

WALKING ON A TIGHTROPE: THE DRAFT ECHR ACCESSION AGREEMENT AND THE AUTONOMY OF THE EU LEGAL ORDER

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1. Introduction

The ongoing negotiations on accession of the European Union to the European Convention on Human Rights (“ECHR” or “Convention”) prove to be a difficult task for the negotiators. Since the accession involves the unusual occurrence of a supranational organization signing up to a sophisticated system of human rights protection, this does not come as a surprise. Apart from the political difficulties of obtaining the consent of forty-seven signatories to the Convention and of the EU’s institutions and Member States, the requirements of two very different legal orders need to be brought in line. From the point of view of European Union law, the most prominent obstacle to an integration of the EU into the external supervision mechanism of the Convention is the autonomy of the EU legal order. From the very start of the negotiations it has been clear that that autonomy, which is jealously policed by the Court of Justice of the European Union, would be a major issue for the negotiators. This contribution is therefore dedicated to the intricacies which the negotiators, and potentially the ECJ, face in this respect. It refers to the different versions of a draft agreement published by the informal working group on accession.¹ It contains a critical analysis of the draft with regard to the autonomy of the EU’s legal order but also makes more general comments on whether the proposed solutions would be workable.

2. Background

The EU is currently not a party to the ECHR. As a consequence, it is not directly bound by the human rights guaranteed therein. An accession of the EU to the

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1. First draft agreement on the accession of the EU to the Convention, CDDH-UE(2011)04; (first) revised draft agreement, CDDH-UE(2011)06; (second) revised draft agreement, CDDH-UE(2011)10.

Convention has been on the agenda for over thirty years,² but the technical hurdles to it have only recently been removed. The ECHR is now explicitly open to an accession by the EU.³ And the new Article 6(2) TEU gives the EU not only the competence to sign up to it but at the same time places it under an obligation to do so, by stating that “the Union shall accede to the ECHR”. Negotiations between the Council of Europe and the EU commenced promptly in the summer of 2010.⁴ An “informal working group” presented a first draft agreement in February 2011⁵ and revised versions in March and May 2011.⁶

Accession would end the peculiar situation in which the EU finds itself at the moment. The EU has become a major actor on the international stage and takes pride in its human rights policy.⁷ Furthermore, respect for human rights is one of the conditions for EU membership.⁸ Thus, the fact that the EU itself is not a signatory to any human rights instrument at the moment seriously undermines its credibility internationally. By signing up to the ECHR, the EU would subject itself to the very standards it requires of others and its own legitimacy would be enhanced. More importantly, an accession of the EU to the ECHR would close an important gap in the external control exercised by the European Court of Human Rights (“ECtHR” or “Strasbourg Court”). It is well known that under certain circumstances individuals can hold the Member States of the EU responsible for violations of the ECHR before the Strasbourg Court. The leading cases in this respect are *Matthews* and *Bosphorus*.⁹ In *Matthews*, the Strasbourg Court held that the Convention generally allowed the Member States to transfer sovereignty to the EU; but where they do so, they are responsible to ensure that Convention rights are “secured”. This means that where EU law violates the Convention, an individual can hold a Member State

2. Golsong, “Grundrechtsschutz im Rahmen der Europäischen Gemeinschaften”, (1978) *Europäische Grundrechtezeitschrift*, 346; Commission, Memorandum on the accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Bulletin of the European Communities*, Supplement 2/79; cf. the article by Jacqué, “The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms”, in this *Review*.

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

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

5. CDDH-UE(2011)04, cited *supra* note 1.

6. CDDH-UE(2011)06 and CDDH-UE(2011)10, both cited *supra* note 1.

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

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

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

to account. This stance was generally confirmed in *Bosphorus*, albeit with a twist. *Bosphorus* concerned the impounding by Irish authorities of an aircraft owned by the National Yugoslav Airline but operated by a Turkish airline. An EU Regulation aiming at transposing an embargo against Yugoslavia imposed by the UN Security Council required the impoundment of Yugoslav aircraft. In its decision, the ECtHR confirmed its holding in *Matthews* but introduced an important distinction. While *Matthews* concerned a violation of the ECHR contained in EU primary law, the alleged violation in *Bosphorus* had its origin in a Regulation, i.e. EU secondary law. The ECtHR went on to state its famous presumption that as long as an international organization “is considered to protect fundamental rights ... in a manner which can be considered at least equivalent to that for which the Convention provides” the Court would presume that a State has acted in compliance with the Convention where the State had no discretion in implementing the legal obligations flowing from its membership of the organization.¹⁰ That presumption is, however, rebuttable if the protection in the particular case is regarded as “manifestly deficient”.¹¹ The ECtHR considered that the human rights protection offered by the European Union was equivalent to what the Convention requires. Since Ireland had impounded the aircraft on its territory, the ECtHR had no difficulty finding that *Bosphorus* airlines were within its jurisdiction as required by Article 1 ECHR.

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

10. *Bosphorus*, cited *supra* note 9, paras. 155 and 156.

11. *Ibid.*, para 156.

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

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

3. The autonomy of the EU legal order

An accession treaty to the ECHR has to be compatible with the EU's founding Treaties and will probably be the subject of an Opinion by the ECJ requested under Article 218(11) TFEU. The most prominent obstacle for international agreements is the autonomy of the European Union's legal order, which some past draft agreements have failed to overcome. This was again highlighted by the ECJ in the recent Opinion 1/09 where it held that the EU may submit itself to the decisions of an international court, but that an agreement must nonetheless not violate the Treaties.¹⁴ The ECJ has had a chance to flesh out what the autonomy of EU law means in a number of Opinions and contentious cases. Since accession will subject the EU's legal order to an external scrutiny by the ECtHR, the autonomy of EU law is likely to take centre stage in the accession negotiations and before the Court of Justice. The following short evaluation of the most important decisions on autonomy provides the background for the remainder of this contribution.

The ECJ's case law reveals that a distinction needs to be drawn between two dimensions of autonomy: an internal dimension, of relevance to the relationship between the EU's legal order and the domestic legal orders of the Member States, and an external dimension dealing with the relationship between the EU legal order and international law. The former relationship was addressed very early on in the Court's case law when it held in the landmark decision of *Costa v. ENEL* that the (then) EEC Treaty constituted "le droit né du traité issu d'une source autonome" which was later translated into English as "the law stemming from the treaty, an independent source of law".¹⁵ In that

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

14. Opinion 1/09, 8 March 2011, nyr, paras. 74 et seq.

15. Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

case the autonomy of the EU's legal order was employed as an argument for the primacy of EU law over domestic law. Moreover it meant that its binding force and primacy are not dependent on the domestic law of the Member States, but flow from the Treaties themselves.¹⁶ It is remarkable that the ECJ did not elaborate on the concept of autonomy by providing a definition but seemed to take it as given. With regard to an accession of the EU to the ECHR, the external dimension of autonomy is of greater relevance. Its first mention can be found in Opinion 1/91 on the first draft agreement on the European Economic Area (EEA). In that Opinion the ECJ declared the first EEA draft agreement to be incompatible with the autonomy of the EU's legal order. The ECJ identified three distinct reasons why the agreement violated the autonomy of EU law.

First, the ECJ criticized the jurisdiction of the EEA Court envisaged by the agreement. That court was to have jurisdiction over disputes between the parties to the EEA treaty. The term "party to the treaty", however, had not been clearly defined since the EEA agreement was to be concluded as a mixed agreement, i.e. by both the EU and its Member States as parties. Thus in each of the proceedings before it, the EEA Court would have had to determine who was the correct "party to the agreement". There were three possibilities: the EU, a Member State or the EU and the Member States together. This assessment would have been based on the division of responsibility between the EU and its Member States under EU law: the EEA Court would therefore have had to interpret the EU's treaties. This would have been "likely adversely to affect the distribution of responsibilities defined in the Treaties, and hence the autonomy of EU law" and consequently the exclusive jurisdiction of the ECJ.¹⁷

The second reason was very much related to the first. The EEA Court would have been given jurisdiction to interpret the substantive rules of the EEA agreement. Many of the provisions in the EEA agreement had the same wording as similar rules in the EEC Treaty and had been drafted according to them. From the point of view of the autonomy of EU law, this alone would not have been problematic.¹⁸ The ECJ acknowledged that these rules would not necessarily have to be interpreted in the same way, since the aim and object of the EEA agreement was different from that of the EU Treaties. While the former was concerned with free trade and competition in economic relations between the parties, the latter's objectives went further by creating a legal order of its

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

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

18. *Ibid.*, para 40.

own.¹⁹ However, it was the intention of the drafters that the provisions should be interpreted uniformly. Thus, the ECJ concluded, any interpretation of these identically worded provisions in the EEA Treaty would necessarily prejudice the interpretation of the provisions of the EU Treaties. The ECJ did not consider it sufficient that the EEA Court was obliged to follow the ECJ's case law on these provisions since the agreement only provided for the EEA Court to follow the case law existent on the day of signature of the EEA agreement. Any new developments in the ECJ's case law would not have been included.²⁰

Third, the agreement foresaw a possibility for the domestic courts of the EFTA States to make a request for a preliminary reference to the ECJ regarding the interpretation of the EEA agreement. The ECJ held that an agreement concluded by the EU could transfer new functions to the EU's institutions. However, the autonomy of EU law meant that such a transfer could not lead to a *de facto* amendment of the Treaties. The problem in the case of the first EEA agreement was that the ECJ's answers to the requests by the EFTA States' domestic courts would not have been binding on them. This, the ECJ held, would have changed the nature of the preliminary reference procedure since under EU law any answer given by the ECJ binds the domestic court making the reference. Such a change in the nature of the functions of an EU institution could only be brought about by way of Treaty amendment according to Article 48 TEU.

Later, in Opinion 1/00, the ECJ took the opportunity to restate in its own words what the autonomy of EU law meant.²¹ It identified the following two aspects of the external dimension of autonomy:

“Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered ... Second, it requires that the procedures for ensuring uniform interpretation of the rules of the European Common Aviation Area (ECAA) Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement.”²²

Thus, an international court must not interpret the Treaties in an internally binding fashion. In light of the Opinions rendered, the threshold for this seems to be rather low: it suffices if there is a danger that an international court

19. *Ibid.*, paras. 14–16.

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

21. Opinion 1/00 [2002] I-3493.

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

prejudices the interpretation of the Treaties. Furthermore, the EU and its Member States must not circumvent the amendment procedure laid down in Article 48 TEU by way of an international agreement with third parties. In *Kadi*, the Court confirmed this to mean that an international agreement equally could not prejudice the constitutional principles of the Treaties, especially fundamental rights.²³ This conclusion added an additional twist to the ECJ's jurisprudence on the external dimension of the EU legal order's autonomy: an agreement must neither constitute a hidden amendment to the Treaties nor may it touch upon other constitutional principles in primary EU law, including fundamental rights, which at the time the *Kadi* decision was handed down were only protected as unwritten general principles of EU law.

The concept's relevance has again become apparent in the Court's recent Opinion 1/09²⁴ on the Draft Agreement on the European and Community Patents Court, which the ECJ declared to be incompatible with the Treaties. The ECJ distinguished the agreement before it from the agreements dealt with in the Opinions discussed above. The Patents Court would not only have been given jurisdiction to interpret the provisions of an international agreement but also to interpret EU law,²⁵ which the Court had on previous occasions considered incompatible with the autonomy of EU law. The Court did not regard the built-in guarantees for the involvement of the ECJ to be sufficient even though they were closely modelled on the preliminary reference procedure contained in Article 267 TFEU. It based its arguments mainly on the effect this would have on the courts of the Member States, since under the Patent Agreement they would have been divested of their jurisdiction to decide disputes on EU patents.²⁶ The agreement envisaged that their jurisdiction should be replaced by an exclusive jurisdiction of the Patents Court on actions relating to patents²⁷ leaving the national courts only with residual jurisdiction in these matters. This, the ECJ argued, would also strip them of their powers in relation to the interpretation and application of EU law.²⁸ While the Patents Court was given the right, and in its guise as appeal court the duty, to make a preliminary reference to the ECJ, the ECJ concluded that there were not sufficient guarantees for its own involvement.²⁹ The ECJ identified the problem that there was no possibility to enforce the duty to ask the ECJ for a reference. In contrast, where a national court violates its duty to make a reference to the ECJ, there are two possibilities to remedy this: either the Commission or another Member State

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

24. Opinion 1/09, cited *supra* note 14.

25. *Ibid.*, para 77.

26. *Ibid.*, para 64.

27. Art. 15 of the draft agreement.

28. Opinion 1/09, cited *supra* note 14, para 89.

29. *Ibid.*

can instigate infringement proceedings under Articles 258 and 259 TFEU.³⁰ Alternatively, an individual can bring a State liability case against the Member State.³¹ Since the Patents Court would have been given jurisdiction to interpret European Union legislation and primary law, the Court regarded this deprivation of the national courts as a threat to the autonomy of EU law as it would consequently divest the ECJ of its jurisdiction, too. This Opinion adds a new dimension to the ECJ's case law on the autonomy of the EU legal order. Not only does the Court consider that the EU's own institutions must be protected from being affected by EU agreements, but also institutions of the Member States which carry out obligations under EU law. The autonomy of the EU's legal order therefore permeates the national legal orders and partly incorporates them.

The preceding analysis shows the importance of the autonomy principle in the ECJ's case law on the compatibility of international agreements and of obligations arising from such agreements with EU law. The ECJ clearly views the autonomy of EU law as a principle of constitutional quality. Similar to its internal dimension, the external autonomy of the EU legal order means that it is not dependent on the rules of another legal order, in this case international law.³² EU law is therefore self-referential.³³ It ensures that the Treaties cannot be amended through the back door, without sticking to the amendment procedure laid down in Article 48 TEU. Treaty amendments are only possible insofar as EU law provides for them. Furthermore, it guarantees that the content of the EU's internal rules are not determined by the interpretations of an outside body, but only by the EU's own institutions – most notably the Court of Justice.

In this respect it is remarkable that the EU, which was founded as an international organization, should place so much emphasis on its own autonomy *vis-à-vis* international law. This is even more striking given that the ECJ does not allow for any such autonomy on the part of the Member States' legal orders, but requires them to accept the supremacy of EU law.³⁴ The ECJ's case law on autonomy can therefore be read as proof of the EU's emancipation from being a mere international organization to its current guise as a supranational entity which in many respects resembles a federal State. But even if one accepts that the autonomy of the EU's legal order is ingrained in the EU's constitution, that constitution, *viz.* the Treaties, may provide for limits. Article 6(2) TEU might be regarded as such a limit since it explicitly requires the EU's accession to the ECHR. It could be argued that this explicit competence to accede limits

30. *Ibid.*, para 87.

31. *Ibid.*, para 86.

32. Barents, *op. cit. supra* note 16, pp. 172 and 259.

33. *Ibid.*, p. 259.

34. Starting with Case 26/62, *Van Gend & Loos*, [1963] ECR 1.

the autonomy of EU law as far as an accession to the ECHR is concerned. This would presuppose, however, that Article 6(2) TEU has some substantive content and is not merely an attribution of an external competence. There is room for such an argument since Article 6(2) TEU additionally places the EU under a duty to accede. But the Treaties are silent as to the exact scope of that duty. In particular, there is nothing in the Treaties to suggest that Article 6(2) TEU demands that any and every form of ECHR accession agreement would have to be accepted regardless of its content. On the other hand, it is clear from that provision that the EU and its Member States must not reject the accession to the ECHR outright. Article 6(2) TEU therefore implies that a minimal accession restricted to the Convention as it stands would not in principle be in conflict with the autonomy of the EU's legal order. This includes a possibility for review by the ECtHR. However, the exact ramifications for such review as they are laid down in the accession agreement may well not be in accordance with the requirements of the autonomy principle.

For this reason, it is justified to measure the draft agreement by the standards formulated in the ECJ's case law on the autonomy principle. It is axiomatic that agreements which provide for the jurisdiction of a court outside the EU legal system are likely to come into conflict with the autonomy of EU law. Since the draft accession agreement is largely concerned with the procedure before the ECtHR, the autonomy of EU law will be an issue. This has been foreseen by the Lisbon Treaty, which in Protocol 8 states that the accession treaty "shall make provision for preserving the specific characteristics of the Union and Union law", which is a reference to the preservation of the autonomy of EU law. The present article will therefore assess whether the provisions of the draft accession treaty would pass the hurdle of compatibility with the autonomy of EU law or whether further safeguards would be required. In doing so, it will also provide some general comments on the expedience of the proposal.

4. Autonomy and the accession agreement

Accession of the EU to the ECHR is a rather unusual step in the EU's treaty practice. One major difference between the agreements subject to the Opinions discussed above and the accession treaty is that the accession treaty does not envisage a transfer of the *acquis communautaire* to third States. On the contrary, the situation is such that the EU is to join an established treaty regime, which will lead to a degree of adaptation on the part of the EU. The EU will thus not be the sole dominant party at the negotiating table and might therefore

find it harder to push through all of its wishes.³⁵ All this makes it a truly Herculean task for the negotiators. They have to devise a draft agreement which satisfies political demands, improves (or at the very least does not hinder) the protection of human rights and stays within the strict limits set by the autonomy of the EU legal order.

Since a final accession treaty is not yet available, the following analysis is based on the drafts released so far³⁶ and on other official documents available at the time of writing. These are documents produced by the informal working group, statements made by experts at a hearing before the European Parliament and documents produced by other national or EU institutions. I shall address four points. First, findings of violations by the Court of Human Rights. Second, the possible exclusion of primary law from the scrutiny of the ECtHR. Third, the co-respondent mechanism to be introduced by the accession treaty. Fourth, the plan to introduce a procedure to guarantee a prior involvement of the ECJ.

4.1. *External control by the Court of Human Rights*

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

When deciding upon an alleged violation of the Convention, the Court of Human Rights must take relevant domestic law into account. Thus at first glance, there is a danger of the ECtHR interpreting EU law. However, this is not the case. Just like other international courts, the ECtHR regards the domestic law of the parties to the Convention as part of the facts. This is reflected in *Huvig* where the ECtHR stated that "it is primarily for the national authorities, notably the courts, to interpret and apply domestic law It is therefore not for the Court to express an opinion contrary to theirs"³⁷ Thus the ECtHR

35. Brandtner likened the situation of the EFTA States in the negotiations of the EEA agreements to that of a "powerless audience" being frustrated by an important actor, Brandtner, "The 'Drama' of the EEA", 3 EJIL (1992), 328.

36. CDDH-UE(2011)04; CDDH-UE(2011)06; and CDDH-UE(2011)10, all cited *supra* note 1.

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

would not undertake a binding interpretation of the content of EU law. However, De Schutter rightly pointed out that there seem to be instances where the ECtHR cannot merely accept the domestic law of the respondent party before it as facts.³⁸ These are situations where the ECtHR's determination of a violation necessarily forces it to assess provisions of domestic law. For instance, the question whether a remedy is effective according to Article 13 ECHR necessitates an assessment of certain domestic legal provisions. The same goes for judgments on whether a restriction of a human right was "prescribed by law"³⁹ or whether someone was deprived of their liberty "in accordance with a procedure prescribed by law".⁴⁰ A recent example of a case where a similar assessment had to be made about EU law is the *Kokkelvisserij* case.⁴¹ As in *Connolly*, the applicant (a cooperative) complained that it had not been given the chance to respond to the submissions of the Advocate General, and thus its right to a fair trial guaranteed by Article 6 ECHR had been infringed. In contrast to *Connolly*, the ECtHR addressed the substantive question. It accepted the ECJ's argument in the EU proceedings at issue, where it had pointed to Article 61 of its Rules of Procedure which allows for the reopening of the oral procedure after the Opinion of the Advocate General has been rendered.⁴² In view of that provision and of an Opinion by Advocate General Sharpston in another case where she had explicitly referred to the possibility of reopening the proceedings according to that Article,⁴³ the Court came to the conclusion that this was a realistic option. The example shows that the ECtHR occasionally has to look closely at provisions of domestic law. The autonomy of EU law would however only be affected if this led to an internally binding determination of their content, which would not be the case. The ECtHR only decides whether there was a violation of the Convention in a concrete scenario after proceedings at the domestic level have been completed. The ECtHR then takes into consideration the relevant national law and the practice of the domestic courts in interpreting and applying this law. The ECtHR's take on this question is reflected in *Kemmache*:

38. De Schutter, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: Feuille de route de la négociation", 83 *Revue Trimestrielle des droits de l'homme* (2010), 551–552.

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

40. Art. 5 ECHR.

41. *Kokkelvisserij v. Netherlands*, Appl. no. 13645/05, 20 Jan. 2009.

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

43. Opinion of A.G. Sharpston in Case C-212/06, *Gouvernement de la Communauté française and Gouvernement Wallon*, [2008] ECR I-1683, para 157.

“The Court reiterates that the words ‘in accordance with a procedure prescribed by law’ essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law. However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. ...”⁴⁴

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

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

The other issue regarding the autonomy of EU law would be situations where the ECtHR finds a piece of secondary law to have violated the Convention. Would such a finding be compatible with the autonomy of EU law? After all, the ECJ has a monopoly on declaring European Union law invalid⁴⁵ and any such declaration by an international court would be incompatible with the autonomy of EU law. However, this is not what the Court of Human Rights

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

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

would do.⁴⁶ Its decisions have no automatic direct effect in the legal orders of the parties to the Convention. This is evident from the wording of the Convention, which states in Article 46 that the “High Contracting parties undertake to abide by the final judgment of the Court in any case to which they are parties”. The judgments of the ECtHR are of a declaratory nature and only binding under international law. Their effect in domestic legal orders depends on the individual parties. Yet as regards the EU’s legal order, the ECJ’s own case law suggests that the decisions of the ECtHR might become directly applicable. The Court held in Opinion 1/91:

“Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice.”⁴⁷

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

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

47. Opinion 1/91, cited *supra* note 17, para 39.

4.2. *Exclusion of primary law*

In the discussions around the accession, a proposal was made that primary EU law, i.e. mainly the Treaties, should be excluded from the ECtHR's review.⁴⁸ The reason behind this proposal appears to be that the EU cannot itself amend its own primary law. Therefore, it should not be responsible for it.⁴⁹ This proposal does not appear to have been included in the draft agreement. The revised draft agreement allows only for reservations to be made "in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the Convention".⁵⁰ This provision would make it possible to make a reservation as regards primary law. However, another provision in the agreement dealing with the so-called co-respondent mechanism, which is discussed in greater detail below, suggests that such exclusion is not intended. That provision states that a Member State can be designated as a co-respondent "if it appears that [an] allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value ...".⁵¹ From this it is clear that an exclusion of primary law is not intended.

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

4.3. *The co-respondent mechanism*

After an accession by the EU to the ECHR, it will become crucial for an individual applicant to know who they should hold responsible in the Strasbourg

48. This seemed to be the opinion of the French Government, cf. French Senate, "Communication de M. Robert Badinter sur le mandat de négociation (E 5248)", 25 May 2010, available at: <www.senat.fr/europe/r25052010.html#toc1> (last visited 24 May 2011).

49. Köngeter, "Völkerrechtliche und innerstaatliche Probleme eines Beitritts der Europäischen Union zur EMRK", in Bast (Ed.), *Die Europäische Verfassung, Verfassungen in Europa* (2005), pp. 230, 245.

50. Art. 3 of CDDH-UE(2011)10, cited *supra* note 1.

51. Art. 4(3) of CDDH-UE(2011)10, cited *supra* note 1.

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

Due to this difficulty in locating where exactly the alleged violation of the Convention happened, the negotiators of the EU's accession suggest introducing a co-respondent mechanism.⁵² This mechanism would allow the EU and a Member State to be joined as co-respondents so that both could be held responsible for an alleged violation.⁵³ The co-respondent mechanism would be different from the already existing possibility of naming multiple respondents from the outset. The working group on accession identified the difference as lying in the fact that the EU and the Member States are not entirely autonomous from each other⁵⁴ and found that this would avoid gaps in accountability under the Convention system.⁵⁵ Furthermore, as will be explained below, the co-respondent mechanism only requires that the domestic remedies of either the EU or the Member State are exhausted. The exact conditions for the application of the mechanism are not yet clear. The three available draft provisions dealing with the mechanism all differ quite significantly. As this contribution is primarily concerned with the autonomy of the EU legal order, both the first and second revised drafts are commented on. Given that the informal working group on accession has not yet come to a final agreement on the wording of

52. This mechanism was first introduced by the Council of Europe's Steering committee for human rights in its 2002 study on the technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2. See also Jacqu e, *supra* note 2.

53. It is still undecided whether the mechanism should be extended to non-EU Member States in cases where they apply EU law through separate agreements, cf. CDDH-UE(2011)06, cited *supra* note 1, para 7.

54. CDDH-UE(2010)14, Informal working group on the accession of the EU to the ECHR, Meeting report of the 3rd working meeting, 22 Oct. 2010, para 9.

55. CDDH-UE(2011), para 37.

the co-respondent provision, it is worthwhile exploring the compatibility of both drafts with the autonomy principle.

The *first* revised draft agreement provided the following:

“Where an application is notified to the European Union or to a member state of the European Union, or to both of them, and it appears that an act or omission underlying an alleged violation notified could only have been avoided by disregarding an obligation under European Union law, [a High Contracting Party] / [either of the High Contracting Parties] may become a co-respondent to the proceedings by decision of the Court.”⁵⁶

It is clear from this draft that the mechanism would be triggered in two situations. The first would be where the EU and one or more Member States are held responsible for the same violation from the outset. The second situation would occur where either the EU or a Member State is nominated as the original respondent and a potential co-respondent joins at a later stage.⁵⁷ Where the EU and a Member State are held responsible by the same applicant for different violations, the mechanism is not applicable.⁵⁸ Procedurally, the status of co-respondent would be conferred on a party by decision of the ECtHR.

At first glance the proposal to introduce a co-respondent mechanism raises no serious objections with a view to the autonomy of the EU's legal order. It is particularly noteworthy that the ECtHR's decision to join the EU and a Member State as co-respondents would not necessitate a determination of the competences between the EU and the Member States, which would be one possibility of deciding who is responsible under the Convention.⁵⁹ In that sense, the co-respondent mechanism is to be understood as a way of avoiding a situation in which a respondent, say a Member State, would claim not be responsible for the violation maintaining that the violation was the responsibility of the EU, and vice versa. This makes the co-respondent mechanism a viable tool for avoiding interferences with the autonomy of the EU legal order. However, this would only be the case if it were made clear that the defendants in such proceedings would not have a right to raise the defence just mentioned. Such a defence would for instance be conceivable in a scenario like *Bosphorus*. If the EU refused to join the respondent Member State as co-respondent, that Member State should not be able to argue that responsibility in reality lies with

56. Art. 4 of CDDH-UE(2011)06.

57. CDDH-UE(2010)16, Informal working group on the accession of the EU to the ECHR, Draft revised elements prepared by the Secretariat on the introduction of a co-respondent mechanism.

58. Draft revised explanatory report, CDDH-UE(2011)08, para 34.

59. Cf. Lock, “EU accession to the ECHR: Implications for judicial review in Strasbourg”, (2010) *EL Rev.*, 777.

the EU. This implies that the Member States' responsibility for EU law as expounded in *Matthews* would in principle have to continue. Otherwise the ECtHR would be forced to decide who was actually responsible for a violation of the Convention under EU law. Such an assessment would involve an interpretation of the Treaties in an internally binding manner and would thus violate the autonomy of the EU's legal order.⁶⁰ Arguably, in some cases such a situation could be avoided if one adopted a "soft approach" to violations of the autonomy principle.⁶¹ Again the *Bosphorus* scenario might provide an example as the legal situation was relatively clear and easy to understand. Ireland's decision to impound the aircraft was based on one legal basis, which was a directly applicable EU Regulation. Thus there would have been no problem for the ECtHR to identify the location of the alleged violation without having to engage in difficult interpretations of EU law. However, one can conceive of cases where a similar assessment would be very difficult to make, for instance, the case of an EU Directive, which had been transposed into national law. A Member State might raise the defence that the alleged violation occurred because it did not have any discretion in transposing the relevant part of the Directive. If the ECtHR had to make an assessment of such a situation, it would be forced to interpret the Directive as to how much discretion was left to the Member State in the concrete case, which would be incompatible with the autonomy of the EU legal order. In order to avoid this, the draft should make it clear that such a defence is inadmissible.

As regards the requirements for its applicability, the first revised draft states that the co-respondent mechanism is triggered in cases of a normative conflict, limiting its applicability to situations where a conflict could only have been avoided by disregarding an obligation under EU law.⁶² This would only be the case where the Member State has no discretion in implementing its obligations or where, if there is discretion, all options would lead to a conflict with EU obligations. In this regard the draft is reminiscent of the requirements for applying the *Bosphorus* presumption. The very first draft contained the requirement of a substantive link with EU law,⁶³ compared with which the requirement of a normative conflict is clearer and more certain. However, that requirement also forces the ECtHR to make an assessment whether it appears that the

60. Cf. Opinion 1/91, cited *supra* note 17, para 34.

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

62. Art. 4(1), CDDH-UE(2011)06, cited *supra* note 1.

63. Art. 4(1), CDDH-UE(2011)04, cited *supra* note 1.

respondent could only have avoided a violation of the Convention by violating an obligation under EU law. In order to make this assessment, the ECtHR has to define what the obligations of the respondent Member State are under EU law and whether EU law gave the Member State a degree of discretion which would have allowed it to avoid the conflict. This may force the ECtHR to make quite a detailed interpretation of EU primary and secondary law and is therefore potentially in conflict with the autonomy of the EU legal order. The informal working group appears to have been aware of this problem when composing the draft agreement. Article 4(5) of the draft *revised* agreement provides that “When deciding on such requests [to become co-respondent] the Court shall assess whether the reasons stated ... are not manifestly incomplete or inconsistent”. It is envisaged that the ECtHR would only examine superficially whether the requirement of a normative conflict is fulfilled. This is clearly a strategy of avoiding a violation of the autonomy of EU law. Should that version of the draft become part of the final agreement, the ECJ might accept it as a way of avoiding a conflict with the autonomy principle. However, there can be no certainty as to that effect.

Even more problematic cases might arise in connection with alleged violations of the ECHR by omission. A decision of such a case might involve a determination of who was under an obligation to act in the concrete case: the Member State or the EU. Such assessment could only be made on the basis of the division of competence within the EU and would violate the autonomy of the EU’s legal order. If both EU and Member State are co-respondents this could be avoided if a defence of not being internally responsible were impossible. In that sense the discussion is very similar to the discussion on active violations of the Convention. A proposed amendment to Article 59 ECHR contained in the revised draft agreement, however, causes concern. It states that “nothing in the Convention ... shall require the European Union to perform an act or adopt a measure for which it has no competence”.⁶⁴ The explanatory report reveals that this provision reflects the requirement in Article 6(2) TEU, according to which the accession shall not affect the competences of the EU.⁶⁵ The danger is, however, that this provision would be invoked as a defence in proceedings before the ECtHR, which then would have to decide on the allocation of competences based on the Treaties. This would not be in accordance with the autonomy of EU law and constitutes a weakness in the proposal by the informal working group which does not seem to have been addressed yet. It would be better if, in case of an omission, no such defence could be raised and the question were resolved internally by the EU and its institutions, most

64. Art. 1(2) of CDDH-UE(2011)10, cited *supra* note 1.

65. CDDH-UE(2011)05, para 26.

notably the ECJ. For this very reason, it is not necessary to include this provision in the agreement, since an internal resolution of a violation of the Convention would have to be in accordance with Article 6(2) TEU anyway.

A related issue would be whether the ECtHR should designate the precise origin of a violation it has found in proceedings brought against co-respondents. Such designation would raise the same objection just made: it would potentially involve an interpretation of EU law. The informal working group seems to be aware of this problem when stating that the “Court would not acquire any power to rule on the distribution of competences between the EU and its member states”.⁶⁶ Nonetheless the working group considers that in some cases “there may be an interest in precisely indicating the origin of the violation”.⁶⁷ Human rights organizations have also argued for such determination by the Court of Human Rights.⁶⁸ They rightly contend that this would allow for an effective execution of judgments and swift redress for the applicant. However, it is hard to see how such a demand could be squared with the need to preserve the autonomy of EU law. Instead of an allocation of responsibility by the Court of Human Rights, it would make sense to create a mechanism at EU level for this purpose instead.

The latest version of the co-respondent mechanism appears to have been drafted with similar concerns in mind. It reads:

“Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law.

Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments.”⁶⁹

For cases in which the EU is co-respondent, this version no longer presupposes the existence of a normative conflict and is much closer to the original draft

66. CDDH-UE(2010)17, Informal working group on the accession of the EU to the ECHR, Meeting report of the 4th working meeting, 8 Dec. 2010, para 14.

67. *Ibid.*

68. Views of the European group of national human rights institutions to the CDDH-UE working group, available at <www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/EG%20_%20Submission.pdf> (last visited 24 May 2011).

69. Art. 4(2) and (3) of CDDH-UE(2011)10, cited *supra* note 1.

agreement which required a “substantive link”. If this newer proposal were adopted, the role of the ECtHR would be reduced to assessing whether “it appears” that a provision of EU law is compatible with the Convention. Such appearance could be deemed to exist wherever one of the parties advances an argument to that effect. The ECtHR’s competence to interpret EU law under this new proposal would be even further reduced since Article 4(5) of the revised draft provides that the Court should only assess whether “it is plausible that the conditions ... are met”.⁷⁰ Thus the new draft appears to offer a viable solution accommodating both practical needs and the restraints imposed upon the negotiators by the autonomy principle.

However, there is potentially a conflict with the autonomy of EU law as far as concerns the designation of the Member States as co-respondents for cases in which the EU is the original respondent. The first draft quoted above provides that in cases in which the EU was the original respondent one or more Member States may only be joined as co-respondents where the EU could not have possibly avoided the violation. The provision would only apply in situations where the violation is located in EU primary law, which cannot be amended by the EU itself. In this regard, the first revised draft is clearly based on the *Matthews* case law.⁷¹ The very latest draft has the same content but is worded more explicitly in that respect. The crucial difference between the two lies in the ECtHR’s competence to examine the conditions for the applicability of the co-respondent mechanism. The first draft discussed here would require the ECtHR to interpret EU law and assess which rank in the hierarchy of norms the provision in question has, which is likely to be in conflict with the autonomy of EU law. In contrast, the latest version would only require the Court to assess whether “it appears” that the compatibility of primary EU law with the Convention was at issue. Again this assessment would be carried out in a rather superficial manner, not involving a binding interpretation of EU law.

Regarding the designation of the co-respondent, Article 4(5) of the revised draft and the explanatory report reveal that a party would become co-respondent either on its own application with leave of the Court or upon invitation by the Court.⁷² Where the Court decides to invite a co-respondent to join, the potential co-respondent would be free to accept the invitation or not.⁷³ Where both the EU and a Member State are held responsible from the outset, the Court has to decide whether to treat them as co-respondents or as merely joint respondents. To this author, it is not quite clear why the co-respondent should not be

70. Art. 4(5) of CDDH-UE(2011)10, cited *supra* note 1.

71. CDDH-UE(2011)08, cited *supra* note 58.

72. *Ibid.*, para 40.

73. *Ibid.*, para 41.

compelled to join proceedings. It is undisputed that where both are nominated as co-respondents by the applicant, they have no choice but to partake in the proceedings. There is arguably no difference in the situation where they are later joined by decision of the Court. As will become evident later, not compelling the co-respondent to join the proceedings leads to problems.

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

4.4. *Prior involvement of the ECJ*

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

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

Where the Member State is designated as the respondent, the problem arises that the ECJ may not have made any decision as to the compatibility of the EU legislative act with fundamental rights and would thus not have been given the chance to remedy the violation. This is because the only way of involving the ECJ would have been through the preliminary reference procedure under Article 267 TFEU. Of course, Member State courts are under an obligation to make such a reference either if they are a court of last instance⁷⁴ or where they are convinced that a piece of EU legislation is invalid.⁷⁵ But there is no guarantee for the applicant that a reference is actually made and they cannot enforce the obligation. A domestic court may fail to refer a case either because it was not aware of the duty under Article 267 TFEU or because it came to the conclusion that one of the exceptions to the duty to make a reference imposed on courts of last resort applied. Such exceptions are found in the ECJ's *CILFIT* decision. According to that decision a national court of last instance need not make a reference where the question raised is irrelevant to the outcome of the case, where the EU law provision has already been interpreted by the ECJ (*acte éclairé*) or where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).⁷⁶

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

“In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that

74. Art. 267(3) TFEU.

75. *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*, cited *supra* note 45, para 15.

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

the CJEU may carry out an internal review before the ECHR carries out external review.”⁷⁷

Proposals on how to ensure a prior internal review include a preliminary reference by the ECtHR to the ECJ,⁷⁸ an involvement of the ECJ by means of an opinion,⁷⁹ a right of the Commission to instigate proceedings before the ECJ while proceedings before the ECtHR are temporarily suspended⁸⁰ and even a preliminary reference from the ECJ to the ECtHR in lieu of the individual application.⁸¹

Before addressing the proposal contained in the revised draft agreement, an initial question should be answered: is such involvement required in order to preserve the autonomy of EU law? That would be so if the ECtHR were given jurisdiction to interpret the Treaties in a binding fashion in the absence of a procedure ensuring the prior involvement of the ECJ. As explained above, this would not be the case. A finding by the ECtHR of a violation of the Convention would not directly lead to an invalidation of the EU act in question. Therefore, the involvement of the ECJ is not required in order to preserve the autonomy of EU law.⁸²

77. Joint communication from Presidents Costa and Skouris, available at: <www.echr.coe.int/NR/ronlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CED-HCJUE_EN.pdf> (last visited 24 May 2011); a similar argument had previously been made by the ECJ: Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf> (last visited 24 May 2011); the (classified) negotiation directives issued by the Council of the EU also contain a reference to it, which can be found in a working document from the EU Commission, doc. DS 1930/10.

78. Badinter, “Adhésion de l’Union européenne à la convention européenne de sauvegarde des droits de l’Homme”, French Senate, available at: <www.senat.fr/europe/r25052010.html#toc1> (last visited 24 May 2011).

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

80. ECJ Judge Timmermans made that proposal at a hearing before the European Parliament’s Committee on Constitutional Affairs on 18 March 2010, available at: <www.europarl.europa.eu/activities/committees/eventsCom.do?language=EN&body=AFCO> (last visited 24 May 2011).

81. Steering committee for human rights, technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, CDDH(2002)010 Addendum 2 paras. 75–77.

82. In fact, two members of the informal working group have “reserved their position” on the introduction of a prior involvement, CDDH-UE(2011)10, cited *supra* note 1; this author has voiced his principled criticism elsewhere, cf. Lock, op. cit. *supra* note 59.

There is, however, a danger that the introduction of such a mechanism could itself be incompatible with the autonomy of the EU legal order as it might constitute a hidden amendment to the Treaties if it were included in the accession agreement. Should the drafters not include any reference to an internal mechanism, every agreement internal to the EU would have to be measured by the same standards. Opinion 1/91 showed that a Union agreement may provide the Union's institutions with new functions. However, it must not change the nature of their function. This means that the ECJ must not be given a role which it currently does not have under the Treaties. If the mechanism foresaw a new procedure before the ECJ, which was not based on one of the currently existing procedures, the autonomy of the EU legal order could consequently be violated. This would certainly be the case if a procedure were introduced which allowed for a preliminary reference from the ECJ to the ECtHR, since the ECJ does not normally make such references. Enabling the ECtHR to make a preliminary reference to the ECJ might also prove problematic in light of Opinion 1/09. It is recalled that the ECJ regarded the enforceability of the duty to make a reference as indispensable.⁸³ This hurdle would be hard to overcome, since the ECtHR is a court operating outside the EU's legal system and outside the reach of the infringement procedures under Articles 258 and 260 TFEU. However, since the prior involvement of the ECJ is not necessitated by the autonomy of EU law, the enforceability of a duty on the part of the ECtHR would not be of relevance. This is a crucial difference to the situation in Opinion 1/09.

The informal working group on accession considered the question of a prior involvement of the ECJ and generally seemed to be in agreement that in cases where the EU is a co-respondent and where the Court of Justice has not yet had an opportunity to rule on the conformity with fundamental rights of the EU act in question, there should be such involvement.⁸⁴ The latest available draft at the time of writing reads as follows:

“In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and subsequently for the parties to make observations. The European Union shall ensure that such assessment is made quickly so that the proceedings before the European Court of Human Rights are not unduly delayed.”⁸⁵

83. Opinion 1/09, cited *supra* note 14, para 89.

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

85. Art. 4(3) of CDDH-UE(2011)10, cited *supra* note 1.

With regard to the autonomy of the EU legal order, the procedure before the Court of Justice might prove problematic. The draft does not reveal anything about how and by whom the review before the ECJ is to be initiated. The very first draft provided explicitly that it was to be conducted in accordance with internal rules of the EU.⁸⁶ There is nothing to suggest that the revised draft is meant to change this. The reference to internal rules of the Union was intended to avoid a violation of the autonomy of EU law, which remains a valid objective. If the draft provided for a specific procedure, this would potentially involve a hidden Treaty amendment and fall foul of the requirements for preserving the autonomy of EU law. Thus the determination of the procedure before the Court of Justice has been left to the European Union. This contribution assumes that the EU would want to avoid having to amend the Treaties. Not only would an amendment potentially trigger referenda in some Member States with an uncertain outcome but it would hardly be limited to the rather specific technical questions surrounding an accession of the EU to the ECHR and might thus open a Pandora's Box by allowing the Member States to renegotiate the Treaties as a whole.

The question for the EU is therefore which options, if any, the EU has on the basis of the current Treaties and within the constraints imposed by the autonomy of EU law. In a working document, the Commission argues that the procedure for the prior involvement of the ECJ should be similar to the procedure governing the preliminary reference procedure.⁸⁷ It is envisaged that such a procedure would be included in the Council decision concluding the accession treaty.⁸⁸ The question is whether the introduction of such a procedure would be in accordance with the autonomy of EU law. The Commission argues that this would be so pointing to Article 19 TEU, which states that the ECJ ensures "that in the interpretation and application of the Treaties the law is observed".⁸⁹ Yet Article 19 TEU does not provide for a specific procedure before the ECJ, but merely defines the overall role and function of the ECJ. This means that any procedure suggested would still have to be in accordance with the procedures existent at the moment.

The most plausible solution would be to allow the European Commission to have a case reviewed by the ECJ. The European Commission would be the natural institution to be in charge of this since it would be the institution representing the EU before the ECtHR and would thus be familiar with the case. Moreover, the initiation of judicial review would be a power which the Commission already has under Article 263(2) TFEU. Thus an extension of this

86. Art. 4(3) of CDDH-UE(2011)04, cited *supra* note 1.

87. EC working document DS 1930/10, para 5.

88. *Ibid.*, para 10.

89. *Ibid.*, para 12.

power would at first glance not conflict with the autonomy of EU law. But closer scrutiny reveals that this question cannot be answered that easily.

The first issue is whether the Commission should be under an obligation to instigate such proceedings. This would necessitate a Treaty amendment since the initiation of proceedings under Article 263 TFEU is within the discretion of the Commission.⁹⁰ Thus as far as EU law is concerned the initiation of proceedings would have to remain in the discretion of the Commission. This would have the advantage of giving the Commission an opportunity to assess whether such proceedings are necessary. Where the Court of Justice has already made pronouncements on the compatibility with fundamental rights, the Commission could choose not to instigate them. The Commission would thus be in a position to exercise a filter function, which would chime with its role as the guardian of the Treaties. If the Commission failed to bring the case before the ECJ, the ECtHR would decide without a prior involvement of that Court. This would not be problematic since, as already indicated, the prior involvement of the ECJ is not necessary in order to preserve the autonomy of EU law. The main reason for it is to give the EU courts a possibility to remedy a violation and thus to avoid a conviction. Where the EU Commission decides not to introduce proceedings, one can assume that the EU does not have an interest in being given the opportunity to remedy the violation and thus the ECtHR would be able to find such violation without prior involvement of the ECJ.

There is, however, the problem of the strict time limit contained in Article 263(6) TFEU, which provides that proceedings must be instituted within two months of the publication of the legal act in question. According to well-established case law, this time limit is a matter of public policy and not subject to the discretion of the parties or the Court.⁹¹ The main reason for the time limit in Article 263(6) TFEU is legal certainty. Acts by the Union's institutions should not be subject to judicial review after a certain amount of time has passed. By the time proceedings have reached the ECtHR, the two month period will inevitably have expired. The question therefore is whether this strict time limit stands in the way of a prior involvement of the ECJ as foreseen by the draft. The autonomy of EU law would be an obstacle if the nature of the ECJ's functions were affected. It is recalled that in Opinion 1/91 the Court did not accept an extension of the preliminary reference procedure to the courts of the EFTA States because the answer provided by the ECJ was not to be binding.⁹² Would a dispensation with the time limit contained in Article 263

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

91. Joined Cases T-121 & 151/96, *Mutual Aid Administration Services*, [1997] ECR II-1355; Case T-276/97, *Guérin automobiles*, [1998] ECR II-261; Case 24/69, *Nebe*, [1970] ECR 145; Case 227/83, *Moussis*, [1984] ECR 3133; Case C-246/95, *Coen*, [1997] ECR I-403.

92. Opinion 1/91, cited *supra* note 17, para 61.

TFEU lead to a comparable change in the nature of the function of the ECJ? In view of the ECJ's case law on Article 263(6) TFEU this would seem to be so. However, Article 263 TFEU is not the only procedure which allows for judicial review of EU acts by the ECJ. The preliminary reference procedure contained in Article 267 TFEU equally provides for a legality review by the ECJ. According to the ECJ's decision in *Textilwerke Deggendorf (TWD)*,⁹³ the same time limit is in principle applicable in preliminary reference procedures concerning the validity of acts of the EU's institutions.⁹⁴ *TWD* concerned a Commission decision addressed to the Federal Republic of Germany declaring that State aid granted to the applicant was unlawful under the Treaties. The national court made a preliminary reference concerning the legality of the Commission's decision after the time limit for an individual application had long expired. The ECJ argued that a decision not challenged under Article 263 TFEU becomes definite against the addressee.⁹⁵ The reason was to safeguard legal certainty.⁹⁶ Despite having been made aware by the national authorities of the possibility of challenging the Commission's decision under Article 263(4) TFEU, *TWD* failed to do so and challenged domestic decisions revoking the aid in the domestic courts instead. Its challenge was deemed inadmissible, since the time limit contained in Article 263(6) TFEU had expired.

The *Nachi* case confirms these findings with regard to anti-dumping regulations.⁹⁷ The Court's reasoning in this respect is convincing when it points to the dual nature of anti-dumping regulations. They are not only formally legislative acts but at the same time affect an individual directly and individually. For the individual they are therefore equivalent to decisions so that the application of the time limit is justified.⁹⁸ At the same time it can be deduced from *Nachi* that where "normal" legislation is concerned, i.e. an act of general application only, this rationale would not apply. The Court emphasized that the time limit could only preclude a review under Article 267 TFEU where the individual had a possibility of challenging an act under Article 263(4) TFEU. As Arnulf argues, it seems unlikely that the rule would normally extend to measures of general application.⁹⁹ This is correct since the situation is different when it comes to legislative acts. Such acts are applicable *erga omnes* and are normally of an unlimited duration. If these acts are incompatible with fundamental rights (or have been adopted illegally for other reasons) they violate

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

94. Wegener in Calliess and Ruffert, *EUV/EGV*, 4th ed., Art. 267 AEUV, para 15..

95. *Ibid.*, para 13.

96. *Ibid.*, para 16.

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

98. *Ibid.*, paras. 36–37.

99. Arnulf, *The European Union and its Court of Justice*, 2nd ed. (OUP, 2006), p. 129.

the rights of individuals each time they are implemented. If they were not challengeable for more than two months after their adoption, an illegal situation would be perpetuated. Thus the interests involved differ from those involved when dealing with decisions and there is thus no room for legal certainty to prevail over legality. This finding is confirmed by the more recent case law of the ECJ which allows challenges to be brought under Article 267 TFEU where the applicant did not have standing to bring a case under Article 263(4) TFEU.¹⁰⁰

When it comes to assessing the compatibility of the prior involvement of the ECJ with the autonomy of the EU legal order, the question then is whether in light of this case law the ECJ can be said to have jurisdiction to review the legality of EU legislation even where the time limit contained in Article 263(6) TFEU has passed. Given the case law on Article 267 TFEU discussed here, there is room for such an argument. However, the question remains whether giving the Commission a right to routinely have legislation reviewed independent of the concrete circumstances surrounding an applicant's standing would not change the nature and function of the procedure before the ECJ. Considering that a review after the expiry of the time limit contained in Article 263(6) TFEU is only possible in exceptional circumstances, such a right of the Commission could be considered to go too far. There is thus a danger that the prior involvement of the ECJ cannot be effectuated without an amendment to the Treaties.

A further point which might prove to be problematic with regard to the autonomy of EU law is that the draft provides for the EU to ensure that the ruling is delivered quickly. This clearly addresses a question internal to EU law and might thus constitute a hidden amendment to the Treaties and be in violation of the autonomy of EU law. However, Article 23(a) of the Statute of the Court already provides for an accelerated procedure before the Court of Justice. The Statute has the legal status of a Protocol to the Treaties and is therefore part of EU primary law.¹⁰¹ Thus an accelerated procedure is not alien to the Treaties as they currently stand. Its introduction in cases envisaged by the draft provision would therefore be possible without amending the Treaties, so that the provision would not constitute a hidden Treaty amendment. The ECJ would merely have to amend its Rules of Procedure which in Articles 104(a) and 104(b) allow for an accelerated procedure.

The final question then is whether the ECJ's review should be limited to violations of fundamental rights. According to the draft proposal, the ECtHR

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

101. Cf. Art. 281 TFEU and Statute of the Court, O.J. 2010, C 83/210.

is to afford sufficient time for the ECJ to make an assessment as to the compatibility of a provision of EU law “with the Convention rights at issue”. It also seems to be the intention of the European Commission to have the ECJ perform a strictly limited review of the Union act on account of the relevant fundamental right.¹⁰² Given that the ECJ’s review would be limited to the ECHR rights at issue, it would allow the ECJ to decide quickly so that proceedings before the ECtHR would not be unduly delayed. Furthermore, the proceedings before the ECJ would mirror the test to be carried out by the ECtHR. However, there is currently no purely fundamental rights review under EU law. Articles 263 and 267 TFEU are not limited to a review of compatibility with fundamental rights but are more general reviews of legality. The content of the questions is not limited so long as they concern the compatibility of EU legislation with primary law. The wording of Article 267 TFEU limits the ECJ to answering the questions referred to it. This would suggest that the Commission could limit its request, too. But this would alter the nature of the Commission’s right to have legislation reviewed by the ECJ and thus risks being incompatible with the autonomy of the EU legal order since Article 263 TFEU does not provide for any such limitation. It is therefore suggested that the accession agreement should avoid expressly limiting the ECJ’s right to review EU acts which are the subject of a complaint in the ECtHR. This would still allow the Commission to exercise its filter function by simply not submitting cases to the ECJ which it does not consider to be in violation of fundamental rights. It is moreover recalled that in light of the ECJ’s practice of re-formulating the questions posed under Article 267 TFEU and its practice of deciding the questions on the basis of other provision than those referred to it by the national court,¹⁰³ a limitation of its jurisdiction might not have great effect. In addition, if the ECJ found that the act was invalid for other reasons, this would still help to remove the alleged violation of fundamental rights and make a review by the ECtHR superfluous. It would therefore be within the purpose of the prior involvement of the ECJ, which is to highlight the subsidiarity of the review carried out by the ECtHR.

5. Conclusion

This contribution shows that accession by the EU to the ECHR raises fundamental questions of constitutional significance. The task of drafting an

102. EC Working Document DS 1930/10, para 9.

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

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