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Will the Accession of the EU to the European Convention on Human Rights fundamentally change the relationship between the Luxemburg and the Strasbourg Courts?

Christiaan Timmermans





European University Institute  
**Centre for Judicial Cooperation**  
Distinguished Lecture

**Will the Accession of the EU to the European Convention on  
Human Rights fundamentally change the relationship between  
the Luxemburg and the Strasbourg Court?**

**Speech delivered at the ‘Judicial Cooperation in Private Law’  
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**Christiaan Timmermans**

Former Judge  
Court of Justice of the European Union

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Contacts:

### **Centre for Judicial Cooperation**

Law Department

European University

Villa Schifanoia, via Boccaccio 121, IT-50133 Florence

CJC@eui.eu

Telephone: [+39] 055 4685761

**[www.eui.eu/cjc](http://www.eui.eu/cjc)**



## **Abstract**

During the last decade the structure and scope of fundamental rights protection in the EU have dramatically changed. Ever-closer links have been established between the European Court of Human Rights and the Court of Justice of the EU, and their respective jurisprudence. Moreover, the Lisbon Treaty has elevated the EU Charter of Fundamental Rights to the status of EU primary law and imposed an obligation on the EU to accede to the European Convention on Human Rights (ECHR) (Article 6 (2) EU). How will the accession impact on the relationship between the Courts?

On the one hand, the ECHR and the case law of the Strasbourg Court have of course always been an important source of inspiration for the CJEU ever since it started to develop its case law on fundamental rights protection. The Convention as an instrument of international law did not directly bind the EC/Union. Yet, in practice the approach of the Luxembourg Court has come to be quite close to Strasbourg by way of increasing its acceptance and reference to the latter's case law. And this influence has been reciprocated. This judicial dialogue is not just a matter of judicial diplomacy. Often, the references to each other's case law reflect a real mutual impact. The CJEU has, on occasion, invoked the evolution of the case law of the Strasbourg Court to adapt its own interpretation of the scope of fundamental rights' protection. Also the Strasbourg Court has sometimes referred to an evolution of the Luxembourg Court case law as an argument to further develop its own interpretation of the Convention. There is more to be said about this mutually beneficial effect of the cooperation between both Courts through their case law. Indeed, both Courts have been instrumental to strengthening each other's legal system.

## **Keywords**

Judicial dialogue, Judicial cooperation, ECHR, CJEU, Fundamental rights, EU accession to ECHR





## Introductory remark

During the last decade the structure and scope of fundamental rights protection on the level of the EU has dramatically changed. Ever-closer links have been established between the European Court of Human Rights (ECtHR or Strasbourg Court) and the Court of Justice of the EU (CJEU or Luxemburg Court), and their respective case law. Moreover, the Lisbon Treaty has elevated the EU Charter of Fundamental Rights to the status of EU primary law and imposed an obligation on the EU to accede to the European Convention on Human Rights (ECHR) (Article 6 (2) EU). How will the accession impact on the relationship between both Courts? Allow me a few, somewhat speculative remarks.

## The relationships between the Luxemburg and the Strasbourg Court as they stand

The ECHR and the case law of the Strasbourg Court have of course always been an important source of inspiration for the CJEU as from the days it started to develop its case law on fundamental rights protection.<sup>1</sup> The Convention as an instrument of international law did not directly bind the EC/Union. Yet, in practice the approach of the Luxemburg Court has come quite close to that by way of increasing its acceptance and reference to the Strasbourg case law. This influence has been reciprocated. Indeed, an intensive dialogue has developed between the Courts through their case law. In its decision in the *Kadi* case,<sup>2</sup> the CJEU, in claiming jurisdiction over Community instruments implementing Security Council Resolutions on the blacklisting of presumed terrorists, extensively invoked the human rights' case law of the Strasbourg Court. The Strasbourg Court referred to the *Kadi* judgment in the *Nada* case which dealt with similar questions.<sup>3</sup> The Strasbourg Court had referred to the EU Charter of fundamental rights as to a relevant interpretative material for a dynamic interpretation of the Convention, already at the time when the Charter was not yet of a binding nature<sup>4</sup> and before the CJEU started doing so. Since then, the ECtHR has regularly referred to the Charter.<sup>5</sup> A recent article by Anderson and Murphy opines that “the case law of the Strasbourg Court to date suggests a willingness to review the level of protection in the light of the Charter”.<sup>6</sup>

This judicial dialogue is not just a matter of judicial diplomacy. Often, the references to each other's case law reflect a very real and mutual impact. The CJEU has on occasion invoked the evolution of the case law of the Strasbourg Court to adapt its own interpretation of the scope of fundamental rights' protection. For instance, on the question of whether Article 8 of the Convention also grants a right of privacy to companies so as to allow them to challenge access to their premises by Commission inspectors in competition law cases, the Court gave a negative answer in the *Hoechst* case of 1989.<sup>7</sup> However, in its *Roquette Frères* judgment of 2002,<sup>8</sup> the CJEU reversed this interpretation, invoking the development in that regard of the case-law of the Strasbourg Court.<sup>9</sup>

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<sup>1</sup> CJEU, *Rutili*, Case 36/75 (1975) ECR 1219 and *Hauer*, Case 44/79 (1979) ECR 3727.

<sup>2</sup> CJEU, *Kadi*, Case C-402/05P (2008) ECR I-6351.

<sup>3</sup> ECtHR, *Nada*, judgment of 12 September 2012, no. 10593/08.

<sup>4</sup> ECtHR, *Christine Goodwin v United Kingdom*, judgment of 11 July 2002, no. 28957/95.

<sup>5</sup> See for a listing of these cases the Bulletin published on the website of the CJEU (curia), Reflets n° 1/2013 Edition spéciale Charte des droits fondamentaux de l'UE, pp. 2-7.

<sup>6</sup> D.Anderson and C.C. Murphy, “The Charter of Fundamental Rights” in A.Biondi, P.Eeckhout, S.Ripley (eds.), *EU Law After Lisbon*, Oxford, University Press, 2012, p.155 at 178.

<sup>7</sup> CJEU, *Hoechst AG v Commission*, Joined Cases C-46/87 and 227/88, ECR 1989 – 2859.

<sup>8</sup> CJEU, *Roquette Frères*, C-94/00 (2002) ECR I-9011.

<sup>9</sup> ECtHR, *Niemietz v Germany*, judgment of 16 December 1992, no. 13710/88 and *Colas Est v France*, judgment of 16 April 2002, no. 37971/97.

A more recent, telling example of this cooperation through the case law is given by the CJEU judgment of 21 December 2011 in an asylum case - *N.S.*<sup>10</sup> In that judgment the Court based its assessment of the situation in Greece with regard to the treatment of asylum seekers on the factual assessment made by the Strasbourg Court in its *M.S.S.* judgment of 21 January 2011.<sup>11</sup>

The Strasbourg Court has also sometimes referred to an evolution of the Luxembourg Court case law as an argument to further develop its own interpretation of the Convention. The judgment of that Court (Grand Chamber) in the case of *Scoppola (No 2) v. Italy* provides an example.<sup>12</sup> The Court, reversing the earlier case law, interpreted the principle of legality enshrined in Article 7 of the Convention as requiring the retroactive application of the more lenient penalty referring also to the *Berlusconi* judgment of the CJEU to the same effect.<sup>13</sup>

There is more to be said about this mutually beneficial effect of the cooperation between both Courts through their case law. Indeed, both Courts have been instrumental to strengthening each other's legal system.

In the *Hornsby* case of 1997,<sup>14</sup> the Strasbourg Court indirectly condemned the non-execution of the CJEU judgment as contrary to Article 6 of the Convention. It has also ruled that a refusal by a national, last instance court to use the preliminary reference procedure might violate the right to a fair trial under Article 6 of the Convention if such refusal appears to be arbitrary.<sup>15</sup> This approach was recently confirmed and further strengthened in a judgment of 20 September 2011 in the case of *Ullens de Schooten and Rezabek v Belgium*. The Strasbourg Court in this case required that a last instance court motivates the refusal to make a preliminary reference.<sup>16</sup>

In the same vein, the position of the Convention in the EU and its Member States will be reinforced in such cases in which Convention rights are accepted as fundamental rights of the EU. Indeed, when it comes to the enforcement of these rights within the Member States, they will benefit from the safeguards of the Union's legal system (direct effect, supremacy). So, the respect for fundamental rights on the part of Member State's authorities might be even more effectively enforced in Germany through the Union's legal system than on the mere basis of the authority of the decisions of the Strasbourg Court as accepted by the Bundesverfassungsgericht.<sup>17</sup>

It seems therefore fair to conclude, that the cooperation between the CJEU and the Strasbourg Court, as it has developed over the years, has been beneficial to each Court and more generally to the level of human rights' protection.

A special feature of this cooperative relationship is represented, of course, by the *Bosphorus* case law of the Strasbourg Court. It demonstrates, one might say, a form of judicial comity vis-à-vis the

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<sup>10</sup> CJEU, *N.S.*, Joined cases C-411/10 and C-493/10 not yet reported.

<sup>11</sup> ECtHR, *M.S.S. v Belgium and Greece*, no. 30696/09. See for an asylum cases in which the Strasbourg Court took into account the case law of the Luxembourg Court (CJEU *Elgafaji*, Case C- 465/07 (2009) ECR I-921): ECtHR, *Sufi and Elmi v United Kingdom*, judgment of 28 June 2011, no.2700/10.

<sup>12</sup> ECtHR, *Scoppola*, judgment of 17 September 2009, no. 10249/03.

<sup>13</sup> CJEU, *Berlusconi*, Joined Cases C-387/02, C-391/02, and C-403/02 (2005) ECR I-3624.

<sup>14</sup> ECtHR, *Hornsby*, judgment of 19 March 1997, no. 18357/91.

<sup>15</sup> ECtHR, *John v Germany*, decision of 13 February 2007, no. 15073/03, and *Herma v Germany*, decision of 8 December 2009, no. 54193/07.

<sup>16</sup> ECtHR, *Ullens de Schooten and Rezabek v Belgium*, decision of 20 September 2011, no. 3989/07 and 38353/07.

<sup>17</sup> See the decision of that Court in the case of *Görgülü*, 14 October 2004, 2BvR 1481/04. According to the Bundesverfassungsgericht, German Courts are not *de iure* bound to respect a judgment of the Strasbourg Court. They should, however, duly consider or take into account such a judgment. See more generally Georg Ress, "The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order", Texas International Law Journal 2005, p. 359.

CJEU as to the level of protection of fundamental rights granted by the latter.<sup>18</sup> Indeed, in its *Bosphorus* judgment the Strasbourg Court accepted the protection granted by the CJEU as, in principle, equivalent to the protection ensured under the Convention as interpreted by the Strasbourg Court, justifying a more remote or subsidiary control by that Court as to the respect of fundamental rights by the European Union. The *Bosphorus* judgment has since then been repeatedly confirmed by the Strasbourg Court.<sup>19</sup> However, the judgment of 6 December 2012 in *Michaud v France*<sup>20</sup> seems to limit the applicability of the *Bosphorus* presumption to cases in which the CJEU has, in fact, been able to exercise its control. This case has not been referred to the Grand Chamber of the ECtHR.

The cooperation through the case law is matched by an informal cooperation between both Courts through regular informal meetings in which recent developments in the case law are discussed. After such a meeting in January 2011, the Presidents of both Courts issued a Joint Communication. This was a novelty, but could be considered as anticipating the expectation expressed by Declaration No. 2 annexed to the Lisbon Treaty stating that the dialogue between both Courts could be reinforced after accession. And indeed the Communication addressed more particularly an issue related to the accession (see *infra*).

## EU Charter of Fundamental Rights

The Charter strengthens the relationship between the EU legal system and that of the Convention. With its entering into force, the Convention has now become a source of law - of binding law - within the EU legal system. This follows from Article 52(3) of the Charter, which obliges the EU to respect the Strasbourg Convention as a minimum level of protection in case, and in so far as Charter rights correspond to Convention rights. According to the explanations of this provision, “the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR”. The corresponding rights have been usefully listed in the explanations.<sup>21</sup> This means that already now the Convention, as to the substance of fundamental rights, is a part of EU law and even of primary law, the Charter forming part of the Treaty. Consequently, this unilateral commitment confers on the Convention rights a higher status than would normally be the case with regard to treaties concluded by the Union by virtue of Article 216 (2) FEU. These treaties rank somewhere in between primary and secondary EU law.

Moreover, in so far as the Convention may now be considered a part of EU primary law, this will also have to imply the interpretation given by the Strasbourg Court to these corresponding rights. The recitals of the Charter and its explanations seem to confirm this by explicitly referring to the case law of the ECtHR. So, one might say that as from December 1<sup>st</sup> 2009 the EU has made itself subject (again: unilaterally) to the jurisdiction of the Strasbourg Court. The most recent case law of the CJEU seems to endorse this interpretation of Article 52 (3) of the Charter.<sup>22</sup>

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<sup>18</sup> ECtHR, *Bosphorus Airways v Ireland*, decision of 30 June 2005, no. 45036/98.

<sup>19</sup> E.g. ECtHR, *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v The Netherlands*, decision of 20 January 2009, no. 13645/05.

<sup>20</sup> ECtHR, *Michaud v France*, decision 6 December 2012, no. 12323/11

<sup>21</sup> The relevance of the explanations for the interpretation of the Charter is explicitly underlined by Article 6 (1) EU and Article 52 (7) of the Charter. Unfortunately however, most official editions of the Treaties do not produce the text of the explanations which have been published in OJ 2007, C 303.

<sup>22</sup> CJEU, *McB*, case C-400/10 PPU (2010) ECR I-8965, para. 53; *DEB*, case C-279/09 (2010) ECR I-13849, para. 35; *Dereci*, case C-256/11, judgment of 15 November 2011, para. 70; *Melloni*, case C-399/11, judgment of 26 February 2013, para. 50; *Arango Jaramillo*, case C-334/12, RX-II, judgment of 28 February 2013, para. 43. The last three judgments have not yet been reported.

Since entering into force, the EU Charter of fundamental rights has come to play a rapidly increasing role in the case law of the CJEU.<sup>23</sup> Indeed, it has now become, and logically so, the first and main source of reference for the Court when it is confronted with fundamental rights issues,<sup>24</sup> which is increasingly the case. The objective of the Charter to make already existing EU fundamental rights more visible appears to be successfully met, in light of the litigation before the Union Courts, including the preliminary procedure, which is becoming more fundamental rights focused.

However, the primary focus on the Charter might induce the Court to place less emphasis on the Convention and the relevant case law of the Strasbourg Court. And indeed in some recent decisions of the Grand Chamber (*Sky Österreich*,<sup>25</sup> *Akerberg Fransson*,<sup>26</sup> *ZZ*<sup>27</sup>), the Court has refrained from any reference to that case law, apart from a limited exception in the *ZZ* judgment, where such references would have been welcome and to be expected in line with normal practice. Fortunately, in each of these cases the Advocate General had made abundant reference to Convention case law. Earlier judgments might have already given indications of a possible policy change in this regard. In *Otis*<sup>28</sup> the Grand Chamber, following a precedent set by the Second Chamber in *Chalkor*,<sup>29</sup> stated with regard to the principle of effective judicial protection (a general principle of EU law, embodied as well in Article 6 (1) of the ECHR) that because it was now secured by Article 47 of the Charter, the reference should be made only to that Article. In *Radu*,<sup>30</sup> the Grand Chamber again refers to these precedents but omitting the word “only”. Indeed, in other recent judgments, also of the Grand Chamber, one again finds references to the Convention and the Strasbourg case law.<sup>31</sup>

One can understand that the Court, now that the Charter has become a binding instrument, prefers to refer to the Charter in the first place as the main source of fundamental rights in the EU legal system. However, that should certainly not imply that the case law of the Strasbourg Court has become less relevant for the interpretation of the relevant rights and be less worthy of reference. As it was quite pertinently expressed in a Fourth Chamber judgment of 28 February 2013,<sup>32</sup> “reference must be made” to the case law of the European Court of Human Rights “in accordance with Article 52(3) of the Charter”. Or to quote Advocate General Sharpston in *Gascogne*:<sup>33</sup> “By virtue of Article 52(3) of the Charter, since the rights guaranteed by Article 47 (Charter) correspond to rights guaranteed by the ECHR, their meaning and scope are to be construed in the light of Articles 6(1) and 13 ECHR. Thus, the criteria developed by the Strasbourg Court in interpreting those provisions should be applied (...)”. One may perhaps add that a change of judicial policy in this regard would risk to have a negative impact on the cooperation between both Courts and in any event be difficult to reconcile with the ambition of reinforcing the existing dialogue between both Courts after the accession of the EU to the Convention, as expressed by the Declaration on Article 6(2) EU annexed to the Lisbon Treaty.

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<sup>23</sup> For an overview see A.Rosas and H.Kaila, “L’application de la Charte des droits fondamentaux de l’Union européenne par la Cour de justice: un premier bilan”, *Il Diritto dell’Unione Europea*, 1/11, p. 1; Th. Von Danwitz and K.Paraschas, “A fresh start for the Charter- Fundamental questions on the application of the European Charter of Fundamental Rights”, *Fordham Law Journal* 2012, pp. 1396 ff.; C. Ladenburger, “Protection of Fundamental Rights post-Lisbon-The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions”, *FIDE 2012 Institutional Report*.

<sup>24</sup> See for instance CJEU, *DEB*, case C-279/09, cit.

<sup>25</sup> CJEU, *Sky Österreich*, C-283/11, judgment of 22 January 2013, not yet reported.

<sup>26</sup> CJEU, *Akerberg Fransson*, C-617/10, judgment of 26 February 2013, not yet reported.

<sup>27</sup> CJEU, *ZZ*, C-300/11, judgment of 4 June 2013, not yet reported.

<sup>28</sup> CJEU, *Otis*, C-199/11, judgment of 6 November 2012, not yet reported.

<sup>29</sup> CJEU, *Chalkor*, C-386/10P, judgment of 8 December 2011, not yet reported.

<sup>30</sup> CJEU, *Radu*, C-396/11, cit.

<sup>31</sup> For instance, CJEU, *Melloni*, C-399/11, cit., para. 50.

<sup>32</sup> CJEU, *Arango Jaramillo*, C-334/12 RX-II, cit., para. 43.

<sup>33</sup> C-58/12P *Gascogne Sack Deutschland GmbH*, Opinion of 30 May 2013, para. 72, not yet reported.

## Accession to the ECHR

In spite of the close cooperation between the Luxemburg and Strasbourg Courts and the incorporation of the substance of the (corresponding) Convention rights by Article 52(3) of the Charter, the Lisbon Treaty moreover requires the EU to become a party to the ECHR (Article 6 par.2 EU). I do not think formal accession is necessary because the present level of fundamental rights protection within the EU legal order must be considered insufficient. However, there are other, more formal reasons justifying accession.<sup>34</sup>

First of all, accession would finally achieve the highly desirable integration of the EU in the pan-European system of human rights protection established by the 47 Member States of the Council of Europe. Indeed, it becomes more and more difficult to accept that important issues of human rights protection are increasingly withdrawn from the direct jurisdiction of the ECtHR because of the ever-continuing transfer of rule-making competences from the EU Member States to the EU, a transfer, which has still been further increased by the Lisbon Treaty. It is true that someone who considers that his/her human rights have been infringed by an EU act might in certain circumstances address his complaint to the Strasbourg Court against a Member State or even all Member States.<sup>35</sup> However, that itself is an anomaly: the accused, that is the Union itself, is not able to defend the case, and cannot be condemned. And finally, as it is elegantly put in the preamble of the draft accession agreement, accession would enhance coherency in human rights protection in Europe.<sup>36</sup> Indeed, after accession the Strasbourg Court could solve a possible conflict between the case laws of the Luxemburg and the Strasbourg Court.

Negotiations on accession started on a technical level in 2010 and produced a first draft in October 2011.<sup>37</sup> A second round appeared necessary and was successfully concluded in April 2013.<sup>38</sup> Draft accession instruments are on the table.<sup>39</sup> The whole negotiation process until now has been remarkably transparent. The reports of the negotiating group and the texts of the subsequent versions of the draft agreement and the explanatory report were made available on the internet. In my view the negotiators

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<sup>34</sup> See also Pieter van Dijk, "Comments on the Accession of the European Union/European Community to the European Convention on Human Rights", European Commission for Democracy through Law, CDL(2007)096, para.2.

<sup>35</sup> ECtHR, *Matthews v United Kingdom*, judgment of 18 February 1999, no.24833/94 but see ECtHR, *Connolly v 15 Member States of the EU*, decision of 9 December 2008, no. 73274/01.

<sup>36</sup> See also the Declaration adopted by the High Level Conference on the Future of the European Court of Human Rights, Brighton 19 and 20 April 2012 (Brighton Declaration), para. 36.

<sup>37</sup> See for a first comment: 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", Fondation Robert Schuman, European Issues No 28, 7th November 2011; M. Kuijer, "The Accession of the European Union to the ECHR: a gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?", *Amsterdam Law Forum*, Vol. 3, no;4, 2011, p. 17; T. Lock, "Walking on a tightrope: the draft ECHR Accession Agreement and the autonomy of the EU legal order", *CMLRev.* 2011, p. 1025; N. O'Meara, "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR", *German Law Journal* 2011, p. 1813. See more generally on the subject of accession: G.Gaja, "Accession to the ECHR", in Biondi, Eeckhout, Ripley, *EU Law after Lisbon*, cit., p. 180, J-P. Jacqué, "The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", *CMLRev.* 2011, p. 995, B. Smulders, "De drie-pijler structuur van de grondrechtenbescherming in de EU: Enkele institutioneelrechtelijke overwegingen omtrent de groeiende complexiteit van deze bescherming na Lissabon", in T.Baumé a.o. (eds), *Today's Multi-layered Legal Order: Current Issues and Perspectives*, Liber Amicorum in honour of Arjen W.H.Meij, Zutphen 2011, p. 325.

<sup>38</sup> See R.Böcker, "Gaten dichten Toetreding van de Europese Unie tot het EVRM", *NJB* 2013, p. 1560.

<sup>39</sup> See Draft revised agreement and Draft explanatory report annexed to the Final Report to the CDDH, 47+1(2013)008rev2 of 10 June 2013.

should be congratulated. The text of the draft is short, simple and straightforward, which is furthermore noticeable taking into account the complexity of some of the issues involved.

So, the perspectives for accession have brightened but there is still a long way to go. On the side of the EU, the European Commission has now asked an opinion of the CJEU about the compatibility of the draft agreement with the EU treaties under Article 218 (11) TFEU; the necessary internal EU rules with regard to EU decision-making on participation in ECHR procedures and the procedure of prior involvement of the CJEU still have to be agreed upon; accession requires a unanimous decision of the Council to be approved by the Member States according to their constitutional procedures (Article 218(8) TFEU) and then finally the Accession instruments must be ratified by all 47 Member States of the Council of Europe.

### **Prior involvement of the CJEU and the co-respondent mechanism**

Accession of the EU to the Convention raises a number of complex legal issues. Being fully aware of that, the authors of the Lisbon Treaty have annexed a special Protocol to that Treaty (No. 8) requiring the Accession Treaty, notably, to make provision for preserving the specific characteristics of the Union and Union law and to ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions.

One of these issues more particularly concerns the CJEU.<sup>40</sup>

The system of human rights protection provided for by the Strasbourg Convention is a subsidiary one. To get access to the Strasbourg Court a complainant must first bring his case before the national courts, if he has a remedy and in principle, but not necessarily, up to the highest court. This is not only a matter of efficiency, of allowing cases to be solved, so as to diminish the workload of the Strasbourg Court. The national legal system should first be given full possibility to correct the human rights problem, if there is any, the national courts being responsible in the first place to provide for the necessary legal protection, including the protection of fundamental rights. Now precisely in that regard, the EU legal system is more complex because of the dual nature of its legal protection. EU law will normally affect citizens only indirectly through implementing national law and measures taken by the national administration. As a consequence of this decentralized system of administration, legal protection is also largely decentralised: it must be obtained through the national courts, in cooperation with the CJEU through the preliminary ruling procedure. The possibility for private parties to have direct access to the Union courts is the exception. Since the Treaty of Lisbon this dual nature of the system of legal protection against unlawful EU acts (and national acts incompatible with EU rules) is explicitly recognized by the EU Treaty (Article 19 (1)).

Now, what is the problem, one could ask? If legal protection must be obtained on the national level, the complainant, as always, has first to pass through the national courts to get access to the Strasbourg Court. Well, the problem is that this access could then be obtained without the Luxemburg Court having had the possibility to address the issue. It seems difficult to accept and at the same time hardly compatible with the rationale of the exhaustion of legal remedies principle, that the Strasbourg Court could be addressed to judge directly or indirectly the conformity of a Union act with the Convention without the CJEU having been able to examine the issue. Indeed it is the Luxemburg Court that has, within the legal system from which the act emanates the jurisdiction and the responsibility to ensure respect of fundamental rights. The Member States' courts, as far as the validity of Union acts is concerned, do not have that jurisdiction.<sup>41</sup>

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<sup>40</sup> See more generally on this issue A.Tizzano, "Les Cours européennes et l'adhésion de l'Union à la CEDH", *Il Diritto dell'Unione Europea* 1/11, p. 29.

<sup>41</sup> CJEU, *Foto-Frost*, C-314/85 (1987) ECR 4199.

What about the preliminary ruling procedure? That procedure is indeed the only possibility to involve the CJEU before the case is brought to the Strasbourg Court. However, that procedure is not in the hands of the parties, it is not a remedy but a prerogative of the national court. A last instance Court is of course in principle obliged to refer but only if that Court detects a question of interpretation or validity of Union law which must be answered to solve the case and without prejudice to the exceptions of ‘acte clair’ and ‘acte éclairé’. It cannot at all be excluded that a case brought before the Strasbourg Court appears at that stage to raise serious questions about the conformity of a Union act with the Convention without the CJEU having been involved and even without the national court of last instance having necessarily infringed its obligation to refer.

It seems to me that once the Union is a party to the Convention, the principle of exhaustion of legal remedies must be applied in a very specific way. Namely, even when an action of the Union can only be challenged indirectly through the national courts, in principle, where serious questions of validity of a Union act are involved, the CJEU must first have been able to examine that question before the Strasbourg Court judges the case. It would seem to me difficult to accept, to give an example, that questions of respect of fundamental rights of such importance as raised in cases like *Bosphorus*,<sup>42</sup> *Kadi*<sup>43</sup> or *Advocaten van de Wereld*,<sup>44</sup> would be decided by the Strasbourg Court without the CJEU, which has the competence to examine the validity of the Union act in question, having had the opportunity to address these questions.

Another argument sometimes invoked to justify the introduction of a procedure of prior involvement relates to the monopoly of the CJEU to assess the validity of Union acts. I agree with those who consider this argument as not being really convincing. Indeed, a decision of the Strasbourg Court will not interfere with that monopoly. The Strasbourg Court will not judge the validity of Union acts, just as it does not do that with regard to national acts. Were that Court to judge a Union act to be incompatible with the Convention, the interpretation of that act would remain the sole competence of the Luxembourg Court and the validity of that act would not be directly affected. It might even happen that the CJEU could interpret the incompatibility away by proceeding to a consistent interpretation. The advocates of the monopoly argument do not go so far as to contest the final jurisdiction of the Strasbourg Court to establish an incompatibility of a Union instrument with the Convention. Nevertheless, one wonders how prior involvement of the CJEU in a case results in that Court not finding a fundamental rights problem, but the Strasbourg Court subsequently comes to the opposite conclusion, this would then suffice to neutralize the monopoly argument.

In May 2010, the CJEU published a Discussion Document endorsing the need for a procedural mechanism of prior involvement. This position of the CJEU is shared by the Strasbourg Court as follows from the Joint Communication from Presidents Costa and Skouris of 17 January 2011. The two Courts have made this position publicly known with explicit reference to the ongoing negotiations on accession between the Council of Europe and the EU.

The draft Accession Agreement does now indeed provide for such a mechanism, at least the principle of such a mechanism, in Article 3(6). The Union will have to enact further rules to lay down the modalities of this procedure, which is now under consideration. The European Commission would seem to be the obvious candidate to be allowed access to this procedure, also the respondent Member State. They should have the possibility in those cases pending before the Strasbourg Court, which appear to raise serious questions of conventionality of a Union instrument, to bring those questions before the Luxembourg Court. Of course, the decision of the Luxembourg Court will not bind the

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<sup>42</sup> CJEU, *Bosphorus*, C-84/95 (1996) ECR I-3953.

<sup>43</sup> CJEU, *Kadi*, case C-402/05P (2008) ECR I-6351.

<sup>44</sup> CJEU, *Advocaten van de Wereld*, C-303/05 (2007) ECR I-3633.

Strasbourg Court, which would have the final say. As the last sentence of the provision in the draft Accession Agreement puts it in diplomatic language: the mechanism shall not affect the powers of the Strasbourg Court. The mechanism should be flexible. A referral to the Luxembourg Court should not be automatic but reserved more particularly to cases where a serious question of conventionality arises, and that is to be appreciated by the European Commission or the other parties to whom standing would be granted.

Legal doctrine is far from unanimous about the need for such a mechanism.<sup>45</sup> One encounters more specifically three objections against introducing a procedure of prior involvement.

A first objection is one of unequal treatment. It also happens, and not infrequently, that complaints are declared admissible by the Strasbourg Court without a national Constitutional or Supreme Court having first been addressed. This is certainly true. However, normally in such a situation at least a lower court of that State will have given judgment in the case. And that is precisely the difference: without prior involvement none of the competent EU courts would be addressed.

A second objection is based on the argument that the insistence by the CJEU on the need of a mechanism of prior involvement is to be explained by its reluctance to accept the jurisdiction of the Strasbourg court as the last instance Court on fundamental rights issues. I would call this the bad faith scenario. This objection seems to me totally unfounded. Of course, the CJEU will accept the final authority of the Strasbourg Court after accession; this is the whole purpose of accession.

In fact, the CJEU accepts this already now by fully recognizing the consequences of Article 52 (3) of the EU Charter of fundamental rights. According to this Article, as we have already seen, the Member States have unilaterally agreed to the obligation for the Union to respect Convention rights corresponding to Charter rights as a minimum level of protection. This obligation includes the interpretation of those corresponding Convention rights given by the Strasbourg Court as fully accepted by the Luxembourg Court.<sup>46</sup>

If this bad faith scenario is true, one wonders how the President of the Strasbourg Court could have endorsed the need for a mechanism of prior involvement by subscribing on behalf of his Court to the Joint Communication of the 17<sup>th</sup> January 2011 with the President of the Luxembourg Court (and how, for that matter, the drafters of the Draft explanatory report to the draft Accession Treaty could have written: "The Joint Declaration by the Presidents of the two European courts (...) provided a valuable reference and guidance for the negotiation").<sup>47</sup>

And finally, would prior involvement of the Luxembourg Court indeed risk, so to say, pre-empting the decision of the Strasbourg Court? The ultimate decision will entirely remain in the hands of the latter Court. Personally, I have no doubt that after accession the relationship between both Courts could not be qualified in terms of constitutional or multilevel pluralism: the Strasbourg Court will have the final say and in so far be superior to the Luxembourg Court. But of course the existing cooperation and dialogue between both Courts, also through their case law, should be continued after accession or even increased to avoid unnecessary conflicts. This is also the message given by the drafters of the Lisbon Treaty (Declaration No. 2 on Article 6 para. 2 TEU).

A third objection is to argue that if the dual system of legal protection in the EU is creating problems for the application of the subsidiarity principle under the Convention, this is an internal

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<sup>45</sup> Critical about the need for such a mechanism: Groussot, Lock and Pech, "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011", cit., p. 236, T.Lock, "EU Accession to the ECHR: Implications for Judicial Review in Strasbourg", *European Law Rev.*, 2010, p. 793.

<sup>46</sup> See fn. 22.

<sup>47</sup> See para. 14 of the Draft explanatory report annexed to the Final Report to the CDDH, cit.



problem for the EU and should be solved by the EU itself instead of burdening the Convention system with providing a solution - Let the EU first bring its own house in order before accession. I do not deny there is merit in this argument. However, one of the conditions for accession on the side of the Union as expressed in Protocol No 8 is precisely that the Accession Agreement “shall make provision for preserving the specific characteristics of the Union and Union law (...)”. If the non EU Contracting Parties of the Convention were not willing to accept this condition, there would be a major problem. Fortunately, this appears not to be the case, at least not now. Moreover, what should an internal EU solution to the problem have to imply? Strengthen the obligation to refer of last instance courts by amending Article 267 TFEU or providing for a remedy in that Treaty allowing private parties to bring a case before the CJEU in the absence of a preliminary reference by a last instance court? Neither would, in my view, be desirable, nor would it be realistic to open a debate about treaty amendments.

This provision of the draft Accession Agreement allowing prior involvement of the CJEU has been integrated in the Article of the draft Agreement that regulates the co-respondent mechanism. That mechanism is a complex one; it is certainly going to raise delicate questions in practice. The idea in itself however is clear. Precisely because of the overlap in practice of Union law and national law as already mentioned, the Union should be able to participate as a co-respondent in a procedure brought against an EU Member State whenever the national measure brought before the Court is so closely related to Union law that the complaint indirectly puts into question the compatibility with the Convention of a provision of Union law. That provision could be part of secondary or primary Union law.

The Member States may be also admitted as co-respondents in cases brought against the Union when the complaint calls into question the compatibility with the Convention of provisions of EU primary law. The involvement of Member States in such cases may be explained because of their capacity as *Herren der Verträge*.

The status of a co-respondent is that of a party to the proceedings who will be bound by the judgment. This is of course the main advantage of and, at the same time, justification for the co-respondent mechanism. In a situation where the dividing line between Member State and Union responsibility for a measure is unclear and the Strasbourg Court is not empowered to judge the issue of the division of competences between the Union and the Member State, the co-respondent mechanism allows the Court to leave that question open and, if necessary, condemn both jointly. The advantage for the complainant will be that he obtains a judgment, which is enforceable against both parties. As it is stated in the draft explanatory report “The co-respondent mechanism is (...) not a procedural privilege for the EU or its member States, but a way to avoid gaps in participation, accountability and enforceability in the Convention system”.<sup>48</sup> The Court decides whether the conditions for being accepted as a co-respondent are being fulfilled. However, a Contracting Party cannot be drawn into the procedure as a co-respondent against its will.

I limit my comments on this mechanism and the possibility of a prior involvement of the CJEU to one crucial question: What will happen in a case where a complaint is brought against the Union before the Strasbourg Court because of a violation of the Convention by a Union act, for instance a regulation, which the complainant has not and could not have appealed before the Union Courts because of a lack of standing? How should the subsidiarity principle be applied in such a case? Should the complainant have immediate access to the Strasbourg Court or should he await the implementation and application of the regulation in his Member State? In other words, if in such a case a complaint before the Strasbourg Court would be at all admissible, would the principle of exhaustion of legal remedies then not have to be applied so as to fully take into consideration the dual nature of the Union’s system of

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<sup>48</sup> Draft explanatory report annexed to the Final Report to the CDDH, cit., para. 39.

legal protection that is either through the Union or the national Courts? If in my example the complainant would not have to wait for access to the national court, but could immediately bring a complaint against the regulation before the Strasbourg Court, would there not be a lacuna in the draft agreement because there would be no possibility for a prior involvement of the CJEU before the Strasbourg Court decides on the compatibility of the regulation with the Convention?

### **Future relations between the ECJ and the Strasbourg Court**

What will be the consequences of an accession of the EU to the Convention? Will it fundamentally modify the relationship between both Courts? Accession will, at least formally, bring a fundamental change: the Union will become subject to the jurisdiction of the Strasbourg Court. That will imply that the CJEU becomes subordinated to that jurisdiction. This would seem to be in line with the case law of the Court on the relationship between EU law and international law. The CJEU has in principle accepted that the EU legal order can be made subject to the jurisdiction of an international court in the EEA Opinion.<sup>49</sup> The Lisbon Treaty has now removed the hurdle erected by Opinion 2/94 on the Human Rights Convention.<sup>50</sup>

If the CJEU becomes subject to the jurisdiction of the Strasbourg Court, does that necessarily imply that the cooperation between both courts as it has developed until now, will change? To be more precise, would that mean the end of the *Bosphorus* case law? Most commentators regard this as a logical consequence of accession.<sup>51</sup> The EU, as a matter of principle, acceding to the Convention on an equal footing with the other Contracting Parties,<sup>52</sup> means that there would be no justification anymore to grant the CJEU preferable treatment above that of a Supreme Court of a Contracting Party.

This sounds convincing but in my view the question is more complex. *Prima facie* it would seem rather paradoxical if the presumption of good behaviour accepted before accession would have to be abandoned because of accession. That good behaviour has certainly continued since the *Bosphorus* judgement was rendered, and even been improved. Convention rights in so far as they correspond to Charter rights now form part of primary Union law (Article 52(3) Charter), including their interpretation by the Strasbourg Court. And one should also take into consideration the practise of the CJEU in referring extensively to the Strasbourg case law expecting and hoping that this practice will be continued despite what has been said above. More generally, it seems at least a matter for discussion whether the CJEU as an international Court with jurisdiction covering 28 Member States, also in view of its close cooperative relationship with the Strasbourg Court, can be considered in a similar position as a Supreme Court of a Member State.

On the other hand, the Strasbourg Court has accepted the *Bosphorus* standard of limited control only with regard to a situation in which a Member State's action is not the result of an exercise of discretion but the consequence of the need to comply with legal obligations flowing from EU law. Moreover the Court took note of the fact that the international organization from which the relevant act emanated, could itself not be held liable under the Convention. So, there appears in the *Bosphorus* judgement also an element of trying to accommodate respect of obligations under the Convention with the necessity for a Member State to honour its Union obligations in order to alleviate the possible

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<sup>49</sup> Opinion 1/91 (1991) ECR I-6079, paras. 39 and 40. ff

<sup>50</sup> Opinion 2/94 (1996) ECR I-1759.

<sup>51</sup> So Kuijer, "The Accession of the European Union to the ECHR: a gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?", cit., p. 21, F. G. Jacobs, "The Lisbon Treaty and the Court of Justice", in Biondi, Eeckhout, Ripley, *EU Law after Lisbon*, cit., p. 197 at 205, Lock, "EU Accession to the ECHR: Implications for Judicial Review in Strasbourg", cit., p. 797/8, O'Meara, "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR", cit., p. 1828.

<sup>52</sup> Draft explanatory report annexed to the Final Report to the CDDH, cit., para.7.

tension between these two sets of obligations, which the Strasbourg Court could not solve. Accession will of course fundamentally change this uncomfortable situation.

On balance, I would not exclude the possibility that the *Bosphorus* standard could survive accession, possibly in a more mitigated form. In any event, at least in my view, it would be in the interest of both Courts and more generally of the Union and the Convention regime, if the existing cooperation between both Courts would be continued and possibly further developed, also after the Union's accession to the Convention. I might refer again to Declaration No 2 on Article 6, para. 2 TEU. But the final say on these matters, including the fate of the *Bosphorus* case law, belongs to the Strasbourg Court.

So, to answer the question raised in the title, yes, accession of the EU to the ECHR will certainly change the relations between the Strasbourg and the Luxemburg Court, the latter becoming formally subject to the jurisdiction of the former. What will be the consequences for the existing dialogue between both Courts, including the fate of the *Bosphorus* leniency, remains however to be seen.