

## Articles

# “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

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### A. Introduction

The evolution of the protection of fundamental rights in Europe is on the brink of entering a new phase, with the imminent accession of the European Union (EU) to the European Convention on Human Rights (ECHR).<sup>1</sup> Assuming no unforeseen obstacles arise, the EU will soon become the 48th HCP to the Convention, and the first non-state signatory. This is a unique situation with clear legal and political consequences. Pre-accession negotiations between the Council of Europe and the EU have effectively concluded. The CDDH Informal Working Group on the Accession of the European Union to the Convention (CCDH-UE), established under the aegis of the Council of Europe’s Steering Committee on Human Rights (*le Comité Directeur pour les Droits de l’Homme* (CDDH)), met regularly from July 2010 until June 2011, tabling the Draft Legal Instruments on the Accession of the European

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<sup>1</sup> EU accession to the ECHR has been on the legislative agenda for decades; the European Commission’s *Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* (COM 79 210 Final), adopted 4 April 1979, providing an early and comprehensive analysis on the issues surrounding accession. Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-01759 thwarted the EU’s ambition to accede without a specific treaty base. On establishing the Convention on the Future of Europe in 2001, the European Council’s Laken Declaration required, *inter alia*, that the Convention should consider the question whether the EU should accede to the ECHR. Considerable groundwork was completed on this issue by Working Group II of the Convention on the Future of Europe led by Esko Helle, Vytenis Andriukaitis and Neil McCormick in 2002-03, which ultimately led to the removal of legal obstacles to accession on the entry into force of the Lisbon Treaty via Article 6(2) TEU, and via ratification of Protocol 14 ECHR and subsequent entry into force of Article 59(2) ECHR on 1 June 2010.

Union to the European Convention on Human Rights (Draft Accession Agreement) on 30 June 2011.<sup>2</sup>

The Draft Accession Agreement indicates that the joint preferred settlement of the Presidents of both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)<sup>3</sup> will be accepted as the procedural basis governing the future working relationship between the ECtHR and the CJEU post-accession—the finer details of which were subject to much debate during the negotiation process. Whilst Judge Costa (then President, ECtHR) and Judge Skouris (President, CJEU) have predicted that the accession proposals will affect a limited number of cases challenging EU compliance with Convention rights in the context of the application or implementation of EU law,<sup>4</sup> the effects of EU accession will be felt beyond Luxembourg and Strasbourg. Accession may also have implications for national courts and at the executive level, which could put their roles in the protection of human rights into sharp relief.

With the negotiation phase complete, this article examines the procedural aspects in the Draft Accession Agreement that most clearly impact upon the relationship between the ECtHR and CJEU, focusing particularly on the introduction of a “co-respondent” mechanism and an “internal review” mechanism providing for the prior involvement of the CJEU in specific cases where the ECtHR exercises its power of “external review.” These procedural changes were influenced by the proposals delivered jointly by Judges Costa and Skouris on 27 January 2011,<sup>5</sup> which broadly reflected the stance adopted by the CJEU in its discussion document on EU accession published on 11 May 2010.<sup>6</sup> In light of the legal and political context of EU accession to the ECHR, this article assesses these key procedural changes as

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<sup>2</sup> See the *Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights*, 16 CDDH-UE (2011), available at: <http://www.statewatch.org/news/2011/jul/eu-coe-echr-final.pdf> (last accessed: 27 September 2011). The Draft Accession Agreement, which foresees EU accession to the ECHR and Protocols 1 and 6 (with scope for accession to further Protocols in future) was concluded at the final meeting of CDDH-UE from 20-24 June 2011, with publication of the final copy online on 19 July 2011. CDDH-UE had tabled three earlier drafts during its Working Meetings in February 2011 (4 CDDH-UE(2011), March 2011 (6 CDDH-UE(2011) and May 2011 (10 CDDH-UE(2011)).

<sup>3</sup> Joint Communication from Presidents Costa and Skouris, 27 January 2011 [hereinafter “Joint Communication”].

<sup>4</sup> *Id.* at para 6. Presidents Costa and Skouris foresee that prior involvement of the CJEU in cases stemming from indirect actions in national courts “should not arise often.”

<sup>5</sup> *Id.* For further details on the CDDH-UE’s discussions on the Joint Communication’s proposals, note: 5<sup>th</sup> Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, *Draft Meeting Report*, 3 CDDH-UE (2011).

<sup>6</sup> Discussion document of the Court of Justice of the European Union (CJEU) on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, CJEU, 5 May 2010.

they relate to future judicial practice, and identifies potential consequences of accession for relevant national and transnational actors.

## B. EU Accession in Context

### I. ECtHR and CJEU: Dialogue and Mutual Influence

The relationship between the ECtHR and CJEU is generally viewed, not least by the courts themselves, as being harmonious and co-operative, in similarly deferential terms as the relationship both international courts claim to enjoy with national courts and tribunals within their respective legal orders.<sup>7</sup> Whilst the relationships the ECtHR and CJEU enjoy with national courts are occasionally marred by tensions with national legislatures,<sup>8</sup> considerable efforts have been undertaken to promote and deepen the links between the ECtHR and CJEU. There is clear evidence that the advancement of dialogue between the ECtHR and CJEU is being achieved judicially (mutual cross-citations of ECtHR and CJEU cases are increasingly common, arguably enhancing both courts' legitimacy).<sup>9</sup> Moreover,

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<sup>7</sup> In the context of dialogue between the CJEU and national courts, see Francis Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 TEXAS INTERNATIONAL LAW JOURNAL (TEXAS INT'L L.J.) 547 (2003); David Edward, *National Courts – the Powerhouse of Community Law*, 5 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 1 (2002); Speech at the opening of the Court of Justice's judicial year by the President of the CJEU, see Vassilios Skouris, *The Position of the European Court of Justice in the EU Legal Order and its Relationship with National Constitutional Courts* (2004). In the context of dialogue between the ECtHR and national courts, see for example, Lady Justice Mary Arden (Court of Appeal, England & Wales), *Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe*, Sir Thomas More Lecture, The Honorable Society of Lincoln's Inn (2009); Lord John Kerr (UK Supreme Court), *The Conversation between the European Court of Human Rights and National Courts: Dialogue or Dictation*, 13<sup>th</sup> John M Kelly Memorial lecture, University College Dublin (2009).

<sup>8</sup> A recent example in the UK context being parliamentary and public outcries following ECtHR rulings on prisoners' voting rights negative to the UK's approach: *Greens and M.T. v. United Kingdom* Eur. Ct. H.R. 1826 (2010) and *Hirst v. United Kingdom (No 2)*, 2005-IX Eur. Ct. H.R., and the UK Supreme Court's judgment on the right to seek review of their reporting obligations when on the sex offenders' register; see *R ((JF) by his litigation friend (OF)) & anor v. Secretary of State for the Home Department* 17 U.K.S.C. (2010). The controversy led the coalition government to announce the re-launch of a commission to consider the adoption of a UK Bill of Rights (Hansard HC Vol 523, Part 120, Col 955, 959-960 (16 February 2011)).

<sup>9</sup> Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 EUROPEAN JOURNAL OF LEGAL STUDIES (EJLS) 9 (2007); Francis Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice – The Impact of European Union Accession to the European Convention on Human Rights*, in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE* 292 (Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2006). See further, Laurent Scheeck's empirical study on “supranational judicial diplomacy” between the Court of Justice and ECtHR, which frames the “dialogue” between the judges (measured, as is the norm, by reference to the citation of the other court's judgments) as the diplomatic actions of “supranational judicial networks;” Laurent Scheeck, *Competition, Conflict*

the varied and creative ways this dialogue is advanced extra-judicially should not be underestimated, whether through meetings, speeches or academic engagement. Formal and semi-formal meetings between the members of both courts to discuss “matters of common interest”<sup>10</sup> are now routine; indeed, it is during one such meeting outside the framework of official accession negotiations that Judges Costa and Skouris agreed their supplementary proposals for the future working relationship between the ECtHR and CJEU post-accession.<sup>11</sup>

The ECtHR judgments in *Matthews*<sup>12</sup> and *Bosphorus*<sup>13</sup> were instrumental in defining the relationship between EU and ECHR law in terms of how the ECtHR assesses the fundamental rights protection afforded by the EU and its hands-off approach to external review. The significance of these cases has been extensively discussed elsewhere.<sup>14</sup> In summary, the ECtHR confirmed in *Matthews*, a case involving an alleged violation of EU primary law, that a transfer of competence from a Member State to the EU does not negate State responsibility under the ECHR, which “continues after such a transfer.”<sup>15</sup> Thus, in a situation where EU law allegedly conflicted with a right guaranteed by the ECHR, an individual could challenge it indirectly—by making an application to Strasbourg against a EU Member State—rather than directly against the EU. The ECtHR’s judgment in *Bosphorus* built on *Matthews* in resolving an apparent clash between Ireland’s obligations under UN sanctions (as implemented by EU secondary law) and rights protected under the ECHR, by declaring that when an international organization is considered to protect fundamental rights “in a manner which can be considered *at least equivalent* to that for which the Convention provides” (emphasis added),<sup>16</sup> the ECtHR would presume State compliance with the ECHR provided it had no scope to exercise discretion when implementing its legal obligations pursuant to its membership of the relevant international

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*and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks*, available at [http://www.ucd.ie/t4cms/06\\_wish\\_paper\\_laurent\\_scheeck.pdf](http://www.ucd.ie/t4cms/06_wish_paper_laurent_scheeck.pdf) (last accessed: 27 September 2011).

<sup>10</sup> Joint Communication, *supra* note 4, at para. 1.

<sup>11</sup> *Id.* at paras. 1 and 2

<sup>12</sup> *Matthews v. United Kingdom*, 1999-I Eur. Ct. H.R. (1999).

<sup>13</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, 2005-VI Eur. Ct. H.R. (2005).

<sup>14</sup> For comprehensive analyses, see further Tobias Lock, “Beyond *Bosphorus*: The European Court of Human Rights” *Case Law on the Responsibility of Member States of International Organizations under the European Convention of Human Rights*, 10 *Human Rights Law Review (HRLR)* 529 (2010); Tobias Lock, *EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg*, 35 *EUROPEAN LAW REVIEW (E.L.REV.)* 777 (2010).

<sup>15</sup> *Matthews*, *supra* note 13, at para. 32.

<sup>16</sup> *Bosphorus*, *supra* note 14, at para. 155. The ECtHR stressed that it defined “equivalent” as meaning “comparable” rather than “identical.”

organization. The *Bosphorus* presumption enshrined the EU’s privileged position, rebuttable only with evidence that the protection accorded was “manifestly deficient.”<sup>17</sup> The result is that no scope is available to challenge EU acts allegedly in violation of Convention rights before the ECtHR, with limited, indirect provision to challenge such acts against Member States. This presumption has stood firm over time, and the fact of its existence may have played its part in consolidating comity between the ECtHR and the CJEU. Its limitations were strikingly exposed in *Connolly*,<sup>18</sup> where an individual denied permission to submit comments on an Advocate General’s (AG) Opinion found no route available to challenge the decision under Article 6 ECHR, on the basis that no Member State had intervened in the proceedings, hence there was no State respondent against which to make an application. This anomalous situation would be resolved by EU accession,<sup>19</sup> which would lift the ban on bringing direct challenges against the EU before the ECtHR. This begs the question as to whether the *Bosphorus* presumption will survive. Sacrificing it may be a high price to pay on the part of the EU in order to accede, but the rationale for maintaining it is, and always was, hard to justify. Keeping the presumption in place would undermine the EU’s commitment to genuine accountability in its fundamental rights activities. It is likely to be up to both the ECtHR and the CJEU to ensure that comity prevails post-accession, in a context where both courts and the interactions between them will be subject to greater scrutiny.

## *II. Accession Negotiations: Adopting Judicial Preferences?*

As noted above, CCDH-UE tabled the Draft Accession Agreement for ratification following a relatively swift year-long negotiation process. Comprised of 14 experts acting in personal capacities, the negotiators included seven experts from non-EU HCPs, and seven from EU Member States. On the part of the EU, the European Commission acted as the Union’s negotiator,<sup>20</sup> bound by negotiating directives<sup>21</sup> and regularly updating the EU institutions

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<sup>17</sup> *Id.* at para. 156.

<sup>18</sup> *Connolly v. 15 Member States of the European Union*, Sect. V Eur. Ct. H.R. (2008).

<sup>19</sup> The gap in human rights protection exposed by *Connolly*, *id.* (and subsequent related case law), would be closed by EU accession to the Convention; see further Lock, *Beyond Bosphorus*, *supra* note 14, at 533.

<sup>20</sup> Council Decision authorizing the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), 10817/10 RESTREINT UE, 8 June 2010 (the partially classified Council Decision is available online at: <http://register.consilium.europa.eu/pdf/en/10/st10/st10817-ex02.en10.pdf> (last accessed: 27 September 2011)).

<sup>21</sup> ‘*European Commission acts to bolster the EU’s system of protecting fundamental rights*,’ European Commission, IP/10/291, 17 March 2010.

on issues arising. The process was remarkably transparent in some respects: provision was specifically made to engage with civil society, with two oral sessions and regular receipt of written observations from interested parties on the developing Draft Agreements. Working Meeting minutes and Draft Agreements were routinely made available on a public website.<sup>22</sup> By contrast, a high level of secrecy surrounded the partially classified negotiating directives, with observer status to the Working Meetings restricted.<sup>23</sup> It is curious that the EU's negotiating position remained so closely guarded in contrast to the Council of Europe's efforts to maximize transparency in the process. It is clear, however, that the shape and content of the final accession agreement were directly influenced by judicial preferences, expressed in formal and informal capacities prior to and during the negotiation phase. On the basis that the judges of the ECtHR and the CJEU will be handling the main legal consequences of accession, it is right that the courts co-operated to find solutions which were duly taken on board by the negotiators.

### C. Draft Accession Agreement: Future Judicial Practice

EU accession to the ECHR will subject the EU to the external review of the ECtHR in respect of rights guaranteed under the ECHR, in the same manner as the other HCPs. To accommodate the accession of the EU as an international organization and the future engagement between the ECtHR and the CJEU, two core aspects of the Draft Accession Agreement focus on future judicial practice: (i) the introduction of a co-respondent mechanism, and (ii) its associated power of internal review, which would enable the CJEU to make a pronouncement on the compatibility of EU legal acts with ECHR rights, in the event that such an issue reaches the ECtHR before the CJEU has had an opportunity to adjudicate on the point in question (discussed further, *infra* sections C.I and C.II).

Both elements were addressed by Judges Costa and Skouris in their Joint Communication, delivered mid-way through the negotiation phase. It should be noted, however, that their observations on these procedural changes were prefaced with comments on the interpretation of rights guaranteed by the Charter of Fundamental Rights of the European Union (the Charter) and the ECHR. The Joint Communication recognizes that the Charter has "become of primary importance in the recent case-law of the CJEU," following the entry into force of the Lisbon Treaty which conferred the status of primary law on the Charter. It was notable that prior to the entry into force of the Lisbon Treaty, two

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<sup>22</sup> CDDH-UE documents are accessible online at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue\\_documents\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp) (last accessed: 27 September 2011).

<sup>23</sup> Observer status was only granted to the Registry of the European Court of Human Rights and the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI).

constitutive courts of the CJEU, the European Court of Justice (ECJ) and Court of First Instance (CFI, now known as the General Court), had occasionally referred to the Charter in the context of both Opinions of Advocates General and in judgments,<sup>24</sup> notwithstanding the Charter’s non-binding status. The entry into force of the Lisbon Treaty had an immediate impact, with references by the CJEU<sup>25</sup> to the Charter becoming systematic and routine, and early judgments interpreting its provisions—and applying Convention rights via Article 53 of the Charter—being persuasive. In November 2010, the ECJ’s judgment in Joined Cases C-92/09, *Volker* and C-93/09, *Eifert* signaled an important shift in that Court’s approach, for the first time using the Charter as a basis for judicial review to annul secondary EU legislation.<sup>26</sup> In light of this move by the ECJ to exploit the legally binding nature of the Charter to the fullest extent, the Joint Communication’s reference to the Charter’s primary importance as the “reference text and the starting point”<sup>27</sup> for the CJEU’s assessment of fundamental rights recognized by the Charter is unsurprising.

Going one step further, the Joint Communication stresses the importance of the CJEU ensuring there is “the greatest coherence”<sup>28</sup> between the Charter and Convention where rights correspond. To that end, Judges Costa and Skouris suggest “parallel interpretation” of such rights.<sup>29</sup> Given the considerable overlap between Charter and Convention rights, this suggestion is logical, reflecting Article 52(3) of the Charter, which provides that where rights protected by the Charter and Convention correspond, “the meaning and scope of those rights shall be the same”. The Charter gaining legally binding status in December 2009 has had implications for the adjudication process where both Charter and Convention rights are invoked. The Joint Communication perhaps unwittingly gives the impression that there is a need to encourage or initiate parallel interpretation of overlapping Charter and Convention rights. Yet the CJEU has been expressly engaging in this kind of direct comparison for some time: the recent Opinion of AG Cruz Villalón in *European Air Transport* is a clear example of this systematic interpretation of the Charter and Convention rights in tandem.<sup>30</sup> A slightly different dynamic is evident in *Volker* and *Eifert*:

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<sup>24</sup> During the calendar year prior to the entry into force of the Lisbon Treaty, the Charter was cited in some 39 separate cases, both in CFI and ECJ judgments and AG Opinions.

<sup>25</sup> The Joint Communication, *supra* note 4 refers to the citation of the Charter in some 30 judgments since 1 December 2009.

<sup>26</sup> Joined Cases C-92/09, *Volker und Markus Schecke GbR* and C-93/09, *Hartmut Eifert v. Land Essen*, 2010 E.C.R. I-0000.

<sup>27</sup> Joint Communication, *supra* note 4, at para.1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at para. 1

<sup>30</sup> *See*, for example, Case C-120/10, *European Air Transport SA v. Collège d’Environnement de la Région de Bruxelles-Capitale, Région de Bruxelles-Capitale* (Opinion of AG Cruz Villalón) (2011).

AG Sharpston's approach being more akin to the "parallel interpretation" promoted by Judges Costa and Skouris, with the ECJ firmly using the Charter as its point of departure and with more limited references to the Convention.

Does the decision to preface these proposals on future judicial practice post-accession in this way suggest that the Courts are alert to the likelihood of increased fundamental rights case law—particularly in the context of judicial review—post-accession? The post-Lisbon factors of the CJEU's expanded jurisdiction, the EU's increased competences and the raised prominence of the Charter will all contribute to growth in the corpus of fundamental rights case law. Or is the self-awareness indicative of the CJEU's commitment to deal robustly with fundamental rights issues, so as to avert, as far as possible, challenges before the ECtHR? Whatever the underlying reason, the unusual extra-judicial explanation of the CJEU's adjudicatory approach in the context of fundamental rights is illuminating, and should be welcomed.

#### *I. Co-respondent Mechanism*

The co-respondent mechanism aims to govern a simple question: post-accession, to whom should a complaint be addressed? Three situations are envisaged in terms of the ECtHR's power of external review: first, applications solely against an EU Member State; second, applications solely against the EU; and third, applications against both the EU and a Member State (in which either both parties are held responsible from the outset, or alternatively a second party—the EU or one (or more) EU Member State(s)—joins the action at a later stage). Where appropriate, the co-respondent mechanism would enable the EU and/or Member State(s) to join proceedings as co-respondent(s). This may be appropriate to avoid actions taken separately against either the EU or a Member State, when both are (allegedly) responsible. It also seeks to reduce the scope for Member States to argue that their hands are tied due to their obligations under EU law—in the *Matthews* type of situation, enabling the EU to join proceedings as co-respondent would at least involve a party who could actually *do* something tangible to resolve the incompatibility under EU law.

The Draft Accession Agreement sets two tests for activating the co-respondent mechanism. Article 3(2) of the Agreement regulates the addition of the EU as co-respondent where actions are initially taken against one or more Member States, providing that the EU "may" become a co-respondent in a case "if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by

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disregarding an obligation under European Union law.”<sup>31</sup> The corresponding provision enabling EU Member States to join as co-respondents is similarly non-committal: Article 3(3) providing that EU Member States “may” become co-respondents where an allegation calls into question the compatibility of primary law of the Union with rights guaranteed by the Convention, particularly when the alleged violation could have been avoided only by disregarding an obligation under EU primary law.<sup>32</sup> The text indicates no compulsion on either the EU or Member States to join proceedings as a co-respondent, Article 3(5) providing that a HCP “shall become a co-respondent only at its own request and by decision of the [ECtHR].”<sup>33</sup>

Although this approach was foreseeable, it is nonetheless a weakness of the Draft Accession Agreement. It would have been a welcome sign for the *Matthews* principle according general responsibility to have been followed through with an obligation on the EU to join proceedings as co-respondent where the compatibility of an EU legal provision with a Convention right is challenged. The agreed tests do, however, ensure equal terms with other HCPs, and in any event, the likelihood of the EU seeking to join as co-respondent in such circumstances is high—not necessarily for the obvious benefit of gaining full procedural rights, but in the interests of complementarity. In expressly stating that the co-respondent mechanism should not be seen as a “procedural privilege”<sup>34</sup> for the EU or its Member States, the Explanatory Report reinforces this notion of mutual trust and of promoting the proper administration of justice. This procedural option should be distinguished from third party intervention under Article 36(2) ECHR, a process which permits a third party (whether a HCP or another subject of international law) to participate at the written and oral stages of proceedings, but without formally becoming a party and hence bound by the judgment. Interestingly, the Explanatory Report appears to promote EU involvement via third party intervention, rather than formally becoming a co-respondent<sup>35</sup> noting that in some circumstances involvement as a third party intervener will be the EU’s only option.<sup>36</sup> It therefore remains to be seen how enthusiastically the EU will opt for involvement through the co-respondent mechanism where the conditions under Article 3(2) or 3(3) of the Draft Accession Agreement are met. On the part of Member States, joining as co-respondent may appeal in situations where a primacy-based

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<sup>31</sup> Draft Accession Agreement, *supra* note 3, Article 3(2).

<sup>32</sup> *Id.*, Article 3(3).

<sup>33</sup> *Id.*, Article 3(5). Note also, Article 46 ECHR, on the prevention of compulsory joining of a HCP as co-respondent.

<sup>34</sup> *Id.*, Explanatory Report, at para. 33.

<sup>35</sup> *Id.*, Explanatory Report, para. 40.

<sup>36</sup> *Id.*

argument could be made concerning the necessity of breaching primary State law in order to comply with an EU legal act, the content of which arguably violates an ECHR provision—a point expressly stated in Articles 3(2) and 3(3) of the Draft Accession Agreement, which had been omitted from earlier drafts.

A curious omission from the Draft Accession Agreement is the effect of adverse findings by the ECtHR in its external review function where the EU is a co-respondent. This is addressed by the Explanatory Report, which notes that where the ECtHR finds a violation of the ECHR, it is intended that the ECtHR will ordinarily find the respondent and any co-respondents jointly responsible.<sup>37</sup> This seeks to avoid any actual or apparent risk of the ECtHR assessing the distribution of competences between the EU and its Member States. However, the respondent or any co-respondents will not be precluded from making submissions disclaiming responsibility. It could prove interesting to see how the ECtHR handles this scenario.

## *II. Prior Involvement of the CJEU in Cases Where the EU is Co-respondent*

The requirement that the ECtHR's external review power should be supported by a form of internal review<sup>38</sup> by the CJEU in respect of compatibility issues not previously adjudicated upon by the CJEU had been jointly proposed by Judges Costa and Skouris in January 2011.<sup>39</sup> This prior involvement of the CJEU in the context of the ECtHR's external review function could prove to be a defining feature of the post-accession relationship between the courts. It is therefore vital to get the procedural settlement right. Negotiating the terms of the review powers under Article 3(6) of the Draft Accession Agreement proved challenging: conscious of the overriding need to preserve the autonomy of both legal orders, a wish to avert the prospect of increased inter-court competition post-accession, and in the context of a distinct lack of appetite for changes to existing Treaties,<sup>40</sup> the negotiators had to work within the confines of existing Treaty obligations to reach a workable solution.

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<sup>37</sup> *Id.*, Explanatory Report, para. 54.

<sup>38</sup> *Id.*, Article 3(6).

<sup>39</sup> A number of experts, including Professor Christiaan Timmermans (former judge, CJEU) (speaking in a personal capacity) had suggested versions of "internal review" before a meeting of the European Parliament Constitutional Affairs Committee (AFCO), 18 March 2010, prior to the European Commission's adoption of negotiation directives.

<sup>40</sup> Although a limited Treaty change is imminent due to the financial crises in EU Member States (to establish a European Stabilization Mechanism (ESM) to stabilize the Eurozone (Article 136(3) TFEU), there is virtually no motivation for making further Treaty changes in the foreseeable future.

To avert the prospect of actions challenging the compatibility of EU legal acts with the ECHR from being reviewed by the ECtHR without the CJEU first having had the opportunity to give its own ruling on compatibility, the internal review procedure would provide for the prior involvement of the CJEU before the ECtHR formally rules in its external review capacity. Differentiating between situations where this procedure would and would not be appropriate is relatively straightforward. In principle, direct actions would be immune from the prior involvement provisions: in cases where complainants directly challenge actions of the EU institutions, the principle of exhaustion of remedies would oblige appellants to take their action to the CJEU first, in accordance with EU procedural law, thus ensuring an opportunity for the CJEU to review the alleged incompatibility. That is not to say, however, that accession would have no impact on standard judicial review proceedings before the CJEU. Despite the loosening of the standing test offered by the Lisbon Treaty, access to the CJEU remains challenging to obtain for many non-privileged applicants. What is the likelihood that creative lawyers will attempt to circumvent Article 263(4) TFEU to bring a claim directly to Strasbourg? Or, more radically, seek to argue that Article 263(4) TFEU itself violates the principles guaranteed in Articles 6 and 13 ECHR? Chances are that the former possibility will at least be tested.

Where litigation originates in national courts, however, the situation is more complex and hinges on the national courts' use (or otherwise) of the preliminary reference procedure. Internal review appears to be primarily designed to capture issues arising from domestic cases in which the compatibility of an EU legal act with the ECHR is challenged, where a national court opts not to refer the allegation under Article 267 TFEU, and the dissatisfied complainant—once domestic remedies have been exhausted—subsequently makes an application to Strasbourg. In admissible cases, Article 3(6) Draft Accession Agreement would provide scope for internal review by the CJEU before the ECtHR exercises its power of external review.

This situation should be distinguished from other applications where internal review may not be appropriate: for example, where a litigant makes their application dissatisfied at the outcome of their national proceedings in which a preliminary reference *was* made; or where the challenge concerned a domestic implementing measure, which the national court opted to deal with without the need for a reference. In the former situation, the CJEU would have had its opportunity to review the allegation raised; in the latter, it may be considered that issues concerning an allegation relating to implementing measures are best resolved by the national court. If the CJEU's primary concern is to review issues relating to EU law before the ECtHR exercises external review, it would seem that instances of non-reference may prove to be subject to particular scrutiny.

Whilst Judges Costa and Skouris proposed their vision of internal review confident that “in all probability [the need for internal review] should not arise often,”<sup>41</sup> time will tell

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<sup>41</sup> Joint Communication, *supra*, note 4, at para. 6.

whether this prediction is optimistic. The making (and admissibility) of a reference depends on many variables. With the power to refer placed in the hands of national judges under Article 267 TFEU, the making of a reference to the CJEU on grounds of interpretation<sup>42</sup> or even validity<sup>43</sup> cannot be guaranteed in all appropriate cases. It is possible that litigants dissatisfied at no reference having been made in the course of national legal proceedings, or at the content of preliminary rulings or their application by national judges where references are made, may try to seek any new route available to pursue their case in Strasbourg, if circumstances permit. This could consequently add to demands on the ECtHR, particularly at the admissibility stage, and also on the CJEU's already heavy caseload if its prior involvement is needed. As both the ECtHR and the CJEU have taken steps to reduce delays in their respective systems, it is hoped that provisions will be made to ensure the new procedures do not prejudice these efforts.

The wording of Article 3(6) Draft Accession Agreement also raises some cause for concern. The core issue—enabling the CJEU to review in advance of the ECtHR on compatibility with the Convention—is clearly addressed by the text of the draft. Rather than creating a system of direct referral of questions between the ECtHR and CJEU (in the style of the preliminary reference system under Article 267 TFEU), Article 3(6) frames the internal review proceedings as incidental procedural mechanism, with “sufficient time” given for the CJEU “to make such an assessment and thereafter for the parties to make observations to the [ECtHR].” This construction may well have been driven by the overriding wish to avoid Treaty amendment; throughout the negotiation process, it was hard to envisage an effective system of internal review that did not alter the jurisdiction of the CJEU. Moreover, Article 3(6) is silent on key procedural issues. Whilst the Explanatory Report confirms that the CJEU's pronouncements will not bind the ECtHR,<sup>44</sup> one is left to guess the form and legal status of such pronouncements. Article 3(6) describes the CJEU's internal review as an “assessment” of compatibility of EU law with Convention rights, whilst the Explanatory Report variously describes the CJEU's input as being a “review,” “assessment” and “ruling”; the latter description having more forceful implications than Article 3(6) seemed to intend. Whilst rulings of the ECtHR in respect of cases in which the EU is involved as co-respondent will bind the EU institutions, including the CJEU, the legal consequences of the CJEU's pronouncements are unclear. It is disappointing (though perhaps inevitable) that many of the finer details have yet to be developed in amendments to the Statute of the Court of Justice, and internal rules of procedure. It would have been useful to specify, for example, the legal effects of the CJEU's pronouncement in the EU

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<sup>42</sup> On factors governing judicial discretion, see further: Case 283/01, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* 1982 E.C.R. 3415.

<sup>43</sup> On the obligation to refer in the event of doubt concerning validity, see further: Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, 1987 E.C.R. 4199

<sup>44</sup> Draft Accession Agreement, *supra* note 3, Explanatory Report, at para. 60.

legal order (e.g. its force, if any, to strike down legal acts, or to terminate the ECtHR’s external review proceedings). How such issues will be resolved remains to be seen.

The nature of the proceedings also remains unclear. Will internal review be conducted with a purely written procedure, or with full oral hearings? The latter would surely be preferable in general, to avoid apparent disadvantages for parties generally accustomed to oral hearings in standard preliminary reference and judicial review proceedings before the CJEU. It is possible, however, that the fear of delay could be an overriding consideration. While the need to minimize delays is rightly of concern to all sides, the impetus for speed in Article 3(6) requires that “The European Union shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed.”<sup>45</sup> To achieve this, the Explanatory Report refers with approval to the accelerated procedure already in place for urgent preliminary ruling (PPU)<sup>46</sup> cases, with the implication that similar process should be implemented for internal review cases. If this is followed through, provision must be made to ensure the process for PPU cases—a recent broadly successful innovation—is not compromised.

Answers to these questions, which have real implications for the judicial protection of claimants and for the autonomy of EU law, appear unresolved. The practicalities of the mechanism will need substantial clarification through the provision of further guidance in Statute of the CJEU, supplementary rules of procedure or in similar formal document.

#### D. Consequences of EU Accession?

Since the prospect of EU accession to the ECHR became both politically and legally viable, its potential impact has been much discussed.<sup>47</sup> Praise for the political and symbolic value

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<sup>45</sup> *Id.*, Article 3(6). This obligation was subject to various reservations during the negotiation process.

<sup>46</sup> The fast-track *procédure préjudicielle d'urgence* (urgent preliminary reference procedure) (PPU) has operated since 1 March 2008, offering an accelerated procedure for handling urgent preliminary references in the Area of Freedom, Security and Justice (AFSJ), with delivery of preliminary rulings in a drastically shorter time-frame (often within weeks, up to 6-8 months maximum) than under the standard Article 267 TFEU procedure (17.1 months in 2009).

<sup>47</sup> See generally, Leonard F. M. Besselink, *The EU and the European Convention on Human Rights after Lisbon: From ‘Bosphorus’ Sovereign Immunity to Full Scrutiny?*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1132788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132788) (last accessed: 27 September 2011); Jean-Paul Costa, *La Convention européenne des droits de l’homme, la Charte des droits fondamentaux de l’Union européenne et la problématique de l’adhésion de l’Union européenne à la Convention*, EUI Law Working Paper, 1 May 2004; Sionadh Douglas-Scott, *A tale of two Courts: Luxembourg, Strasbourg and the growing European human rights acquis*, 43 COMMON MARKET LAW REVIEW (C.M.L.Rev) 629 (2006); Tobias Lock, *EU Accession to the ECHR: implications for the judicial review in Strasbourg*, 35(6) E.L.REV 777-798 (2010); Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the two European Courts*, THE LAW AND PRACTICE OF INTERNATIONAL COURTS

of EU accession is widespread, whereas views on the future substantive impact of accession are rather more circumspect.<sup>48</sup> It is difficult to accurately predict the future contours of rights-based case law in light of challenges arising as a result of EU accession. However, given the issues raised during the negotiation process, a number of procedural and institutional consequences are apparent. These are not purely relevant to the ECtHR and CJEU—the accession of the EU as a supranational entity cannot be seen in a vacuum. While the consequences for the ECtHR and CJEU may be obvious, for EU institutions, national courts, and ultimately litigants, the impacts will also be tangible.

### *1. Implications for the EU and for Judicial Practice*

In addition to the specific implications for the CJEU's judicial practice and organization of internal review cases discussed above, it was essential that the final Draft Accession Agreement clearly outlined the procedural details concerning this internal review, with further steps taken by the CJEU to the Statute of the Court of Justice, Rules of Procedure, Practice Directions or other guidance notes where appropriate. The CJEU will be focused on ensuring the internal review procedure is conducted efficiently, and in doing so, it should ensure as a matter of priority that any changes made do not prejudice the considerable efforts made to reduce delays for preliminary references, direct actions and appeals. The negotiators' concerns that the CJEU should complete internal review swiftly so as to minimize delays to the ECtHR proceedings may raise important questions if a process akin to the PPU procedure is adopted by the CJEU. The PPU procedure is still relatively new, and though successful has not been without its teething problems.<sup>49</sup> As subjects of PPU proceedings are often deprived of their liberty, face extradition, or are in similarly grave situations, the maxim "justice delayed is justice denied" resonates<sup>50</sup> and has

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AND TRIBUNALS, Vol. 8,,375-398 (2009); Egbert Myjer, *Can the EU join the ECHR – General Conditions and Practical Arrangements* in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE (Ingolf Pernice, Juliane Kokott and Cheryl Saunders eds., 2006); Georg Ress, *The Legal Relationship between the European Court of Human Rights and the Court of Justice of the European Communities according to the European Convention on Human Rights* in GOVERNING EUROPE UNDER A CONSTITUTION – THE HARD ROAD FROM THE EUROPEAN TREATIES TO A EUROPEAN CONSTITUTIONAL TREATY (Hermann-Josef Blanke and Stelio Mangiameli eds., 2003).

<sup>48</sup> See, for example: Jacobs, *supra* note 10, at 291. In contrast, note Charlotte Leskinen's arguments in respect of the potential impact accession may have on the regulation of defenses in competition proceedings: Charlotte Leskinen, *An evaluation of rights of the defense during Antitrust Inspections in the light of the case law of the ECtHR: would the accession of the European Union to the ECHR bring about a significant change?* Working Paper IE Law School, No 10-04, 29 April 2010.

<sup>49</sup> Catherine Barnard, *The PPU: is it worth the candle?*, 34(2) E.L.REV 281 (2009).

<sup>50</sup> Koen Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, 59(2) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (ICLQ) 255, 273 (2010).

informed the design and functioning of the procedure.<sup>51</sup> Therefore, particular effort should be made to ensure these cases are unaffected by the Court taking on its internal review role.

On the part of the ECtHR, the creation of a new route for applications to reach Strasbourg will have implications for the admissibility stage and for the court’s ever expanding docket.<sup>52</sup> Under the terms of the accession, the ECtHR will retain full control of admissibility. In a further defense of the ECtHR’s autonomy, the outcome of the EU’s internal review will not bind the ECtHR, maximizing its freedom to rule on the allegation of non-compliance at issue.

Given the significance of the EU’s accession, it is highly likely that either the European Commission, or one or more Member States, will seek an Opinion on the Accession Agreement from the CJEU under Article 218(11) TFEU. If this happens, Member States’ observations on the Agreement could be revelatory, while the CJEU would have the opportunity to scrutinize the Agreement for compatibility with the autonomy of the EU legal order.<sup>53</sup> Previous Opinions<sup>54</sup> provide a rich source of reasoning in this regard; the Accession Agreement will not be waved through automatically.

Institutional aspects of accession will demand greater involvement from the European Parliament, in particular. Under Article 6 of Draft Accession Agreement, a parliamentary delegation will be entitled to participate in sittings of the Parliamentary Assembly of the Council of Europe, when it exercises functions relating to the election of judges under Article 22 ECHR. A new judicial vacancy will be created at the ECtHR as a result of accession, the new “EU” judge being appointed to serve on the same basis as all other ECtHR judges, without any adjudicatory limits. The modalities for the European

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<sup>51</sup> The CJEU requests national courts to seek an urgent preliminary ruling only “where it is absolutely necessary to give a ruling ... as quickly as possible” (Information Note on References for a Preliminary Ruling (2009/C 297/01). See further, Panos Koutrakos, *Speeding up the Preliminary Reference Procedure – fast but not too fast* 33(5) E.L.Rev 617-618 (2008).

<sup>52</sup> Increases in HCPs have led to a dramatic spike in applications to the ECtHR. Efforts including the introduction of the Pilot Judgment procedure, provision for single-judge formations, reformed admissibility criteria and commitments made as a result of the Interlaken and Izmir conferences have sought to reduce the substantial backlog and streamline proceedings. For an early assessment on the functioning of pilot judgments, see further: Antoine Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges* 57 NOMIKO VIMA (THE GREEK LAW JOURNAL), 1890.

<sup>53</sup> See generally: Lock, *EU accession to the ECHR*, *supra* note 43.

<sup>54</sup> Opinion 1/09 of the Court (8 March 2011) found the draft agreement establishing a European Patent Court incompatible with EU law, primarily on the basis that it would have the effect of ousting the jurisdiction of national courts; see further, Opinions 2/94 (28 March 1986), 1/91 (14 December 1991) and 1/03 (7 February 2006).

Parliament's future participation are to be decided in consultation with the Parliament, with further extensive decisions being finalized on the participation of the EU in other institutional functions. Further, Article 7 of the Draft Accession Agreement provides for EU input into the Committee of Ministers of the Council of Europe in specific circumstances, with voting rights (for example, when considering the adoption of Protocols to the Convention). With the EU currently 27-Member States strong and growing, there is scope for voting procedures to be used to prevent a co-ordinated vote from the 'EU' bloc from having an overall majority." At a financial (and potentially lucrative) level, Article 9 of the Draft Accession Agreement foresees that the EU will pay its dues towards the budget of Council of Europe in relation to the Convention in addition to funds provided by EU Member States in their capacities as HCPs to the Convention.

## *II. Implications for the Relationship between the CJEU and ECtHR*

The new procedural formalities will demand an unprecedented degree of co-operation between the ECtHR and CJEU. Whilst both courts will do their utmost to maintain comity, this should not be at the expense of a robust review process. Despite judicial diplomacy to the contrary, inter-court competition is a theoretical risk; the apex courts of both legal orders are bound to guard their terrain, if not jealously, then forcefully. However, the *Bosphorus* presumption which placed the EU in a privileged position for far too long will be untenable post-EU accession. In a new legal landscape, the CJEU will for the first time formally become part of a system where its reasoning may be questioned.<sup>55</sup> Both it and the legislative and executive branches of the EU will be forced to take notice. An optimist would suggest that this dynamic could prove beneficial, both for the CJEU and for the quality of the EU legislative process. Courts should be open to criticism and challenge—and despite the fact that the CJEU's input is squarely incidental in the co-respondent mechanism, accession will put the spotlight on both the ECtHR and CJEU, requiring greater accountability of both. If EU accession is to achieve its aims, reliance will be placed on judges from both courts to deliver robust judgments which place the interests of justice above those of comity. In terms of the content of judgments delivered by both courts, it remains to be seen whether greater attention (or indeed deference) is given when adjudicating on questions concerning rights guaranteed by the Convention. It will be revealing to see whether the CJEU's reasoning will be more detailed and extensive on such points. The psychology of adjudicating might potentially be influenced by the new and constant prospect (or threat) of external review.

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<sup>55</sup> National Constitutional Courts have volunteered this function in their defense of constitutional jurisdiction, the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) doing so more forcefully than most.



### III. Implications for National Courts

When it comes to the enforcement of rights under both legal orders in question, national courts are the lynchpins to a great extent. National courts are at the nexus of both the EU and ECHR systems, with specific adjudicatory obligations in respect of both. The nature of the EU legal order has largely been defined by national courts' preparedness to respect the seminal doctrines of primacy and direct effect, respecting their obligations under the preliminary reference procedure.<sup>56</sup> The (*de facto*) *erga omnes* ((as a matter of fact) owed towards all) effect of ECHR case law, tacitly recognized in the Interlaken Declaration,<sup>57</sup> is indicative of the shared responsibility of HCPs in the ECHR legal order: not only are national courts required to take account of ECtHR judgments against their own states, but they are encouraged to consider changes necessary in light of adverse judgments against other HCPs.<sup>58</sup> In both legal orders, it is regarded as essential for supranational courts to foster co-operative relationships with the jurisdictions of the respective Member States/HCPs, and for measures to be taken maximizing national courts' abilities to meet their challenging obligations. The increasing complexity<sup>59</sup> of law in both legal orders, and the calls for reform which the ECtHR and CJEU regularly attract, make these efforts all the more necessary.

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<sup>56</sup> The fundamental doctrines of primacy and direct effect were themselves established via case law resulting from national courts' use of the preliminary reference procedure: the rulings in C-6/64, *Costa v Enel* 1964 E.C.R. 585 and C-26/62, *Van Gend en Loos* 1963 E.C.R. 13 established the principles of primacy and direct effect, foundational principles for legal integration and consistency of EU law which had not been provided for by the Treaty of Rome. For affirmations of the CJEU's view on the importance of the preliminary reference procedure, and on harmonious working relationships with national courts, see, *inter alia*, C-16/65 *Schwarze / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* 1965 ECR 1081; Case 107/76 *Hoffmann-La Roche* 1977] ECR 957, para. 5; Case C-337/95 *Parfums Christian Dior* 1997 ECR I-6013, para. 25; Case C-99/00, *Kenny Roland Lyckeskog* 2002 ECR I-4839, para. 14.

<sup>57</sup> Interlaken Declaration (19 February 2010).

<sup>58</sup> See in particular, Interlaken Declaration, Section B(4)(c), in which States Parties commit themselves to “taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system.”

<sup>59</sup> Buyse, *supra* note 53. Note also, calls for reform made by the current UK Coalition Government and parliamentary committees in respect of both the CJEU and ECtHR in recent months (European Union *The Workload of the Court of Justice of the European Union* HL (2010-11) Paper 128 (...) predicted a “crisis” in the CJEU's workload, but avoided speculating on the impact of EU accession, noting that the precise impact will depend on the outcome of accession negotiations. Following the furore over ECtHR rulings on prisoner voting rights, the Commission on the UK Bill of Rights was ordered to examine proposals for the reform of the ECtHR, *supra* note 9.

How, if at all, will national judges be affected by EU accession? On a practical level, it will be important for national judges to familiarize themselves with the implications of accession, to ensure they are aware of a possible new procedural route open to litigants. Although this awareness should not necessarily impact on national judges' adjudication process, they may find their decisions subject to greater scrutiny. Post-accession, if a litigant is dissatisfied with the outcome of their indirect action before a national court (for example, in the event that a litigant fails to obtain a reference for preliminary ruling in a case challenging compliance of an EU legal act with an ECHR provision (unlikely, but theoretically possible), or if a litigant considers that the national court insufficiently deals with the rights-based issue) there may be a new route available to Strasbourg. As noted by both the Joint Communication<sup>60</sup> and Draft Accession Agreement,<sup>61</sup> references for preliminary ruling are not normally regarded as a remedy to be exhausted in order to meet the ECtHR's admissibility criteria.<sup>62</sup> However, with the human rights dimension coming into play, could EU accession cast national courts' use of the preliminary reference procedure in a new light? If the EU (via the CJEU) is so eager to be first to "review" compliance of EU legal acts against the Convention's provisions, and such references from cases on point are not forthcoming from certain jurisdictions, the EU could be tempted to take action to enforce states' Article 267 TFEU obligations.<sup>63</sup> The taking of such steps (extra-judicially) has been rare in the past, but such activism on the part of the European Commission in this context—though extremely sensitive—would not be inconceivable.

The threat of state liability attaching to the (in)action of a national court amounting to a violation of EU legal obligations remains a theoretical concern.<sup>64</sup> However, with so much time and effort invested in the negotiation process, it would be naïve to expect the

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<sup>60</sup> Joint Communication, *supra* note 4, at para 6.

<sup>61</sup> Draft Accession Agreement, *supra* note 3, Explanatory Report, at para 57.

<sup>62</sup> Article 35(1) ECHR. On the issue of preliminary references not constituting a remedy to be exhausted, see further Draft Accession Agreement (CDDH-UE (2011)16fin), Explanatory Report, at para. 57.

<sup>63</sup> Article 267 TFEU states that: The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:(a) the interpretation of the Treaties;(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon [or] where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court [or] If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

<sup>64</sup> Case C-224/01, *Gerhard Köbler v Austria* 2003 ECR I-4876. *Köbler* liability has been tested in a number of Member State national courts without an adverse finding being made; see, for example: UK (*Cooper v Attorney General* [2008] EWHC 2178), France (*Getsas, Conseil d'Etat*, 18 June 2008), Germany (*Bundesgerichtshof, EuW* (2005), 30-32), Austria (*Case A36/00, Verfassungsgerichtshof*, (2003)).

European Commission not to at least monitor the dynamics between courts following accession. The introduction of the internal review procedure may therefore lead national courts to feel greater pressure (whether exerted by the EU institutions, or in terms of a heightened awareness of their own judicial responsibility) to refer where appropriate, should the issue of a preliminary reference be raised in national proceedings where human rights arguments are involved. An unintended consequence may in fact be that preliminary references are taken slightly more seriously by courts at all levels of national legal systems—a consequence which would be unlikely to disappoint from an EU perspective at least. Notwithstanding speculation as to what the impact of accession could be for national courts, it is striking that the Draft Accession Agreement neglects to tackle this issue completely—on the face of the Draft Agreement, national judges will have to simply work it out for themselves. The absence of practitioner input (by means of written evidence, for example) into the negotiation phase may also eventually expose weaknesses in the final Agreement which would have best been resolved at the drafting stage.

#### E. Conclusion

The CDDH-UE should be commended for its efforts to resolve key practical problems relating to EU accession to the Convention. Its work is close to completion: whilst its *ad hoc* terms of reference have been extended until 31 December 2011, at the time of going to print it was hoped that its June 2011 Working Meeting would be its last. However, when the Draft Accession Agreement was considered for adoption by CDDH at an Extraordinary Meeting on 12-14 October 2011<sup>65</sup> a number of delegations raised objections and/or reserved their views on aspects of the Draft Accession Agreement, with the representative from the European Commission noting that further discussions may need to take place between EU Member States—begging the question as to what scope for discussion, if any, they had had during the negotiation phase. In particular, a lack of consensus remained in respect of amendments to Article 59 ECHR (scope of accession), Articles 3(2) and 3(3) Draft Accession Agreement (core aspects of the co-respondent mechanism), Article 7(2) Draft Accession Agreement (the supervision and execution of judgments), and on prior involvement of the CJEU generally. Despite not achieving full consensus on all issues, CDDH concluded that it had fulfilled its role as a steering committee and submitted the Draft Accession Agreement to the Committee of Ministers of the Council of Europe “for consideration and further guidance.”<sup>66</sup>

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<sup>65</sup> At the time of going to print, the Report of the Meeting was published; see further, *Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention of Human Rights*, CDDH (2011), available at: [http://www.statewatch.org/news/2011/oct/eu\\_cddh\\_echr\\_report.pdf](http://www.statewatch.org/news/2011/oct/eu_cddh_echr_report.pdf) (last accessed: 17 October 2011).

<sup>66</sup> Note, minor amendments were made to the Draft Explanatory Report (16 CDDH-UE 2011): *Id.* Appendix III

Notwithstanding the political sensitivities which remain in this attempt to finalize the Draft Accession Agreement, the delegations expressed support for the accession process and its rapid conclusion. Ratification procedures should eventually be activated, following adoption by the Committee of Ministers on the Council of Europe's part. On the EU side, the ratification process would proceed in accordance with Article 218 TFEU (including obligations to secure unanimity in the Council and the consent of the European Parliament) with ratification ultimately required by all HCPs/EU Member States in accordance with their constitutional traditions. The Accession Agreement would enter into force three months after the completion of all ratifications. Securing 47 approvals could be a tall order and may take some time. Additionally, the prospect of the CJEU being called upon to deliver an Opinion on the compatibility of the Draft Accession Agreement with the Treaties remains highly likely. Although the scope and time frame for further negotiation and amendments to the text of the Draft Accession Agreement are unclear, many loose ends still need to be resolved. However, judges and counsel should—if ratification is a characteristically protracted process—have sufficient time to familiarize themselves with the new processes. As a number of core issues have yet to be fleshed out in supplementary procedural rules, the real impact of Draft Accession Agreement on the litigation process will not be clear until tested in practice.

Looking forward, EU accession could provide an interesting legacy for both legal orders. Post-Lisbon, the protection of fundamental rights is becoming increasingly complex: with so many layers of rights-based legislation, judgments from both courts can be less than user-friendly. International and national judges, united in wanting to ensure the highest standards of judicial and human rights protection, tend to accept that this complexity is worth the trade-off. The symbolic value of accession—reinforcing the centrality of fundamental rights protection in both legal orders—should not be underestimated. Notwithstanding this, accession will go beyond symbolism: it will challenge the ECtHR and CJEU to continue to adjudicate robustly, to face clashes of rights guaranteed by the Convention and Charter head-on, and to accept the fact their views may not always correspond. The Draft Accession Agreement represents an imperfect but constructive attempt to enhance fundamental rights protection in Europe, with potential for improvements in a final text or associated rules of procedure. If the final Accession Agreement ultimately achieves this aim, the long road to accession will, despite its challenges, have been worth taking.