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From Informal to Institutionalised Dialogue between the CJEU and the ECtHR : The Tightropes Walk between the EU's Autonomy and the Coherence of Fundamental Rights Protection in Europe

by

Elisabeth Lentsch*

Abstract

Article 6(2) of the Treaty of Lisbon and the Protocol No. 14 to the ECHR paved the way for the long awaited EU's accession to the European Convention of Human Rights (ECHR). This will bring a formal and structural revolution to the human rights protection system in Europe touching upon the jurisdiction of the CJEU. Due to the latter, the EU has become a human rights player in Europe. It has attributed particular significance to the Council of Europe's principal human rights instrument, the ECHR and related case law of the European Court of Human Rights in Strasbourg (ECtHR). In the course of time, both Courts have established a form of dialogue, basically reflected in their mutual recognition and reference in their case law. However, so far the interplay between both Courts is missing any formal legal basis. The legally foreseen EU accession to the ECHR shall institutionalise their relationship.

Such a step means an exceptional turn. For the very first time an international organisation shall be formally bound as a party to an international human rights treaty. Such a membership involves an external monitoring and surveillance mechanism. The process for actual accession was launched and a draft accession agreement was prepared. In this context the question on the safeguard of the autonomy of the EU's legal order and in particular of the jurisdiction of the CJEU was raised as fundamental. This paper shall scrutinise the tension between the explicit obligation for accession to the ECHR, and the related review of the compliance with it by the ECtHR on the one hand, and the veto of the CJEU, which argues with the necessary safeguard of the principle of autonomy of EU law and in particular of its own judicial monopoly.

Keywords: European Convention of Human Rights, Court of Justice of the European Union, European Court of Human Rights, Autonomy of EU law, Exclusive jurisdiction

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I. Introduction

The entry into force of the Lisbon Treaty in December 2009 brought fundamental changes to the Union's fundamental rights landscape. Beside the EU's own fundamental rights catalogue, today primary law orders the EU to accede the European Convention on Human Rights and Fundamental Freedoms of the Council of Europe. Attached to the accession is the judicial review of the compliance of EU law with the convention by the so far uncontested human rights guardian par excellence in Europe, the European Court of Human Rights.

When the originally solely economically oriented European Communities started to consider human rights in its legal system, the ECHR's standards was rated high.

In the course of time, both organisations' courts have founded their relationship on mutual recognition and reference in their case law in the field of human rights. This "informal dialogue" ensured a level of coherence of human rights protection in Europe.

Finally, negotiations on an accession agreement started in the summer 2010[1] and a first draft was presented in February 2011 as well as revised versions in March and May 2011[2]. The final draft agreement was issued by April 2013.[3] On 18 December 2014, the Court of Justice of the European Union issued its opinion on the result of negotiations for the accession agreement. It declared the Draft Accession Agreement to be in conflict with the autonomy of EU law and the CJEU's exclusive jurisdiction.

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[1] Council of Europe, press release 545(2010), 7 July 2010 http://www.coe.int/t/der/brusselsoffice/articles/restarticles/2010/jagland_reding_070710_EN.asp.

[2] CDDH-UE(2011)04 and revised CDDH-UE(2011)06 and second revised draft agreement CDDH-UE(2011)10

[3] Final report to the CDDH, Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights.

This paper shall focus on the tension between the primary law obligation for the Union to accede the ECHR system on the one hand and the respect of autonomy by the Union, and in particular of the exclusive judicial power of the CJEU on the other.

The first section gives an overview of the development of human rights protection in Europe, in particular in the European Union. It discusses the role of the ECHR and the Court of Human Rights case law in the system of the European Union and turns to the relationship of both organisations' courts.

It then addresses the legal changes brought by the Lisbon Treaty, which has fundamental impact on the design of the Union's fundamental rights architecture.

The following section is dedicated to the raised objection by the CJEU with regard to the Draft Accession Agreement, namely the principle of autonomy and its own exclusive judicial power.

The final section draws conclusions on the assessment of the argument of autonomy of EU law and in particular the exclusive competence of the CJEU on scrutinising EU law.

II. The Story of Human Rights Protection in Europe

The cruelty of the Second World War led to the ambition to secure peace and security in Europe. For this reason two organisations were established. On the one hand, the Council of Europe was created in 1949, with the aim to promote democracy, human rights and the rule of law in its signatory states.[4] Only a few years later, the Benelux states, Italy, France and Germany concluded an agreement on enhancing European States' co-operation in form of economic integration.

Human rights were made the Council of Europe's prime concern and a strong normative monitoring system was established. The community treaties left human rights totally unmentioned and completely left out in those days.

In reaction to the several Member States constitutional courts' call for review of Community's action on their compatibility with their national fundamental rights laws, the Court of Justice as the first Community institution, acknowledged the need to ensure the respect of fundamental rights at the then European Community level. In the absence of any human rights catalogue, the CJEU elaborated fundamental rights as general principles by deducing them from comparing the Member States' constitutional traditions on a case to case basis.[5] Since 1969, the Court developed an extensive body of fundamental rights case law and introduced thereby the era of human rights as part of the Community's legal order. It ruled

[4] Founding states were Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the UK.
[5] ECJ, case 26/69 *Stauder* [1969] ECR 57.

then, that international human rights treaties, which the Member States have collaborated or are signatories, "*can supply guidelines which should be followed within the framework of Community law*".[6]

Among the international human rights treaties, the Court of Justice attributed specific importance and relevance to the ECHR. This rooted in the fact that all EU Member States were and are contracting states to. Even though it had not been an integrated part of Community law it received more and more significance within the EU legal system. Initially, it served only as guideline for elaborating the common general principles. After referring for the first time to the ECHR in the case *Nold* in 1974[7], the CJEU started to constantly draw on the specific articles of the Council of Europe's main human rights instrument.[8] Later on, the Convention was even included as a document of reference at political level[9], and finally found its way into EU primary law in Article F (2) of the Treaty of Maastricht in 1992.[10]

Apart from the CJEU's practice of referring to the Convention's provisions, it can be witnessed that the Luxembourg Court attached great importance to the case law of the European Court of Human Rights. It started to refer to the latter's judgement in the case *P v. S. and Cornwall County Council for the first time in 1996*.[11] It continued to ensure consistency of its own rulings with the ECHR and the judicial line of the ECtHR in its subsequent cases.[12] Furthermore, it even supported the enforcement of the Strasbourg Court's findings.[13]

This positive attitude towards the ECtHR rulings applies even in the very few cases, where certain divergence in the interpretation of fundamental rights can be traced.[14] However, in all these matters it must be noted that the CJEU was the first court to decide. Thus its rulings cannot be regarded as deviation from the ECtHR views. Actually, the CJEU even declared then explicitly that no jurisprudence of the ECtHR existed. [15] Moreover, the CJEU even adapted its later judgements in line with the ECtHR's ruling on the matter.[16]

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[6] ECJ, case 4/73 *Nold* [1974], ECR 491, para 13.
[7] ECJ, case 4/73, *Nold* [1974], ECR 491.
[8] ECJ, case 36/75, *Rutili* [1975], ECR 1219, para. 32.
[9] Preamble of the Single European Act, [1986] OJ L 169.
[10] Article F (2) of the Treaty establishing the European Community, Treaty of Maastricht, [1992] OJ C 224. "*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*"
[11] ECJ, case C-13/94, *P v. S. and Cornwall County Council* [1996], ECR I-2143, para 16.
[12] ECJ, case C-7/98, *Krombach* [2000], ECR I-1935 para 39. The ECtHR had to decide in an identical case ECtHR, No 29731/96 CEDH 2001- II (Krombach/France) and decided equally.; ECJ case C-112/00 *Schmidberger* [2002], ECR I-5659, para.79, ECJ case C-60/00, *Carpenter* [2002] ECR I-6279, para. 42; ECJ case C-402/05 P and 415/05 P *Kadi* [2008], ECR I-6351, para. 311,344,360,363.
[13] ECJ, case C-145/04, *Spain/United Kingdom* [2006] ECR I-17917, para 90ff; LOCK Tobias, "Das Verhältnis zwischen dem EuGH und internationalen Gerichten", Tübingen, Mohr Siebeck, 2010, p.272.
[14] This was the case relating to the scope of Article 8 ECHR in relation to business premises was assessed differently by the CJEU dealing with the ECJ joined cases 46/87 and 227/88, *Hoechst* [1989], ECR 2859 and ECtHR, case No 13710/88, *Niemietz* , Série . Another example of divergent views of the courts emerged in the ECJ, case 374/87 *Orkem* [1989], ECR 3283 and the ECtHR case No. 10828/84, *Funke* Série A No 256-A, which dealt with Art 6 ECHR dealing with the right not to give evidence against oneself.
[15] LOCK Tobias, "Das Verhältnis zwischen dem EuGH und internationalen Gerichten", Tübingen, Mohr Siebeck, 2010, p.273ff.
[16] ECJ, case C-94/00, *Roquette Frères* [2002] ECR I-9011, para 29.

The CJEU accepted informally the binding of the ECHR and the ECtHR's case law and has even promoted it within the Union's legal system. This willing approach towards the Strasbourg Court's findings proves the recognition of the ECtHR as a court with the decisive say with regard to the human rights protection in Europe.

Such a friendly attitude generally holds also true for the ECtHR, which strives to avoid divergences in its case law with the CJEU's judgements. Due to the fact that the EU is not party to the ECHR, it is not able to hold it responsible in cases of alleged infringements.[17] Nevertheless, in several cases the ECtHR dealt with the scrutiny of EU law in complaints directed against EU Member States concerning national legal acts within the scope of Union law. Thereto, in the case *M &Co* the predecessor of the ECtHR, the Commission for Human Rights, clarified that according to Article 1 ECHR the Contracting Parties remain responsible for the compliance of all domestic acts and omissions with the ECHR, even if they have transferred parts of their sovereign powers to an international organisation. Otherwise the Convention could be deprived of its effect. The transfer of powers to an international organisation is however not incompatible with the Convention provided that within the organisation fundamental rights will receive an equivalent protection. In the case at issue, the Human Rights Commission adjudged that the equivalent protection within the system of the European Communities was fulfilled and rejected the application on these grounds.[18]

The Strasbourg Court started even to take into account and to consider the Luxembourg Court's findings in its rulings.[19] In the year 1999, the ECtHR was confronted in the case *Matthews* with the scrutiny of EU primary law. Briefly speaking, Strasbourg ruled that the EU Member States also remain responsible for EU primary law since they have transferred parts of their sovereignty to the Union in form of an international treaty.[20] This decision prompted several attempts to challenge EU legal acts in front of the ECtHR. But the Strasbourg Court constantly avoided any control of EU legal acts by declaring them inadmissible.[21]

A remarkable judgement of the ECtHR is the famous case *Bosphorus vs Ireland* in 2005.[22] The ECtHR approved the admissibility of a claim against an EU action, upon which the CJEU already ruled on the merits. It stated, "*In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental*

[17] CFTD v European Communities (App no 8030/77 1978; Dufay v European Communities (App.no 13539/88 Commission for Human Rights 19. Jan 1989
[18] ECtHR case No 13258/87, *M&Co* .
[19] ECtHR, No 28957/95 *Christine Goodwin/United Kingdom*; ECtHR case No 27824/97, *Posti and Rahko/ Finland*, ECtHR cases, No 32911/96, No 35237/97 and No 34595/97 *Meftah and others/France.*
[20] ECtHR case No 24833/94, *Matthews/United Kingdom*, para 32.
[21] ECtHR case No 51717/99 *Société Guérin Automobiles/15 EU Member States* ; ECtHR case No. 6422/02 u 9916/02, *Segi ea and Gestoras Pro Amnestia/ 15 EU Member states*, ECtHR case No. 5667/00, *Senator Lines/ 15 EU Member States*; ECtHR case No. 62023/00, *Emesa Sugar/NL.*
[22] ECtHR case No. 45036/98, *Bosphorus.*

rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. By "equivalent" the Court means "comparable."[23] By approving the presumption of equivalent protection within the EU legal system in substantive and procedural regards.[24] Thereby ECtHR refrained from confronting the CJEU but expressed comity towards the EU fundamental rights regime.

But yet, the ECtHR clarified that "*any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.*"[25]

This case law demonstrates that the ECtHR respects and acknowledges the European Union legal order and its specific characteristics. Nevertheless it does not waive its judicial power on the enforcement of the Convention.

Even though, it is not clear in which case such a manifest deficiency is in place, the ECtHR reserved its judicial competence in case of non-equivalent fundamental rights protection of the EU.

As can be concluded from the past, the ECHR has played a crucial role in the development of fundamental rights protection within the Union. The CJEU has strongly oriented its case law to the ECHR and ensured the conformity of its own rulings in the field with the respective ECtHR findings. It can be observed that the Luxembourg and Strasbourg courts traditionally aimed to keep any divergence in the interpretation of the fundamental rights provisions scarce. In fact, until today the CJEU respects and adapts its jurisprudence according to the ECtHR's findings. Likewise, the Strasbourg Court was confronted with scrutinising cases linked to EU law on its compatibility with the Convention and the latter involves EU fundamental rights developments. Whilst the ECtHR developed a kind of "Solange" approach to the Union's fundamental rights protection, by presuming that equivalent protection is given, it kept its right to assess it in case of manifest deficiency.

III. Lisbon Treaty and Article 6(2) TEU

The Lisbon Treaty introduced fundamental change and set a distinct direction for the future human rights architecture of the EU, but nota bene for human rights protection in Europe in general.

After a decade, the EU finally received its proper legally binding fundamental rights catalogue. After being already proclaimed in December 2000, and increasingly referred to by

[23] Ibid para.155.
[24] Ibid para. 165.
[25] Ibid para.156.

EU institutions, it became the central legal document in the area of fundamental rights protection within the EU legal order.[26]

Nonetheless, the Union did not recall the established close link to the ECHR, which had developed over time. In Article 52(3) of the Charter, the EU acknowledges the ECHR as providing minimum standards for the Union's fundamental rights regime. "*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*." This provision of primary law value shall avoid cases of conflicts between the Charter's and ECHR's provisions and ensure consistency between both human rights catalogues. Accordingly, not only the provisions, but also the interpretation of them by the ECtHR is acknowledged, as explicitly stated in the 5th recital of the preamble and the explanations to the Charter.[27] This results from the recognition of the ECHR as a "living instrument", which involves the consideration of most recent ECtHR judgements as the minimum standards in the jurisprudence of the CJEU.[28] Consequently, when interpreting the Charter's rights, the CJEU would even without accession be bound to the ECtHR's rulings.[29] This can be considered as an "informal accession" of the EU to the ECHR.[30]

A formal accession of the EU to the ECHR introduced by the Lisbon Treaty was probably the most profound decision in the field of fundamental rights as it effects on the whole legal system of the European Union.

The move for accession was preceded by continuous claims already long before, both by the Commission and the Parliament from the 1970s onwards.[31] However, these calls were heard but not followed. Both, the Council of Europe and the CJEU stated that an accession of the Community to the ECHR was legally not possible. On one side Article 53 ECHR required membership to the Council of Europe for acceding to the ECHR. On the other side, the CJEU noted in its Opinion 2/94 that the EU was missing the competence to

[26] Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament, the Council and the Commission [2000] OJ C 364.

[27] Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50 of 11 October 2000, http://www.europarl.europa.eu/charter/convent49_en.htm, CALLEWAERT Johan, "Die EMRK und EU-Grundrechtecharta", EuGRZ 2003, p. 199; NEUMANN Kolja, "Art. 52 Abs. 3 GRCh zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionsrechts", Europarecht (EuR), 2008, p. 425.

[28] TSILIOTIS Charalambos "Das Verhältnis zwischen den Europäischen Gerichtshöfen *in* Iliopoulos-Strangas/Pereira da silva/Potacs (eds.), *The Accession of the European Union to the ECtHR*, Baden-Baden, Nomos, 2013, pp.51-94, p.85, referring to ECJ case C-92/09 and C-93/09 *Schecke and Eifert* [2010] ECR I-11063, para.51f., ECJ case C-29/11 *Dereci and others* [2011] ECR I-11315, para. 70ff., ECJ case C-400/10 McB [2010] ECR I-8965, para.53ff., ECJ case 279/09 *DEB* [2010], ECR I-13849, para.31ff.

[29] LOCK Tobias, "The ECJ and the ECtHR: The Future Relationship between the Two European Courts", The Law and Practice of International Courts and Tribunals 8(2009) 375-398, p.383.

[30] GROUSSOT Xavier and STAVEFELDT Eric, "Accession of the EU to the ECHR" *in* Joakim Nergelius and Eleonor Kristoffersson, *Human Rights in Contemporary European Law*, 2015, p.14.

[31] Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Freedoms of 4 April 1979, Bulletin of the European Communities, Supp. No 2/79, Commission Communication on Community accession to the European Convention for the Protection of Human rights and Some of its Protocols', SEC (90) 2087 final 19 November 1990; European Parliament Resolution on respect for human rights in the European Community (annual report of the European Parliament) [1993] OJ C 115/178, European Parliament Resolution on Community accession to the European Convention on Human rights [1994] OJ C 44/32.

accede, because the so called flexibility clause (the then Article 235 TEC) could not serve as a legal basis.[32] These legal obstacles were sorted out by the ratification of Protocol n° 14 to the ECHR on 1 June 2010, which amended Article 59 of the Convention by allowing the European Union to accede to the ECHR.[33] At EU level, the previously legally unfeasible, but long awaited EU accession to the ECHR obtained normative basis in Article 6(2) TEU, which explicitly and imperatively states, "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.*"

Apart from the enormous symbolic value of the accession of the EU to the ECHR protection system, it would strongly enhance the Union's accountability and credibility in the field of human rights protection and push it to a formal level.

In Europe fundamental rights protection involves actors at national, regional, international and EU level. This multi-levelled system is however missing any legal ordinance.[34] In the course of time, the ECtHR has evolved to the European human rights court par excellence, having the decisive say in questions of compliance with the ECHR. It interprets the ECHR provisions in an autonomous manner.[35] Further, it regards the ECHR as a "living instrument", which means that it is interpreted and applied in the light of current circumstances.[36] All EU Member States are Contracting Parties to the ECHR and subject to the ECtHR's jurisdiction.[37] As outlined, also for actions within the scope of EU law falling in their responsibility can be brought before the Strasbourg Court. In case of the EU being part of the ECHR, any person claiming to be victim of a violation of the ECHR by an institution or body of the EU would be able to bring a complaint against the EU under the same conditions as those applying to complaint brought against Member States. This would close the last gap in ensuring the Convention's minimum standards of human rights within Europe.

The case law of the Luxembourg court proves the high respect towards the ECHR and the ECtHR. This specific status of the ECHR human rights protection system within the fundamental rights regime of the EU appears like an informal accession. The accession would bring the formalisation of the coherence of fundamental rights protection in Europe.[38] Further, it would advance a formal dialogue, which shall "*guarantee a congruent development of the*

[32] CJEU opinion 2/94 of 28.3.1996, [1996] ECR I-1759, para 30.
[33] Article 17 of the Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Article 59 of the Convention.
[34] TERHECHTE Jörg Philipp, "Autonomie und Kohärenz" *in* Iliopoulos-Strangas/Pereira da Silva/Potacs (eds.), *The Accession of the European Union to the ECtHR*, Baden-Baden, Nomos, 2013, pp.23-50, p. 24.
[35] ECtHR, case 8544/79, *Öztürk v Germany*.
[36] ECtHR, case 1082/84, *Cossey v. the United Kingdom*, para. 42.
[37] TERHECHTE Jörg Philipp, "Autonomie und Kohärenz" *in* Iliopoulos-Strangas/Pereira da Silva/Potacs (eds.), *The Accession of the European Union to the ECtHR*, Baden-Baden, Nomos, 2013, pp.23-50, p. 40.
[38] KRÜGER Hans-Christian and POLAKIEWICZ Jörg, "Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa", EuGRZ 2001, pp.92ff, p.97; SAUER Heiko, "Jurisdiktionskonflikte in Mehrebenensystemen", Berlin/Heidelberg, 2008, pp. 261ff; SCHNEIDER Benedikt, "Die Grundrechte der EU und die EMRK", Baden-Baden, 2010; ROHLEDER Kristin, "Grundrechtsschutz im europäischen Mehrebenensystem", Baden-Baden, 2008, pp. 365ff.

case law of the ECtHR and the CJEU in the area of fundamental rights".[39] This was urged by the European Parliament[40] and the Council of Europe[41] and included in the draft accession agreement and its explanations[42]. The Advocate General responsible in the Opinion procedure 2/13 also noted that an accession is "*intended to lead to greater effectiveness and homogeneity in the observance of fundamental rights in Europe.*"[43] Relating to the future, any additional transfer of sovereign powers to an international organisation, such as the EU, should prevent any possible circumventing the human rights protection under the ECHR regime.[44]

IV. Autonomy of EU law, in particular the exclusive jurisdiction of the CJEU

The legal basis and even imperative obligation for accession was given by Article 6(2) of the Treaty of Lisbon. After lengthy negotiations on the accession modalities and finally drafting an accession agreement, the CJEU yellow carded the latter by delivering its *Opinion 2/13* on 18 December 2014. It declared the draft accession agreement incompatible with the EU Treaties. One major argument of its detailed assessment of the Draft Accession Agreement concerned the safeguard of the autonomy of EU law and in particular the exclusive jurisdiction of the CJEU.

The meaning of the autonomy concept of community law outlines *Barents* as, "*a system of law which with respect to its normative character exclusively refers to itself. This means, once Community law exists, its contents are exclusively governed by its own rules and principles. It is a normatively closed system.*"[45]

What exactly is the CJEU's rejecting argument about, when bringing in the concept of autonomy? The concept of autonomy is not explicitly outlined in the EU Treaties. However, already in the past, the CJEU raised this concept in a few judgements and opinions. Already in the past, when dealing with the EU legal order and its relationship to Member States and international actors, the Court marked out the scope and limits of the supranational legal order. [46]

[39] OLIVEIRA PAIS Sofia, "The Protection of Fundamental Rights in Europe" *in* Iliopoulos-Strangas/Pereira da Silva/Potacs (eds.), *The Accession of the European Union to the ECtHR*, Baden-Baden, Nomos, 2013, pp.95-105,p 102.
[40] European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241(INI)).
[41] Council of Europe/Steering Committee for Human Rights (CDDH), Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights, Appendix: Draft legal Instruments on the Accession of the European Union to the European Convention on Human Rights, CDDH(2011)009 of 14.10.2011, pp 5ff.
[42] Draft Accession Agreement of 10 June 2013, Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of 2.4.2013 para.6.
[43] View of Advocate General Kokott in the Opinion procedure 2/13 delivered on 13 June 2014, para.1.
[44] TERHECHTE Jörg Philipp, "Autonomie und Kohärenz" *in* Iliopoulos-Strangas/Pereira da Silva/Potacs (eds.), *The Accession of the European Union to the ECtHR*, Baden-Baden, Nomos, 2013, pp.23-50, p.41.
[45] BARENTS René, "The Autonomy of Community Law", The Hague, Kluwer Law International, 2004, p.259.
[46] ECJ case 6/64 *Costa v ENEL* [1964] ECR 1203; ECJ case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 para3; ECJ Case 249/85 *Albako* [1987] ECR 2345, para 14; ECJ Opinion1/91 EEA I [1991] ECR I-6084, para 30,35 and 47; ECJ Opinion 1/92 EEA II [1992] ECR I-12821, para. 17,18,24,29 and 36; ECJ Opinion 1/00 ECAA [2000] ECR I-3493, para. 5,6,11,21,26,37 and 46.

The first and most famous ruling of the CJEU, the case *Costa v ENEL,* dealt with the question of autonomy of the then Community law and its relation to the EU Member States' legal orders. It declared direct effect of primary law in the legal orders of the Member States the previous case *Van Gend & Loos*, it outlined in *Costa v ENEL*: "*The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.*" [47] The original version of the judgement in French language, speaks of "*une source autonome*". The Court thereby determined primacy of EU law over domestic law, and its characteristic as autonomous legal order. It established a constitutional principle, ensuring the uniform application of the rules necessary for guaranteeing the efficacy of the common market.[48]

The European Union is unique in its construction, not being an international organisation in the common sense, nor being a state. The EU interacts strongly at international level and participates in international legal systems.[49] In this context, the concept of autonomy gained particular importance as for defining the relationship between the European legal order and the international legal system. The participation in international agreements implicates the adoption and respect of external rules and eventually external judicial or quasi-judicial decisions on these normative matters. Such an involvement per se challenges the autonomy of the participating entity.[50] It was raised already in previous cases, when the Union was about to conclude international agreements. The competence of the Union to interact at international level is provided by Article 216 TFEU. It allows the Union to conclude agreements with international organisations, which have binding effect upon the Union institutions and its Member States, as they form „an integral part of Community law".[51]

Accordingly, the conclusion of the Accession Agreement to the ECHR and the EU becoming a Contracting Party to the ECHR is certainly an exceptional situation in international law. There does not exist any comparable example of an international organisation has entered an international human rights treaty and the respective monitoring mechanisms. The ECHR consists of rules and of a monitoring and enforcement system, which would apply to the EU as a member to the ECHR. According to Article 1 ECHR, the EU will be directly bound by the ECHR. Further, Article 46 (1) ECHR sets out that the judgements of the Court have binding effect on every Contracting Party, if party to the proceedings. This means that the Strasbourg Court will be able to judicially review all EU legal acts, including

[47] ECJ case 6&764 *Costa v ENEL* [1964] ECR 585.
[48] VAN ROSSEM, "The Autonomy of EU Law: More is Less?" *in* Wessel Ramses A. and Bleckmans Steven (eds.), *Between Autonomy and Dependence*, The Hague, Asser Press, 2013, p.13- 46, p. 15.
[49] ECKES Christina, The European Court of Justice and (Quasi-)Judicial Bodies *in* Wessel Ramses A. and Bleckmans Steven (eds.), Between Autonomy and Dependence, The Hague, Asser Press, 2013, p.85-109, p. 86.
[50] Ibid. P.86.
[51] ECJ case 181/73 Haegeman [1974] ECR para.5

the CJEU's judgements, on their compatibility with the ECHR. Furthermore, the CJEU will have to abide the ECtHR's judgements.

In this regard, the Court of Justice made clear in its opinion that it does not accept the ECtHR's envisaged role, in particular by stating "*any action by the bodies given decision-making powers by the ECHR […] must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law*".[52] This is considered by the CJEU's as an intervention with the autonomy of the EU legal order and in particular with its own exclusive jurisdiction.

Thereby, the CJU had a deal with the external effect of autonomy of EU law.

In its previous statements, when the Community and its Member States negotiated an international agreement on the European Economic Area (EEA) with the EFTA States, the CJEU issued a decisive *Opinion 1/91*. It was the first statement of the Court for . A crucial question concerned the assignment of the EEA court to define the correct party in disputes between parties of the EEA Treaty, which could be the EU, a Member State or the EU and the Member States together. The CJEU found in its opinion that such a competence would presume that the EEA Court needed to interpret the EU Treaties. This however "*is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice.*"[53] Further, with regard to the interpretation by the EEA Court of provisions in the EEA Treaty identically worded with the Community Treaty, the CJEU stated that this would "*prejudice*" the interpretation of the provisions of the EU Treaties by the CJEU.[54] The possibility of reference of the EFTA states for preliminary ruling before the CJEU regarding the interpretation of the EEA Agreement was foreseen. However, such a ruling would not have binding effect on them. The CJEU regarded this as the change of the nature of the function of the Court of Justice as determined by the Treaties.[55]

When the European Community and non-Member States negotiated on the establishment of a European Common Aviation Area, the Court clarified once again in its *Opinion 1/00*, that for the safeguard of the Community's autonomy the attributed powers of Community institution must remain unaltered as well as the exercise of their internal powers, to a particular interpretation of the rules of Community law. The involvement of an external judicial body in the interpretation of treaties should not have effect of binding the EU and its institutions in the exercise of their internal powers, to a particular interpretation for the rules of EU law.[56]

[52] Opinion 2/13 para 184.
[53] ECJ Opinion 1/91 EEA Agreement [1991] ECR I-6079, para. 35.
[54] Ibid. para. 41-46.
[55] Ibid. para. 61.
[56] ECJ Opinion 1/00 [2002] I-3493, para 12-13.

Finally, the relatively recent *Opinion 1/09* on the establishment of a unified patent litigation system discussed the substance of the Union law's autonomy and its judicial system. The Court declared a submission of the EU under an international legal system possible and even vesting it with the necessary competences.[57] However, the exclusive judicial competence of an international court on the interpretation and application of EU law in the field of Community patents is incompatible with the Treaties. This derives of the judicial autonomy of the CJEU, which is assigned to observe the interpretation and application of the Treaties. This judicial autonomy is necessary to ensure the uniform application of EU law and the necessary coherence of the system of judicial protection in the Union. In particular the preliminary ruling procedure is the essential of the CJEU conferred by the Treaties and indispensable to the preservation of the very nature of European Union law.[58]

The very nature of EU law was addressed, when the legal obligation for accession was set, additionally certain pre-requisites were stipulated in the Treaties. Article 6 (2) TEU states in the 2nd sentence that the accession "*shall not affect the Union's competences as defined in the Treaties.*" Protocol No 8 to the Lisbon Treaty in Article 2 1st sentence continues that the accession "*shall not affect the competences of the Union or the powers of its institutions*". This provision imposes to preserve the specific characteristics of the EU and of EU law and in particular the power of EU institutions.

The prerequisites for an Accession Agreement formed the respective draft by considering the "*specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States.*"[59] For ensuring the autonomous judicial authority of the CJEU over EU law a co-respondent and a prior-involvement mechanism were established.

In its opinion, the Court starts by confirming that an international agreement may affect its powers as long as its autonomy is safeguarded, in particular in relation to the exercise of EU institutions of internal powers. It continues however to qualify the external control by the ECtHR as interference with its own power to interpret EU law, and in particular in interpreting the Charter as well as the determining whether EU law is applicable. It must be noted that the ECtHR is only competent in assessing whether a violation of the Convention is present or not, it does not deal with domestic laws of the Contracting Parties. Further, the agreement is for accession to the ECHR is of particularity as it concerns the accession to a human rights system, which is already explicitly recognised by the EU law, in particular in the Charter and the CJEU case law.

[57] Opinion1/09, para. 70.
[58] Ibid. para. 89.
[59] Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of 2.4.2013 para.63.

The introduction of a co-respondent mechanism should ensure that the EU is involved in cases brought before the ECtHR against an EU Member State, acting under EU law. This relates in particular to alleged violations of the ECHR against an EU Member State, which has acted in implementing EU law, having no room for alternative action (such as with regulations). According to the accession proposal, the ECtHR either invites or decides on a reasoned request by the EU or an EU Member State on becoming a co-respondent in a proceeding. The CJEU criticised the co-respondent system as such an invitation by the ECtHR would empower it to interpret EU law when it decides on the admissibility of such requests to this mechanism. Further, it holds that the competence of the ECtHR to allocate responsibility for actions interferes with autonomy of the CJEU on reviewing EU law, including the division of powers between the EU and its Member States.[60] At this point, it must be said, that the Strasbourg Court already had to look into internal EU rules on the distribution of competences, when the an alleged violation happened in the context of EU law and the Court had to elaborate if it was attributable to the EU Member States or not.

The Court also dealt with the foreseen prior-involvement mechanism as part of the co-respondent mechanism, determined in Article 3 (6) of the draft accession agreement. This corresponds to the principle of prior exhaustion of domestic remedies of the ECHR protection system. Accordingly, the CJEU has the opportunity to scrutinise the compliance of EU acts with the Convention prior to the ECtHR proceeding, which includes the preliminary reference procedure as part of the EU judicial legal system. This shall guarantee the CJEU's monopoly in assessing EU legal acts on their compatibility with Union law and give the opportunity to eventually declare them invalid. However, it must be noted that the CJEU decision and interpretation is not binding to the ECtHR.[61] The CJEU gave a negative statement on the drafting of the prior involvement procedure as it does not clarify that the ECtHR is not competent to decide on whether the CJEU has actually ruled on a certain question. This, so the Court, falls into the competence of the EU Court and a respective decision should have binding effect. Further, it sees a missing clarification of its role with regard to the possibility of preliminary rulings on secondary EU law in the Draft Accession Agreement.[62] While the decision upon the dedication of responsibility and the existence of respective CJEU case law should certainly remain within the competence of the CJEU, the overall rejection of the Accession Draft is not necessary, but could have been made as a condition, as suggested by the Advocate General.[63]

Without going into more details of the Court's opinion, the attempts to meet the criteria were rejected basically on the grounds of the insufficient protection of the autonomy of the

[60] Ibid. para. 215-235.
[61] Draft Accession Agreement of 10 June 2013, Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of 2.4.2013, para.65 ff.
[62] Opinion 2/13 para. 236-248.
[63] View of Advocate General Kokott delivered on 13 June 2014, para.196.

European Union and in particular of its own autonomy. According to its opinion, the Court does not allow the ECtHR to look into internal matters of EU law.

Due to the respective case law on the issue of autonomy in the context of concluding international agreements between the EU and third parties, for some this outcome may not have come as a surprise.

V. Conclusion

The CJEU made a crucial choice when delivering its negative opinion on the planned accession. It has sent a strong signal by stopping the accession process, this time by reasoning it with immense interference with its autonomy. This overall criticism on the Draft Accession agreement and the move of prioritising the EU's autonomy to a seemingly degree is questionable. The CJEU should not have prized the Union's and its own autonomy above the guarantee of these fundamental values provided by a Court with the highest expertise in the field.

In consequence of historical developments, the architecture of European human rights protection system has developed to a comprehensive but also quite complex system, which is characterised by multi-levelled formation. The EU, not a federal state, but a new autonomous legal order, strongly intertwined with the EU Member States legal a systems, has developed its own fundamental rights regime over time. The ECHR system as the principal human rights regime in Europe has played a crucial role in the development of the Union's fundamental rights protection right from the beginning. Due to the fact that all its Member States are parties to the ECHR, the latter received particular significance in the Union's legal order and the CJEU strongly attached its own findings to the ECHR and the case-law of the ECtHR. This holds true for the European Court of Human Rights, whose case law was respected and followed by the CJEU in the past. As can be deduced from the past judicial decisions of both courts, coherence between the Union's and Council of Europe's fundamental rights system was at the forefront. Both courts' relationship was characterised by mutual respect and recognition. This relationship, however, roots in an informal basis, which can be assumed as "informal dialogue" and misses any legal foundation. An institutionalisation of this informal relationship was urged long time ago by calling for an EU accession to the ECHR.

The EU itself cannot be held responsible before the Strasbourg Court as long as it is no member of the Convention. Still, so far the ECtHR already ruled on cases linked to EU law when dealing with cases, where MS are held responsible for implementing EU law and on acts, which fall exclusively within the realm of influence of an EU institution. The fixed

accession of the EU to the ECHR seems crucial for bringing a coherent and overall safeguard of human rights throughout Europe. It shall fill the remaining gaps of the already strongly interconnected human rights protection in Europe.

The envisaged accession of the EU to the international treaty system of the ECHR entails the necessity of conceding the external control on EU matters, which is a principal prerequisite for ensuring the compliance with the ECHR protection system. The CJEU's principal attitude opposing external court's decision is evident due to its previous case law, when dealing with comparable situations.

However, in the case of the accession to the Convention, it must be kept in mind that the EU has explicitly accepted the Convention and the respective case law of the ECtHR as its minimum standards, which can be regarded as an "informal accession".

Further, history proves that the ECtHR as not a competing court. With its famous *Bosphorus* judgement, it approved the presumption of equivalent protection by the CJEU in substantive and procedural regards. Nevertheless, as a specialised judicial body with the focus on the Convention rights only, it offers interpretation on the meaning of the Convention's human rights provisions. The ECtHR has clarified that "any such presumption [of equivalent protection] can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient." This and the acknowledgment of the Convention and the respective case law of the ECtHR as the minimum standards entail that the ECtHR has the final say with regard to the guarantee of compliance with Convention's rights.

Moreover, in the light that this specialised court ensures the minimum human rights standards within Europe, as acknowledged by the Union including its Court. Even though it is certainly right in pointing out the importance and value of the Union's and its own autonomy, this cannot reach so far, that an accession becomes impossible. It is to be reminded that the EU Member States, as the "Herren der Verträge" jointly approved the corresponding external control by introducing the legal obligation for accession explicitly in the Treaties, being aware of the implications such an accession will entail. If the strong objections on the accession agreement will be overcome, stands in the stars. From a human rights perspective EU accession still is a falling star, which will soon reach Europe's terra.

* * *

List of abbreviations

CJEU/ECJ/Luxembourg Court	Court of Justice of the European Union
ECHR/Convention	European Convention of Human Rights and Fundamental Freedoms
ECtHR/Strasbourg Court	European Court of Human Rights
EEA agreement	European Economic Area agreement
EFTA	European Free Trade Association

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