ECHR and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint.

vi) Assessment of the co-respondent mechanism:

In view of the substantive conditions contained in Article 3, paras 2 and 3 of the draft Agreement the co-respondent mechanism is a good and creative solution for the specific situation of the EU and its Member States within the EU legal order as described above. It has been drafted carefully to cover only situations where the participation of the EU and its Member States was necessary. This means that, by giving both the respondent and the co-respondent(s) the status of a party to the proceedings before the ECtHR, situations can be avoided where one party is found in a violation of the ECHR, because of the existence of a provision, which only another party can amend and thus remedy the violation. Therefore, the co-respondent procedure ensures the possible participation of all the stakeholders in the proceedings before the ECtHR and also the accountability and enforceability under the ECHR system. However, one can argue that it is only a ‘possible participation’ and that a considerable weakness of the co-respondent mechanism is the decision to make it voluntary for the co-respondent to join the proceedings, because ‘if a potential co-respondent decides

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161 See Article 36(1) ECHR.
162 Groussot, Lock and Pech, (n 107), page 10.
163 Council of Europe, Report, 14 October 2011, (n 129), para 40.
164 Ibid, para 54.
165 Ibid.
166 Ibid.
not to join the proceedings, their outcome for a successful applicant will be less satisfying as he cannot enforce the judgment against the potential co-respondent. The reasons for providing a voluntary mechanism probably lay in the fact that it was difficult to give the ECtHR the power to oblige the EU to join a case as co-respondent.

In this context, it is interesting to observe that a situation may arise in which the EU decides not to join the proceedings as a co-respondent, although the prerequisites for this are at hand (i.e. Member States allegedly have violated the ECHR by implementing acts adopted by the EU). This situation resembles the one prior to accession of the EU to the ECHR and the ECtHR will have to decide how to deal with such cases. Although they are still only hypothetical, it is possible that under such circumstances the Bosphorus presumption will still be applied. Furthermore, in this situation a Member State of the EU will be the sole respondent and it might be the case that no prior involvement of the CJEU has occurred and still the ECtHR might find that EU legislation is in violation of the ECHR. This particular situation is targeted by the mechanism of prior involvement described below, but nevertheless the draft Agreement does not provide for the prior involvement of the CJEU, when the EU decides not to join the proceedings as a co-respondent.

c) Prior involvement of the CJEU in cases in which the EU is a co-respondent and exhaustion of domestic remedies:

The legal basis for the prior involvement of the CJEU in cases in which the EU is a co-respondent and for the solution of the issue of exhaustion of domestic remedies is provided for in Article 3(6) of the draft Agreement. It concerns the proceedings to which the EU is a co-respondent, i.e. the individual application before the ECtHR concerns acts or omissions of EU Member States and ‘the allegation calls into question the compatibility with the ECHR rights at issue of a provision of EU law, notably where that violation could have been avoided only by disregarding an obligation under EU law’. As already clarified, in such cases it is possible that a reference for a preliminary ruling under Article 267 TFEU has not been made and the CJEU has not yet assessed the compatibility with the ECHR rights at issue of a provision of EU law. However, in the absence of a preliminary ruling, the ECtHR would be required to take a decision on the conformity of an EU act with human rights, without the CJEU having had the opportunity to do so. Therefore, in such hypotheses Article 3(6) of the draft Agreement provides that ‘sufficient time shall be afforded for the CJEU to make such an assessment and thereafter for the parties to make observations to the ECtHR’. In addition to that, the EU will ensure that ‘such assessment is made quickly so that the proceedings before the ECtHR are not unduly delayed’.

Although the provision of Article 3(6) of the draft Agreement does not explicitly stipulate that the preliminary ruling procedure cannot be considered as a legal remedy which an applicant must exhaust before making an application to the ECtHR, this conclusion can be inferred from the interpretation of the provision in question. Since Article 3(6) provides that where a reference for a preliminary ruling under Article 267 TFEU has not been made, sufficient time shall be afforded for the CJEU to make such an assessment, it is clear that in those cases the individual application will not be declared inadmissible by the ECtHR for

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168 As already clarified the issue of the prior involvement is not relevant when the EU is a respondent, because such a hypothesis requires exhaustion of EU domestic remedies, i.e. involvement of the CJEU.
169 See Article 3(2) of the draft Agreement.
170 Council of Europe, Report, 14 October 2011, (n 129), para 57.
171 See Article 3(6) of the draft Agreement.
non-exhaustion of domestic remedies. On the contrary, if all other requirements are at the hand, the application will be considered admissible and the negotiators of the draft Agreement have provided the legal basis for a new procedure of prior involvement of the CJEU in these cases. The new procedure will allow the CJEU to assess the compatibility with the ECHR rights at issue of a provision of EU law, thereby performing an internal review before the provision is subjected to the external review of the ECtHR. That is why it has been asserted that this procedure was ‘inspired by the principle of subsidiarity’. However, no further reference as to the character of this procedure is given. The only indications are that the EU will ensure that such assessment is made quickly so that the proceedings before the ECtHR are not unduly delayed. It seems that the negotiators of the draft Agreement have deliberately decided not to stipulate in details what the procedure before the CJEU should be, because this could have been seen as an interference with the EU judicial system or even as adverse effect on the autonomy of the European Union legal order. As already discussed, such an adverse effect might have led to a negative binding opinion of the CJEU under Article 218(11) TFEU on the compatibility of the draft Agreement with the Treaties, with the consequence that the draft Agreement envisaged might not enter into force unless it is amended or the Treaties are revised. However, such an outcome due to the new procedure has been avoided and the EU will have to decide on its own whether one of the existing procedures before the CJEU will be used, or a new procedure will be created.

9. Assessment of the draft Agreement.

One can certainly note that the draft Agreement has been prepared carefully and has addressed the main concerns related to the institutional, substantive and procedural issues brought up in the context of different discussions, in articles and in studies conducted by the EU and within the Council of Europe. At the same time it closely follows the requirements envisaged in Article 6 TEU and Protocol No. 8 annexed to the Treaties for non-extension of the competences of the EU and for preserving the characteristics of the EU and EU law, while at the same time providing for proper EU participation in the ECHR institutional system, and ensuring that new procedural mechanisms are created.

These institutional novelties represent positive solutions of the contentious issues and successfully reflect the idea of accession of the EU to the ECHR on an equal footing, without affecting the specific characteristics of the EU and without changing unnecessarily the system under the ECHR. On the one hand, with its fully-fledged ECtHR judge, and its participation in the PACE and in the Committee of Ministers, the EU will have similar rights of institutional participation in the ECHR system as the other High Contracting Parties to the ECHR. On the other hand, the EU will bear the relevant obligations as well, by contributing to the ECHR related expenditure and by being subjected to the supervision of the Committee of Ministers, excluding the possibility of co-ordinated voting with the EU Member States. In that regard it could be observed that one of the major requirements stipulated in Protocol No. 8 annexed to the Treaties, namely that the agreement on accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’ in particular with regard to the participation of the EU in the control bodies of the ECHR, has been successfully accomplished by the drafters. However, one can argue that the possibility of coordinated voting between the EU and its Member States exists when it comes to a decision concerning

172 Which would have been the case, if the reference to the CJEU was considered a domestic remedy, which the applicant should exhaust before lodging an application at the ECtHR.

173 Council of Europe, Report, 14 October 2011, (n 129), para 58.

174 For e.g. the accelerated preliminary ruling procedure provided for in Art. 104a of the Rules of Procedure of the CJEU.
the supervision of the fulfilment of the obligations of another High Contracting Party to the ECHR.

Since the EU is supposed to accede to the ECHR on an equal footing the draft Agreement does not exclude the review of EU primary law by the ECHR. This is a privilege which none of the other High Contracting Parties enjoys with regard to their national constitutions. In addition to that, the draft Agreement does not affect the interpretive autonomy and the exclusive jurisdiction of the CJEU. Furthermore, by providing that proceedings before the CJEU will not be understood as constituting means of dispute settlement within the meaning of Article 55 of the ECHR, it eliminates a possible conflict between the exclusive jurisdictions of the CJEU and the ECtHR. By providing that the EU accedes to the ECHR and Protocol No. 1 and Protocol No. 6 to the ECHR, the draft Agreement certainly complied with one of the requirements stipulated, namely that the situation of the EU Member States in relation to the ECHR should not be affected, in particular regarding the Protocols to the ECHR. However, the draft Agreement does not address the future of the Bosphorus presumption. It remains unclear whether the EU legal order will be privileged in any way in comparison to the other High Contracting Parties to the ECHR. Nevertheless, one can argue that the future of the Bosphorus presumption is not part of the subject matter of the draft Agreement, but is to be resolved only by the ECtHR in the light of the rights and obligations the EU will have under the ECHR after accession.

The co-respondent mechanism and the mechanism for prior involvement of the CJEU in cases in which the EU is a co-respondent represent creative solutions and major novelties, which reflect the specific legal order of the EU and the relations between the EU and its Member States. The co-respondent procedure ensures the possible participation of all the stakeholders in the proceedings before the ECtHR and also the accountability and enforceability under the ECHR system. However, one can argue that it is only a ‘possible participation’ and that a considerable weakness of the co-respondent mechanism is the decision to make it voluntary for the co-respondent to join the proceedings, because ‘if a potential co-respondent decides not to join the proceedings, their outcome for a successful applicant will be less satisfying as he cannot enforce the judgment against the potential co-respondent’. 175 The reasons for providing a voluntary mechanism probably lay in the fact that it was difficult to give the ECtHR the power to oblige the EU to join a case as co-respondent and that ‘no High Contracting Party can be forced to become a party to a case where it was not named in the original application’. 176

Moreover, it is important to note that a situation may arise in which the EU decides not to join the proceedings as a co-respondent, although the prerequisites for this are at hand (i.e. Member States allegedly have violated the ECHR by implementing acts adopted by the EU). This situation resembles the one prior to accession of the EU to the ECHR and the ECtHR will have to decide how to deal with such cases. Although they are still only hypothetical, it is possible that under such circumstances the Bosphorus presumption will still be applied. Furthermore, in this situation a Member State of the EU will be the sole respondent and it might be the case that no prior involvement of the CJEU has occurred and still the ECtHR might find that EU legislation is in violation of the ECHR. This particular situation is targeted by the mechanism of prior involvement, but nevertheless the draft Agreement does not provide for the prior involvement of the CJEU, when the EU decides not to join the proceedings as a co-respondent.

175 Groussot, Lock and Pech, (n 107), page 13.
176 Council of Europe, Report, 14 October 2011, (n 129), para 47.
Despite some minor and seemingly inevitable shortcomings of the draft Agreement, one can argue that it represents a well-balanced solution for all the major concerns expressed prior to accession and to all the requirements laid down by the Member States. However, it is still uncertain whether this version of the draft Agreement will be the final one. On the Council of Europe part, the accession agreement will eventually concluded by the Committee of Ministers and ratified by all 47 contracting parties to the ECHR, including those which are EU Member States. On EU part, the accession agreement should be voted unanimously by the Council of the EU, the consent of the European Parliament will also be required, and the decision of the Council of the EU concluding this agreement will enter into force only after it has been approved by the EU Member States in accordance with their respective constitutional requirements. In addition to that, the possibility exists that a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice under Article 218, para 11 TFEU as to whether the agreement is compatible with the Treaties. One can argue that the future of the draft Agreement is now in the hands of the stakeholders, and in particular the Member States which can block the accession process, provided that their guidelines have not been followed and the limitations they imposed have not been complied with.

III. CONCLUSION.

Although human rights protection was probably not one of the main concerns of the founding fathers of the EEC/EU, the legal evolution in the Union for the past fifty years demonstrates their growing importance within EU law and policy. In this regard, two processes can be distinguished – the protection of human rights internally, within the EU itself, and the promotion of human rights in EU external relations, as part of the EU pre-accession process and in a variety of bilateral agreements with non-European states. Internally, the significance of human rights was early on recognized by the CJEU, which granted them a nearly-primary position among the sources of EU law and included them in the legality control performed within the EU judicial system. In addition to that, the subsequent treaty amendments additionally strengthened the position of human rights in the EU by granting them a central place in the EU legal order by stipulating that the EU is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. Furthermore, if a serious and persistent breach by a Member State of these values is determined, certain rights of a Member State may be suspended, including its voting rights in the Council. The Lisbon Treaty further reinforces the position of human rights in the EU legal order by creating an internal human rights catalogue for the EU with the introduction of the Charter of Fundamental Rights of the EU which has the same legal value as the Treaties. Nevertheless, the opt-out of the UK and Poland from the Charter, and the fact that it is not addressed to individuals can be regarded as serious shortcomings.

However, the legitimacy and the credibility of these developments have been doubted, since the EU is still not part of the common pan-European system of human rights protection under the authority of the ECHR. In this regard the Treaty of Lisbon constitutes a major novelty and a breakthrough by providing the legal basis for the accession of the EU to the ECHR. This legal basis and the amendment of the ECHR allowing the EU to accede demonstrate the willingness expressed on behalf of the two legal orders to make accession a legal reality. Accession will certainly be beneficial for the EU Member States and their citizens, on the one hand, and for the EU and its institutions, on the other. Furthermore, it will
additionally increase the legitimacy and the international recognition of the ECHR system and all its accomplishments.

A lot of work has been done since the entry into force of the Lisbon Treaty to bring the EU closer to accession to the ECHR. The draft accession Agreement can be seen as a major accomplishment in that regard, which provides for creative solutions, while respecting the guidelines given by the stakeholders. Although some weaknesses have been identified with regard to the draft Agreement, the most prominent ones being the voluntary character of the co-respondent mechanism and the possibility for the ECtHR to rule on compatibility of EU law with the ECHR before the CJEU had made a ruling on the matter (in the hypothesis when the EU has decided not to join the proceedings as a co-respondent), the overall impression is that the draft Agreement has been prepared carefully and has addressed the main concerns related to the institutional, substantive and procedural issues, as well as the requirements defined by the stakeholders. The EU will accede to the ECHR on an equal footing with the other High Contracting Parties. The interpretive autonomy and the exclusive jurisdiction of the CJEU will not be affected by EU accession to the ECHR. The co-respondent mechanism and the mechanism for prior involvement of the CJEU in cases in which the EU is a co-respondent occupy a central place among the procedural novelties brought up by the draft Agreement.

Since the mandate of the negotiators of the draft Agreement is now considered to be fulfilled, it is up to the Council of Europe and the EU, and ultimately the Member States, to assess the results achieved and eventually to approve them, thereby completing the accession process. The entry into force of the accession agreement will certainly bring to an end the long-lasting legal and political debates about the future and the modalities of the EU accession to the ECHR. However, EU accession to the ECHR will also mark the beginning of another process – one of new and hopefully intriguing legal developments, resulting from the submission of the EU legal order to the independent external review for compliance with human rights standards under the ECHR system.
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