

Accession of the EU to the ECHR: A Legally Complex Situation

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INTRODUCTION

THE PROTECTION OF fundamental rights has been subject to extensive scrutiny and development over the past 50 years. As the competences of the European Union expand, it has become increasingly relevant for the Union to address human rights issues. While the Member States are all party to the European Convention on Human Rights (ECHR), the Union has always remained outside the scope of the ECHR, despite various attempts to accede. This has led to inconsistencies in the interpretation and protection of human rights in the Union. After decades of discussion, the Lisbon Treaty has placed on the Union an obligation to accede to the ECHR and has given an explicit competence to the EU institutions to accede to this system. Nevertheless, the path is still quite long and full of obstacles before an accession to the ECHR. In that sense, it is well-known that the process of accession has been slowed down by some divergences among certain Member States of the European Union. More recently, certain non-EU Member States of the Council of Europe have also expressed strong concerns. The various hick-ups related to accession are in fact not surprising considering the complexity of the task. In essence, this daunting task can be summarized in the following query: how to preserve the specificity of the EU legal order when the principle of equality between the Contracting States of the ECHR is the overarching rule?¹ The first section of this article traces back the origins and the difficult path followed

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¹ One thing remains sure, however, as put by Tulkens, '[t]he quality of the relationship between the European Convention of Human Rights and Union law will determine to a large extent the future of European law in general and the legal culture inspiring it'. See F Tulkens, 'EU Accession to the European Convention of Human Rights', Seminars on Human Rights for European Judicial Trainers, 9 October 2012, 12.

by the EU to accede to the ECHR. Special attention is also given to the study of the different rationales used for adhering to the Convention (A Complex History). The second section focuses on the complex relationship between the two courts, ie the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), in light, more specifically, of the Strasbourg case law and Article 52(3) of the EU Charter of Fundamental Rights (A Complex Relationship). Finally, the third section goes into the Draft Accession Agreement of 12–14 October 2011 and assesses the main reform proposed by the agreement in light, in particular, of the ‘sacrosanct’ specificity and autonomy of the EU legal order (A Complex Procedure).

A COMPLEX HISTORY

The Pre-Lisbon History

Already in 1953, in its draft treaty establishing a European Community, the ad hoc assembly of the European Coal and Steel Community provided for the integration of the substantive provisions of the ECHR in the Treaty. Yet, the

omission of a reference to fundamental rights in the ECSC and the EEC treaties was because, in the opinion of their authors, these were economic treaties with implications for the protection of fundamental rights. By contrast, when it came to founding a political community, the issue of protection of fundamental rights, returned to the forefront.²

In parallel to the debate on accession, it is well-known that protection of fundamental rights developed mainly through the case law on general principles of the Court of Justice.³ As a result of its unwritten and casuistic nature, the protection of fundamental rights in the European Union has often been a source of inconsistency.⁴ In 1979, the European Commission pointed out that accession was an important issue and the protection of fundamental rights ensured by the CJEU essentially have the same aim, ie the protection of a heritage of fundamental rights considered inalienable by those European States organized on a democratic basis. For the

² JP Jacqu e ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 *Common Market Law Review* 995.

³ See the Joint Declaration of the European Parliament, the Council and the Commission of 5 April 1977 [1977] OJ C103/1. This declaration indicates the importance of fundamental rights as part of the general principles of law recognized by the Communities and emphasizing the key role played by the ECHR. Initially, the protection of fundamental rights was believed to fall outside the scope of Union competences, and the ECJ refused to rule on that matter.

⁴ W van Gerven, ‘Towards a Coherent Constitutional System within the European Union’ (1996) 2 *European Public Law* 81, 98.

Commission, '[t]he protection of this Western European heritage should ultimately be uniform and accordingly assigned, as regards the Community also, to those bodies set up specifically for this purpose'.⁵ A complete coherence of the system of fundamental rights protection in Europe can only be achieved by an accession of the EU institutions to the ECHR and the submission of the Union to the external control of the ECtHR.

The political context of the Maastricht Treaty,⁶ as well as the increasing case law of the Court of Justice confirming the Union approach toward the ECHR as a 'significant' source of influence in elaborating fundamental rights through the doctrine of general principles of EU law, led to a debate initiated by the European Commission whether or not the Union should accede to the ECHR.⁷ The Council responded to this development by asking the Court of Justice for an Opinion, a possibility given by Article 218 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 228 EC).⁸ The question to the Court was phrased as follows: 'Would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 be compatible with the Treaty establishing the European Community?'

In its Opinion 2/94, the CJEU considered that,

[s]uch a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article [352]. It could be brought about only by way of treaty amendment.⁹

Thus, the power of the protection of fundamental rights through the general principles of Union law was preserved. Yet, the choice of this '*status quo* approach'¹⁰ did not lead to the decline of human rights protection in the EU. Conversely, an overview of the subsequent jurisprudence of the Court shows a large recognition of the ECHR jurisprudence and a great awareness

⁵ Commission Memorandum adopted on 4 April 1979, Supplement n° 2/79 to the Bulletin of the European Communities at 8–9.

⁶ Article F (2) [Article 6(2) TEU] codified the case law of the Court of Justice and incorporated a reference to the ECHR. However, the location of this Article in the Treaty on the European Union together with the limitations on the jurisdiction of the Court of Justice under Article L, avoided the incorporation of the ECHR by the back door. The Treaty of Amsterdam (Article 46(d) TEU) put an end to the limitation of jurisdiction of Article 6(2) TEU for the acts of the institutions.

⁷ See eg Case 222/84 *Johnston* [1986] ECR 1651.

⁸ Opinion 2/94 of the European Court of Justice, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 28 March 1996.

⁹ *ibid*, para 35.

¹⁰ AG Toth, 'The European Union and Human Rights: The Way Forward' (1997) *Common Market Law Review* 491 *et seq*.

in taking rights seriously.¹¹ Accession was also favoured by the 1998 *Comité des Sages* Report¹² and in 2000, by a resolution adopted on the 16th March, the European Parliament again urged the Intergovernmental Conference to give the Union authority to become a party to the ECHR.

Subsequently, as the Lisbon Treaty entered into force thus through the instrument proposed by the CJEU in Opinion 2/94, a Treaty amendment, the debate over an accession to the ECHR came to an end. Yet there has been a strong restraint against the matter of accession due to the fact that it was once thought by the Court that a change to accession would constitute a fundamental constitutional change which could not legitimately be enforced unless the EU revised the founding Treaties of the Union. However, this argument appears to have given less cause for concern in recent years as Article 6(2) TEU now states that the Union ‘shall’ accede to the ECHR which implies that instead of it being debated further, the Union will be required to accede in the near future but not in a manner that will ‘affect the Union’s competences as defined in the Treaties’.

The Reasons for the Accession

The obligation of accession can be regarded as a positive step in the development of a stable and solid system of human rights. As the Union has expanded in the past 50 years, it now has power over areas where human rights play a crucial and important role such as immigration and criminal justice and it could be successfully argued that it would make little sense for the law-making body to be exempt from the safeguards of the ECHR. It is also paradoxical to maintain that any state that wishes to join the European Union must agree to the provisions of the ECHR when the Union itself, as a body, is exempt from interference from the ECHR. Therefore, it can be said that accession is essential in helping to create a coherent human rights system as it would provide a minimum standard of human rights protection which would be uniformly applied across all Member States and therefore ensuring that there is consistent human rights protection within the Union.

Some of the arguments for accession, for example, that the EU should accede because its Member States are Parties, or because it regards accession as a condition of membership of the EU, or because of its human rights policy in relation with third countries, can be regarded as weak arguments, as they do not touch on what ought to be the central question: whether

¹¹ See X Groussot, *General Principles of Community Law* (Groningen, Europa Law Publishing, 2006), in particular Chapter 3.

¹² The four wise women and men being A Cassese, C Lalumière, P Leuprecht and M Robinson. See A Cassese et al, *Leading By Example: A Human Rights Agenda for the European Union for the Year 2000* (Florence, EUI, 1998).

accession strengthens the protection of human rights in the EU? In that sense, accession is also valuable for the Union as it means that the rights of individual citizens would be more closely protected. At the present moment, the Union is not sufficiently open to effective scrutiny from an external source and this situation thus creates uncertainty for individuals who would like to challenge an act of the European Union before the ECtHR. As a result, if the Union were to accede to the ECHR, a more transparent system would be put in place, allowing more accountability as they could be held liable by the ECtHR. Individuals would be able to bring cases against the Union at the ECtHR in Strasbourg, under the same circumstances as applications brought against national authorities.¹³

Through the establishment of a system of external control, the accession can send a strong signal concerning a high level of human rights protection in Europe and contribute to the harmonious development of the case law of the two European courts in this field.¹⁴ On the practical side, the accession will give competence to the ECHR to assess the compatibility with the ECHR of both the acts of the Member States falling within the scope of EU Law and acts of the EU institutions, eg Regulations or Directives. In that sense, accession will remedy the existing anomalous situation that someone who considers his human rights violated by an EU act must address his complaint before the ECtHR against a Member State and not directly against the Union.

The Conditions of the Accession

Importantly, the accession to the ECHR should be put in the context of the necessary and ongoing procedural reform of the ECtHR. Although there are many practical issues which could arise as a result of the EU acceding, the House of Lords Committee was correct when it stated that

we do not mislead ourselves in thinking that accession by the Union (and Committees) to the ECHR would be anything but politically and legally complex.

¹³ It would mean that citizens may feel more assured with regards to their human rights and they will have confidence in the knowledge that the EU is subject to an external scrutiny by an independent court in addition to being legally bound to protect their human rights as well as presenting a united front to all non-EU countries by having a credible human rights system. This is an important point as there has been a growing contradiction between the human rights commitments demanded from non-EU states, for instance in connection with development aid and association agreements and the lack of any external scrutiny whatsoever of the Union's own actions.

¹⁴ P Alston and J Weiler, 'An Ever Closer Union in Need of a Human Rights Policy' in P Alston (ed), *The EU and Human Rights* (Oxford, Oxford University Press, 1999) 3, 30.

But we do not doubt that, given the political will, the legal and other skills can be found to overcome the difficulties.¹⁵

The Protocol 14—which has been opened for signature since May 2004 and entered into force on 1 June 2010—does not only provide a necessary procedural reform of the ECHR system but also allows for European Union accession to the Strasbourg Convention. It appears clear from the contents of Protocol 14 that the issues of procedural reform and accession are closely related. And it is in fact difficult to accept an accession without a deep reform of the ECHR system of remedies that allows for an effective respect of the right to a fair hearing in a reasonable time. As it is well-known, the ECtHR has delivered more than 10 000 judgments since its reform in November 1998 and the entry into force of Protocol 11. But problematically, the ECtHR had an enormous backlog of approximately 140 000 pending cases in 2011.

The achievement of the procedural reform is a crucial parameter for the accession to the ECHR and its own success.¹⁶ Moreover, it appears clear that additional modifications to the ECHR will be necessary in order to make such accession possible from a legal and technical point of view. A number of legal, technical and institutional issues are still unresolved and have to be addressed in the mandate to be adopted under Article 218 TFEU as well as in the negotiations with the Council of Europe. This might be a difficult task since (the mandate of) the accession agreement should be approved by unanimity in the Union Council and ratified by all States of the Council of Europe. Also, it is of utmost importance that the mandate respects the specificity of the EU legal order as defined by Protocol 8 of the Lisbon Treaty. In conclusion, it should be emphasized that the negotiations were based on giving the same status as other Contracting Parties as far as possible, ie putting emphasis on the principle of equal treatment between Contracting Parties. This appears to be a difficult task particularly if we analyze the principle of equality in the light of specificity/autonomy of the EU legal order.

A COMPLEX RELATIONSHIP

The Pre-Lisbon Case Law

The relationship between Union law and the ECHR has never been clear cut. This complex relationship is highlighted by case law pre Lisbon

¹⁵ Select Committee on the European Union, 8th Report EU Charter of Fundamental Rights (16 May 2000), para 142.

¹⁶ See speech by President L Wildhaber of the ECHR, during the third summit of the Council of Europe, 16–17 May 2005. See speech at the colloquy on future development of the ECHR in San Marino, on 22 March 2007, www.coe.int.

Treaty, in particular the cases of *Matthews*¹⁷ and *Bosphorus* are of crucial importance in order to understand the nature and scope of the legal interaction.¹⁸ These cases also reflect the gap which has been created due to the Union not being party to the ECHR and demonstrate the importance of the EU being able to participate at all levels at the European Court of Human Rights in Strasbourg, which can only be achieved through accession.

As things currently stand, only national measures falling within the scope of EU law are effectively subject to the jurisdiction of the Strasbourg Court, ie acts of the Member States derogating from EU law or implementing EU secondary legislation. It may also be worth mentioning that the ECtHR initially held that it lacked jurisdiction to examine proceedings before, or decision of, the organs of the EC as the EC is not a party to the ECHR¹⁹ before finally ruling on 18 February 1999, in the *Matthews* case,²⁰ that it can review, in principle, national measures that apply or implement EU law. Yet the case law of the ECtHR has since demonstrated a high degree of deference to the extent that it exercises its control on the basis of the presumption that fundamental rights protection in the EU system can normally be considered to be ‘equivalent’ to that of the Convention system.²¹ Although this presumption can be rebutted on a case-by-case basis where it is shown that the protection of ECHR rights was manifestly deficient, the ‘Bosphorus test’, overall, provides a low threshold when compared to the usual standard of supervision the ECtHR normally exercises.

The Impact of the EUCFR and Lisbon Treaty on the Relationship

The question of the accession to the ECHR has been much discussed during the EU Charter’s negotiation. The main reasons for acceding to the ECHR are to improve the uniform protection of fundamental rights by eliminating the detrimental conflicts of interpretation between the two Courts and rendering the ECtHR competent *ratione personae* to examine, as such and directly, the acts of the European institutions.

With the entry into force of the Lisbon Treaty, Article 6(2) TEU put an obligation to accede to the ECHR and the Lisbon Treaty also renders the EU Charter of Fundamental Rights binding. It is important to stress that, until accession to the ECHR is formally realized, there is no direct review of acts of the Union institution before the ECtHR. It is evident that formally

¹⁷ *Matthews v United Kingdom* (App no 24833/94) (1999) ECHR 1999-I (‘*Matthews*’).

¹⁸ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (App no 45036/98) (2006) 42 EHRR 1 (‘*Bosphorus v Ireland*’).

¹⁹ ECoHR Decision of 10 July 1978 on Application no 8030/77, *Confédération française démocratique du travail v European Communities*.

²⁰ *Matthews* (n 17).

²¹ *Bosphorus* (n 18).

speaking the ECHR is not binding on the EU.²² It is arguable, however, that in the present situation of negotiating the accession agreement to ECHR each court pays great attention to the jurisprudence of the other and thus appears motivated not to be the one providing a lesser standard. This assertion is also backed up by Article 52(3) of the EU Charter of Fundamental Rights (EUCFR) that creates a situation of ‘informal accession’. The cooperation between the courts is nevertheless not based on a legal duty to cooperate, but merely on comity.²³ Thus, either court can unilaterally end this cooperation at any moment. An EU accession to the ECHR is therefore a desirable step in order to clarify the relationship and provide for a clear legal basis for the cooperation between the ECJ and the ECtHR.

According to Article 52(3) of the Charter,

[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Two key aims can be identified in this provision. First of all, this paragraph has the purpose to ensure consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorized limitations, are the same as those laid down by the ECHR. As made clear by the explanations, the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the ECtHR and by the CJEU. This paragraph is essential in making sure that the Charter’s rights incorporate as a minimum the standards of the Convention. The level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR. Secondly, the last sentence of the paragraph is intended to allow the Union to guarantee more extensive protection. It is true that under Article 53 ECHR, the Strasbourg Convention constitutes a minimum standard of protection. It is also true that the Court of Justice in its pre-binding Charter case law has sometimes taken a ‘maximalist’ approach of the ECHR rights.²⁴ This approach must be praised since it has established a high standard of protection in Europe and has led to the cross-fertilization of the legal orders. Interestingly, the Court of Justice is now empowered very clearly to do so. Article 52(3) of the Charter may thus be said to

²² JP Costa, ‘The relationship between the ECHR and European Union Law—A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice’, lecture at King’s College London on 7 October 2008 (online).

²³ T Lock, ‘The ECJ and the ECtHR: The Future Relationship between the Two European Courts’ (2009) 8 *The Law and Practise of International Courts and Tribunals* 375, 381.

²⁴ See, eg, Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143.

enhance the plurality of the European constitutional protection and, at the same time, safeguard the autonomy of Union law by allowing a higher level of protection.

It is unfortunate, however, that the existence of Article 52(3) of the Charter does not entirely solve the relationship between the ECHR and EUCFR when it comes to corresponding rights. In fact, it resorts from the *Åkerberg* case²⁵ of 26 February 2013 that the doctrine of corresponding rights remains extremely problematic in relation to the so-called peripheral ECHR rights, eg the *ne bis in idem* principle.²⁶ In this case, the CJEU provided an autonomous interpretation of the *ne bis in idem* principle despite its obligation to follow the ECtHR case law under Article 52(3) of the Charter. In other words, it means that certain corresponding rights (the so-called peripheral rights) do not pertain to the scope of this Charter provision. This creates, once again, another complex relationship between the ECHR and the EUCFR.

Moreover, it is contended that Article 52(3) EUCFR codifies the principle of equivalent protection developed in the Strasbourg regime.²⁷ This doctrine of equivalent protection as developed by the European Commission of Human Rights (ECoHR) and ECtHR can be viewed as an instrument to maintain a peaceful relationship between the EU and ECHR legal orders.²⁸ It is worth noting that, even before the entry into force of the Lisbon Treaty, the CJEU and its Advocates General have often stressed the equivalence of protection between the ECHR rights (including the corollary jurisprudence) and the Luxembourg case law.²⁹ But what is the situation after the entry into force of the Lisbon Treaty? Is there any evolution or impact on the doctrine of equivalent protection? Indeed, this doctrine of equivalent protection is not static but evolutive as it resorts from the analysis of the ECHR case-law from *CFDT* to *Bosphorus* in passing by *M & Co*.³⁰ As seen before,

²⁵ Case C-617/10 *Hans Åkerberg Fransson* Judgment 26 February 2013, ECR 2013:105.

²⁶ In contrast to core rights, eg freedom of expression, that are accepted by all 47 States of the Council of Europe; the so-called peripheral rights are only accepted by States having signed a specific Protocol, eg Article 4 of Protocol 7 in relation to the *ne bis in idem* principle.

²⁷ See ECoHR Decision of 9 February 1990 on Application no 13258/87, *M & Co v Federal Republic of Germany*. ECoHR Decision of 10 July 1978 on Application no 8030/77, *Confédération française démocratique du travail v European Communities*.

²⁸ See P De Hert and F Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 *German Law Journal* 7, 889.

²⁹ For example AG Mischo in Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 48; Case T-112/98 *Mannesmannröhren-Werke AG v Commission* [2001] ECR II-729; AG Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411 para 127.

³⁰ *M & Co* (n 26). The doctrine of equivalent protection can be used in relation to assessing the procedural admissibility of a request (eg *CFDT*) but also for assessing the material scope of a human rights violation based on general policies of the organization (eg *M & Co*) or based on the specific case (eg *Bosphorus*). See in general, P Popelier, C Van de Heyning and P Van

the *Bosphorus* doctrine has brought uncertainty in the sense that it creates a low threshold of scrutiny in contrast with the threshold established in other contexts such as in the *Saadi v UK* case.³¹ In the 2009 *Kokkelvisserij* case,³² in which the Strasbourg Court reviewed EU primary law, *Bosphorus* has been confirmed by the ECtHR and the threshold for finding a human rights violation appears to be, therefore, significantly high.³³

In the 2011 *MSS* case, which concerned the transfer of an asylum seeker from Belgium to Greece in June 2009, Greece being the Member State responsible within the meaning of EU Regulation No 343/2003 (the Dublin Regulation), the ECtHR discussed at length the *Bosphorus* case in a post Lisbon context related to the implementation of EU secondary legislation.³⁴ In its ruling, the Strasbourg Court made clear that the application of the *Bosphorus* doctrine is intricately linked to the role and powers of the CJEU in offering an effective protection of fundamental rights. It also emphasized the limits of the *Bosphorus* judgment that was applicable at the time only to the ‘first pillar’ of European Union Law. In other words, the presumption of equivalence applied only to the fields of policy categorized as first pillar issues. This was not the situation in the *MSS* case where the State makes use of the derogation clause or sovereignty clause under Article 3(2) of the Dublin Regulation.³⁵ As a result, the ECtHR applied a heightened standard of judicial scrutiny. It is worth noting that the CJEU in the *NS* case delivered in the same year as *MSS* relied extensively on the logic of the ECtHR.³⁶ The CJEU ruled that the information cited by the ECtHR enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate the risks related to systematic violations of fundamental rights. The CJEU concluded that the Member States may not transfer an asylum seeker to the Member State responsible within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EUCFR.³⁷ The *NS* case is a perfect illustration of the cross-fertilization of the ECHR and EU legal order.

Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Cambridge, Intersentia, 2011).

³¹ De Hert and Korenica (n 28) 889. *Saadi v United Kingdom*, Application no 13229/03.

³² *Kokkelvisserij v Netherlands* (App no 13645/05) Decision of 20 January 2009.

³³ See C Van de Heyning and R Lawson, ‘The EU as a Party to the European Convention of Human Rights’ 35 in P Popelier et al (n 30).

³⁴ *MSS v Belgium and Greece* (App no 30696/09) 21 January 2011.

³⁵ *ibid* para 339.

³⁶ Joined cases C-411/10 *NS* and C-493/10 *ME* [2011] ECR I-13905.

³⁷ *ibid* paras 91–94.

Finally, it may be said that the *MSS* case shows that the *Bosphorus* logic and its doctrine of equivalent protection is still alive and kicking. The *MSS* judgment also establishes a clear link between the *Matthews* case (EU primary law) and the *Bosphorus* case (EU secondary law), and this in connection with the great importance attached to the role and powers of the CJEU within the circumstances of the case. If the CJEU cannot provide an effective standard of human rights protection then the doctrine of equivalent protection is not applicable and the ECtHR may apply a high standard of judicial review. The essential question remains whether the ECtHR will continue to apply the *Bosphorus* doctrine in the wake of accession of the EU to the ECHR. It is in no way certain that the ECtHR will abandon this doctrine and one may believe that the ECtHR will continue to uphold the doctrine of equivalent protection as a *ratione materiae* standard.³⁸

Bosphorus after Accession

EU accession to the ECHR may impact the *Bosphorus* approach. Indeed, the accession to the ECHR may put an end to the logic of ‘presumption of equivalence’ and ‘manifest deficiency’ coined by the *Bosphorus* case. The ECtHR’s deferential approach may be dropped or extended. Those in favour of abandoning this doctrine argue that it is important to avoid any double standard between the State parties to the ECHR and the EU. An extension of the *Bosphorus* approach’s scope of application would mean, by contrast, that EU regulations or Commission decisions, for instance, would be subject, similarly to national measures that strictly apply or implement EU law, to a low degree of judicial scrutiny in Strasbourg. This ‘specific feature’ of the ECJ’s jurisprudence explains, in part, why the ECtHR agreed to consider that the EU protects fundamental rights in a manner that can be considered equivalent to that for which the Convention provides and devises a ‘manifest deficiency test’ in the *Bosphorus* case, that is, a low standard of scrutiny for EU measures.

The literature has been critical when it comes to the hands-off approach adopted by the ECtHR in *Bosphorus* concerning judicial scrutiny and clearly advocates for the rejection of the *Bosphorus* doctrine in the wake to the EU accession to the ECHR. It is true that if the main rationale of the *Bosphorus* case was based on the fact that the Union was not a party to the Convention then there is no reason to follow the *Bosphorus* doctrine after accession. Much of the criticism towards ‘the presumption of equivalence and the ‘manifest test’ echoed the doubts of the minority judges in *Bosphorus*. Four main objections to the presumption of equivalence can

³⁸ De Hert and Korenica (n 28) 891.

be distinguished. These objections are based on the so-called arguments of equality, proportionality, comity and uncertainty. The equality and proportionality objections were already reflected very strongly in the concurring opinions. The equality objection displays the danger of double standards which may be the consequence of the application of the presumption of innocence by the ECtHR. The proportionality objection mirrors the general and abstract manner in which the majority found equivalence and stigmatizes the lack of a substantive test of proportionality regarding the breach of the right to property as defined in Article 1 of Protocol 1 of the ECHR.

The third type of objection is based on *comity*. This argument is founded on the disappearance of comity between the CJEU and the ECtHR after the accession. It is true that the present relationship between the two European courts is often described as based on the principles of cooperation and respect. But the accession will give the last word to the ECtHR regarding the interpretation of the ECHR rights in every situation. As to the uncertainty objection, it is argued here that the *Bosphorus* case is ambiguous as to the State actions that are exempted from full judicial review. Indeed, for the ECtHR, it seems that if equivalent protection is considered to be provided by the EU, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the EU. What is the exact scope of application of the presumption of equivalence?

In light of these four objections, one should wonder whether the *Bosphorus* doctrine of presumption of equivalence should be dropped after accession.³⁹ A positive answer is far from being certain due to one single element: specificity. In fact, most of the reasoning in *Bosphorus* is based on the specific nature of EU law, both with regard to the limited discretion to which the Member States have when applying and enforcing EU legislation and in establishing and justifying the presumption of compatibility with ECHR standards. The principle of equivalence—based on the rationale of transfer of powers/sovereignty—that lies at the heart of the doctrine of presumption will not disappear and will remain unaffected after the accession. This principle has further been reinforced by the existence of a binding Charter of Fundamental Rights since December 2009 and is now codified in its Article 52(3). Apparently, the presumption of equivalence reflects the specificity of the EU legal order as defined in Protocol 8 of the Lisbon Treaty. In any event, the accession agreement will probably be decisive for the *Bosphorus* approach in the future.

³⁹ For a discussion, see S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 4, 645–82. The author pinpoints the great complexity of EU accession and considers that the future of *Bosphorus* is difficult to predict.

A COMPLEX PROCEDURE

The Draft Accession Agreement and the Autonomy/Specificity of the EU Legal Order

Now that the Lisbon Treaty has enabled the Union to accede to the ECHR and given the strong legal and political impetus for accession, the main obstacle to be overcome with respect to accession is the exact practicalities of an accession agreement. After accession, the Union will be, for the very first time, under an external system of judicial review and could also eventually be held responsible for violations of the Convention. As we shall see, these changes may seriously impact on the autonomy of the EU legal order. To this end, 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') was annexed to the Lisbon Treaty so as to lessen such a threat.

According to Article 1 of Protocol No 8, an accession agreement must preserve the 'specific characteristics' of Union law. While it is unclear what must be preserved by an accession agreement, the specific characteristics appear to be a reference to the autonomy of the Union's legal order.⁴⁰ Two aspects are of particular relevance when it comes to ensuring an accession which does not irremediably impair the autonomy of EU law: the issue of exclusive jurisdiction as to the application and interpretation of Union law (the judicial review issue); and the issue of distribution of powers between the Union and its Member States which is in fact crucial in order to situate where the alleged violation of the Convention occurred and thus allocate the responsibility (the responsibility issue). This section mainly aims at looking more closely at these not so unrelated matters. Before dealing with them, it is important to understand the meaning and scope of autonomy in Union law. This appears to be a long and well-established fundamental concept underlying the legal order of the Union which can be found both in primary law and the CJEU jurisprudence. The autonomy is particularly reflected by the exclusive competence of the CJEU 'to ensure compliance with the law in the interpretation and application of the treaties' (Article 19 TEU).

The case law of the CJEU reflects both internal and external autonomy. While the early understandings of Union autonomy were mostly focused on the relationship between the Union and its Member States, for example as a basis for primacy and direct effect of Union law,⁴¹ the concept does

⁴⁰ T Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *European Law Review* 777, 781.

⁴¹ See especially Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585. Flowing from this, the CJEU also derived the principle of supremacy. Combined, these two core concepts form the foundation for a distinct and autonomous legal order.

encompass several external aspects reflecting the relationship between the EU legal order and international law.⁴² As expressed by Halberstam and Stein, the ‘internal dimension of European constitutionalism is only half the promise of an autonomous legal order’.⁴³ ‘Interpretative autonomy’ signifies that only the institutions of the Union legal order are competent to interpret the constitutional and legal rules of that order. This exclusivity of interpretation was clearly recognized by the Court of Justice in its Opinion 1/91 on the EEA Agreement.⁴⁴ In that sense, the first EEA agreement was not compatible with the Treaty since it allowed the Court of the EEA to decide on the distribution of competences between the Union and its Member States—[respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty (new 19 TEU)]—and [that it would] lead the EEA Court to interpret Union law in conflict with ex Article 164 EEC Treaty (220 EC and new 19 TEU).⁴⁵

In a similar vein, in *Opinion 1/92*, which concerned a revised version of the Draft Agreement on the EEA, the ECJ emphasized the importance of a provision which stated that the Court of Justice was not to be bound by the case law of the dispute settlement body provided for in the international agreement, as an ‘essential safeguard which is indispensable for the autonomy of the [EU] legal order’.⁴⁶ Also, in *Opinion 1/09* on the Draft Agreement on the European Union Patent Court, the CJEU declared the Draft Agreement to be incompatible with the Treaties because of insufficient guarantees for the involvement of the CJEU as to the interpretation of EU law.⁴⁷ In *Kadi* the CJEU considered that not only does the autonomy of EU law impede an international agreement from affecting the allocation of powers within the EU and the exclusive competence of the Court of Justice, but an agreement must also not have the effect of prejudicing the constitutional principles of the Treaty, which include respect for fundamental rights.⁴⁸ This statement, therefore, links the autonomy of EU law together with the hierarchy of norms, with primary law taking priority over Union agreements and secondary law. From this case law one can conclude that an accession agreement (as an international agreement) must not affect the essential powers of the EU’s institutions and the ECtHR must not be given jurisdiction to interpret the Treaties in a binding fashion and decide on

⁴² T Lock, ‘Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order’ (2011) 48 *Common Market Law Review* 1025, 1029.

⁴³ D Halberstam and E Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order’ (2009) 46 *Common Market Law Review* 13, 62.

⁴⁴ Opinion 1/91 EEA, 14 December 1991 [1991] ECR I-6079.

⁴⁵ *ibid* paras 34–35 and paras 44–46.

⁴⁶ Opinion 1/92 [1992] ECR I-2825 para 24.

⁴⁷ Opinion 1/09 [2011] ECR I-1137.

⁴⁸ Cases 402/05 P & 415/05 P *Kadi* [2008] ECR I-6351 paras 283–85.

the division of competence instead of the CJEU.⁴⁹ Therefore, agreeing on a mandate of accession to ECHR is not an easy task. This is particularly true in relation to the participation of the Union in the control bodies of the European Convention but also with regard to the mechanism necessary that *proceedings* by non-Member States and individual applications are correctly addressed to Member States and/or the Union.

Incorporating the Co-Defendant Model as a System of Shared Responsibility

As established by the CJEU in its Opinions on international agreements, the division of responsibility between the Union and its Member States may be assessed only by the Court of Justice. The co-defendant mechanism which implements a system of shared responsibility is supposed to solve this dilemma. This 'voluntary based mechanism' allows the Union or a Member State [at its own request and by decision of the ECtHR] to join the proceedings as 'co-defendant' [with the status as party to the case] alongside the addressee of the individual application at the admissibility stage.

More precisely, the mechanism prescribed by Article 3 (ex Article 4) of the Draft Accession Agreement allows the EU to become a co-defendant to cases in which the applicant has directed an application only against one or more EU Member States. Likewise, the mechanism would allow the EU Member States to become co-defendants to cases in which the applicant has directed an application only against the EU. Where an application is directed against both the EU and an EU Member State, the mechanism would also be applied if the EU or its Member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission. In this case, the co-defendant mechanism would allow the application not to be declared inadmissible in respect of that party on the basis that it is incompatible *ratione personae*.

Entitling the Union's involvement as co-defendant would acknowledge the Union as a separate legal entity and respect the specificities of the Union legal order and respect the exclusivity of the CJEU's jurisdiction, by precluding the ECtHR from interpreting the Treaties and making decisions regarding competences (see Article 3(6) prior control). Moreover, the involvement of the Union in proceedings would arguably further support the execution of a judgment, and enhance cooperation of the Union in terms of enforcement, to ensure that human rights are respected and

⁴⁹ T Lock (n 40).

observed in the international community.⁵⁰ Such an arrangement would have the advantage of ensuring that the final judgment will be directly enforceable against both defendants, without the Strasbourg Court having to make any ruling on the allocation of competences between the Union and the Member State in question. Overall, this system would certainly improve the effective protection of fundamental rights in cases involving EU law. If the EU becomes a co-respondent in addition to the original responding Member State, the *res judicata* of the judgment would be extended to the European Union.⁵¹ In this sense, this system may benefit the applicant as it helps to remove the violation.⁵²

During the negotiations of the accession agreement, it was suggested that the Union should be *obliged* to join a case involving Union law as a co-defendant alongside the Member State. Nevertheless, obliging the Union to join as co-defendant may be viewed as prejudging the liability of the Union. This would be contrary to the rights of the defense and the Convention itself. A more suitable proposal is a procedure where the Union may seek leave to join as a co-defendant. The granting of leave to join as co-defendant could be given merely based on arguments of proper administration of justice rather than considering substantive arguments of responsibility. This would avoid accusations of prejudgement, while enabling the Union to participate as co-defendant. Much criticism has been raised against the co-respondent system. This criticism was mainly founded on its complexity, the risk of an abuse of the procedure [its voluntary nature] and the creation of an unfavourable position for the applicant. It is true that the joining of a co-respondent may affect the applicant in many ways. For example, it may affect the prospect of a friendly settlement; it may delay the process of the case before the Court; and following judgment it may complicate or delay the execution process. In that sense, the non-governmental organizations strongly emphasized during the negotiations, that if the mechanism had to be put into force it should however be limited. It is worth noting that the memorandum regarding the June Draft highlighted that, '[o]n the basis of the relevant case law of the Court, it can be expected that such a mechanism may be applied only in a limited number of cases'.⁵³ However, as observed by Eckes, that expectation may be somewhat of a low estimate.⁵⁴

⁵⁰ These arguments are also applicable to Member States, where the case is brought against the Union. Accordingly, the procedure should also be available for the Member State to join as co-defendant.

⁵¹ T Lock (n 40) 786.

⁵² See X Groussot, T Lock and L Pech, 'EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011', Foundation Robert Schuman, Policy Paper European Issues no 218, 2011, at www.robertschuman.eu/doc/questions_europe/qe-218-en.pdf, 13.

⁵³ Memorandum regarding the June Draft Accession Agreement, para 44.

⁵⁴ C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *Modern Law Review* 254–85, 267.

In addition, some Member States have criticized the current state of affairs concerning the co-respondent mechanism. For example, Germany considers that inviting the EU to submit observations in accordance with Article 36(1) of the Convention would be more appropriate.

Some have also argued that the co-respondent procedure could be abused. However, it is unlikely that such a procedure could be abused since Article 4(3) TFEU, which incorporates the duty of loyalty, prevents Member States from unnecessarily joining the Union to proceedings irrelevant to it. Even without relying on the duty of loyalty, it would be an abuse of process if Member States sought to join the Union in unrelated matters. Finally, it is still rather unclear whether in case of a violation the co-defendant will be equally bound by that finding and whether it is then for the Union to decide who the real perpetrator of the violation is. The simple road here and the one we recommend is to retain joint responsibility in all cases where co-respondents are involved.⁵⁵

Furthermore, the fact that the ECtHR would not have the power to oblige either the EU or the Member States to join proceedings as co-respondent have met with criticism both in doctrine⁵⁶ and, more importantly, from all the non-EU Member States to the Convention (NEUMS). Arguing that an optional co-respondent mechanism ‘might lead to gaps in participation and, consequently, to lack of accountability and enforceability in the ECHR system’,⁵⁷ the critics of the current draft suggest that a voluntary mechanism runs counter to the very interests it purports to support.⁵⁸

Validity of EU Law and Prior Involvement of the CJEU

After accession, the system of external review can conflict with the principle of autonomy of EU law and the established CJEU case law. The CJEU *alone* holds a monopoly over the interpretation and application of the Treaties and is the sole arbiter charged with determining the division of competences between Member States and the Union. The CJEU alone has the power to declare an act of the Union invalid.⁵⁹ Yet the accession to ECHR could undermine the autonomy of EU law since a national court requested to raise the question may adopt a final decision without having requested

⁵⁵ JP Jacqué (n 2) 1015.

⁵⁶ See T Lock, ‘End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR’ (2012) 31 *Yearbook of European Law* 1, 162–97.

⁵⁷ Common Paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on Major Concerns Regarding the Draft Revised Agreement on the Accession of the European Union to the European Convention on Human Rights, 47+1(2013)003.

⁵⁸ See T Lock (n 56).

⁵⁹ Case 314/85 *Foto-Frost* [1987] ECR 4199.

a preliminary ruling, meaning that no further intervention of the ECJ is needed and that the ECtHR can review the compatibility of EU legislation. The CJEU stated in a working document in 2010 that a development where the ECtHR is being called on to decide on the conformity of a Union act with the ECHR without giving the CJEU a prior opportunity to rule on the case would be undesirable.⁶⁰ Naturally, the CJEU wished to maintain its monopoly concerning the declaration of invalid acts of the Union. It is however important to remember that the ECtHR will never be given the power to declare a Union act void, but rather to establish its incompatibility with the ECHR.⁶¹ It is true that the ECtHR only produces so-called ‘declaratory judgments’.

It may be said that the problem of prior involvement only arises when the invalidity of the act for non-observance of rights guaranteed by the Convention is invoked before a national court and the national court does not rely on the preliminary ruling procedure under Article 267 TFEU. For such a case, there is a need of a mechanism involving the CJEU after proceedings before the ECtHR have been investigated in order to avoid infringing the autonomy of the EU legal order (joint communication of the ECJ and ECtHR). A formal mechanism appears to be necessary in the situation where an informal mechanism based on the ‘exhaustion’ of the preliminary ruling is superfluous. The complexity of the issue may be illustrated by the many different types of formal mechanisms that have been advocated during the accession negotiations:

- Preliminary Ruling by ECtHR to the CJEU (Badinter proposal).⁶²
- Involvement of the CJEU by means of an Opinion (CDDH-UE (2011)).
- A Right of the Commission to investigate proceedings before the CJEU (Timmermans proposal).⁶³
- A Right of the Advocate General to investigate proceedings before the CJEU (Jacqué proposal).⁶⁴
- Preliminary Ruling from the CJEU to the ECtHR.⁶⁵
- Obligation on national court to use Article 267 TFEU (avoiding a formal mechanism).

⁶⁰ See Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5/05/2010.

⁶¹ Decision of 24 April 1990 on *Kruslin v France* (App no 11801/85) and Decision of 9 October 2003 on *Slivenko v Latvia* (App no 48321/99).

⁶² French Senate, Communication of Mr Robert Badinter on Negotiation Mandate (E 5248) 25 May 2010, at www.senat.fr/europe.

⁶³ Judge Timmermans, hearing at European Parliament’s Committee on Constitutional Affairs on 18 March 2010, available at www.europarl.europa.eu/activities/committees/hearings.

⁶⁴ JP Jacqué (n 2) 1021.

⁶⁵ See also, Steering Committee for Human Rights (CDDH) on Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights (2002)010 Addendum ii, paras 75–77.

While each suggestion may have its own merits and flaws, common to all is the inherent issues of prolonged proceedings, the excessive demand on an individual the involvement of the CJEU could constitute during the process of accessing the Strasbourg Court and the unavoidable clash between the issue of prior involvement and the principle of equality of the Contracting States to the ECHR—none of the national constitutional courts hold the same privilege as the CJEU would have with the establishment of a prior involvement mechanism.⁶⁶ Notably, on 24 January 2011, the Presidents of both the CJEU and ECtHR agreed on the need for such a mechanism. At this stage, Article 3(6) [ex 4(6)] of the draft agreement stipulates the introduction of such a mechanism,⁶⁷ but remains silent on the exact modalities of the procedure. Apparently, the prior involvement of the CJEU will not affect the powers and jurisdiction of the ECtHR since the assessment of the CJEU will not bind the ECtHR. In order not to unduly delay the proceedings before the Court, the EU shall ensure that the ruling is delivered quickly. In this regard, as emphasized in the meeting report, an accelerated procedure before the CJEU already exists and that the CJEU has been able to give rulings under that procedure within six to eight months. Article 3(6) does not give any information as to how the review is to be initiated. As pointed out by Lock, ‘if the draft provided a specific procedure, this would potentially involve a hidden Treaty amendment’ and thus may jeopardize the autonomy of EU law. Therefore, the determination of the procedure has been delegated to the European Union.⁶⁸ It is worth stressing here that two members of the informal working group have reserved their position as to the introduction of a prior involvement by the CJEU.⁶⁹ Furthermore, during the last meeting of the 47+1 group, in January 2013, all the NEUMS of the working group expressed in a common position that the introduction of a prior involvement by the CJEU was an issue of major concern that ‘needs further consideration and should be seen in the wider context of derogations from the principle of equal footing’.⁷⁰

⁶⁶ C Eckes (n 54) 268.

⁶⁷ ‘[i]n proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. [...] The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court’.

⁶⁸ T Lock (n 42) 1049.

⁶⁹ CDDH-UE (2011) 10.

⁷⁰ Common Paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on Major Concerns Regarding the Draft Revised Agreement on the Accession of the European Union to the European Convention on Human Rights (n 57).

Given the fundamental character of the concept of autonomy to the functioning of the Union legal order, it is arguable that this aspect is what the drafters had in mind when stipulating that the ‘specific characteristics’ of the Union were to be preserved. Hence, Protocol No 8 perhaps dictates an accession agreement that preserves the autonomy of the Union and the exclusive jurisdiction of the CJEU over Union and Member States’ acts that fall within Union law. With this limitation imposed by Protocol No 8, the exact practicalities of a workable accession agreement are unclear. The principle of autonomy reflects the specificity of EU law and is closely linked to the role and place of the Court of Justice. ‘Interpretative autonomy’ signifies that only the institutions of the particular legal order are competent to interpret the constitutional and legal rules of that order. This exclusivity of interpretation was clearly recognized by the Court of Justice in its Opinion 1/91 on the EEA Agreement.⁷¹ Yet it is perhaps exaggerated to consider that the accession jeopardizes the interpretative autonomy of the Court of Justice. Indeed, it results from a constant case law of the ECtHR that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. More specifically, it is not for the ECtHR to rule on the validity of national law in the hierarchy of domestic legislation. The ECtHR has also made clear that the same reasoning is applicable to international Treaties, and in this respect it is not for the Strasbourg Court to substitute its own judgment for that of the domestic authorities. In contrast to the Court of Justice, the ECtHR cannot annul an act of the European Union but merely rule on its compatibility with the Convention.

It is particularly important that the accession agreement is careful not to affect the authority of the CJEU. This is the reason why one has suggested the adoption of a specific mechanism whereby prior CJEU intervention would be made compulsory before any ruling of the ECtHR. Such a system, however, will lead to additional delays for the parties and would raise the risk of open conflict between the two European courts. Furthermore, it seems that any such mechanism would put the EU in a *primus inter partes* position which would be hard to reconcile with the principle of equality of the Contracting States to the ECHR.

CONCLUSION

The most recent developments concerning accession to the ECHR confirms the position taken in this article as to the complexity of the mechanism of accession. The Draft Accession Agreement respects without any doubt the specificity of the EU legal order. Suffice it to look at the co-respondent

⁷¹ Opinion 1/91 EEA (n 44).

mechanism and the prior involvement procedure which lie at the heart of the Draft Accession Agreement. But problematically, the respect of the specificity of EU law damages the principle of equality of the Contracting State to the ECHR. It seems that equality cannot be fully respected by the process of accession to the ECHR. In fact, this process leaves us with the impression that privileges are granted to the European Union. Without equality, the legitimacy of the whole process of accession is undermined.⁷² This is the paradox of a European human rights system of protection based on accession to ECHR. In that respect, the NEUMS have shown reluctance to an optional co-respondent mechanism and the introduction of a prior involvement by the CJEU. During the last meeting of the 47+1 group, in January 2013, all the NEUMS of the working group expressed in a common position that the introduction of a prior involvement by the CJEU was an issue of major concern that ‘needs further consideration and should be seen in the wider context of derogations from the principle of equal footing’.⁷³ In the end, it appears to us that the system created for acceding to the ECHR is very complex. As rightly put by Douglas-Scott, the Draft Accession Agreement has mostly increased ‘complexity rather than human rights protection itself’.⁷⁴ Therefore, one legitimate question is whether accession to ECHR is truly beneficial to the European citizen in terms of effective judicial protection.

⁷² On the other hand, it could be argued that equality is not a binding rule and that the EU is not a State but an international organization in order to minimize the clear legitimacy encroachment, F Tulkens (n 1) 8.

⁷³ See *supra* n 58.

⁷⁴ S Douglas-Scott (n 39).

