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DOES THE EUROPEAN COMMON AREA OF HUMAN RIGHTS AND FREEDOMS REALY EXIST?

Abstract

Europe has a complex system of fundamental rights protection. It is a *truly "*crowded house*".* The main purpose of fundamental rights is not to foster harmonisation or uniformity but to empower individuals, to give them more liberty and to protect them from the state authorities. The EU Court of justice has decided that the EU accession to the ECHR is not in accordance with the EU law. The decision was published on 18 December 2014 in Luxemburg. In this decision, the Court, despite the conclusion that the problem with the lack of legal grounds for the EU accession to the ECHR has been overcome with the Lisbon Treaty, says that the EU cannot be considered as a state, which means that this accession should take into consideration the specifics of the Union, which is strictly demanded from the conditions under which the accession is subject of negotiations.

By explaining this situation, the Court, in fact, says that as a result of the accession, the ECHR, as any other international agreement signed by the EU, will become compulsory for the EU institutions, as well as for its member states, and therefore it will be one integral part of the EU law. The paper will analyze the current issues related with the negative opinion issued by the ECJ concerning the EU accession to the ECHR and the recent debates between the EU Commission and the Council of Europe.

The debate on the role of the ECHR in EU law and on the possible accession of the EU to the Convention has actually intensified throughout the EU integration process. The EU and its institutions will be subject to the control mechanisms foreseen in the ECHR, and particularly of the decisions of the ECtHR. The Court further underlines that it is necessary for the concept of external control to define that, on one hand, the decisions of the ECtHR based on the ECHR will be compulsory for the EU, and its institutions, and, on the other hand, to determine that the decisions of the ECJ related with the rights recognized with the ECHR will not be compulsory for the ECtHR.

The paper will draw attention to three major challenges regarding the functioning of the human rights protection systems in Europe, namely: 1.The latest developments related to the

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ECHR accession to the EU and the meaning of the negative opinion of the ECJ[1] from 2014, 2. Ongoing conflicts between the work of the ECJ and Strasbourg Court and 3. Existing obstacles occurred on the way to creating a quality European common area of human rights and freedoms as European legal and human heritage. The purpose of the EU's accession to the ECHR is to contribute to the creation of a single (common) European legal space achieving a coherent framework of human rights protection throughout Europe.
This paper will argue the main reasons why the EU accession should be kept on the agenda. The current status quo is not satisfactory and therefore no adequate alternative to EU accession because firstly, as regards the procedure before the ECtHR, the current picture is still a distorted one, not reflecting the proper structure of the EU, with Member States having to face alone the implications of EU law under the Convention, secondly, in terms of the substance of fundamental rights, the status quo does not seem capable of ensuring a stable level of protection and legal certainty in the long term, and last but not least, removing the legal obligation on the EU to accede to the ECHR would undermine the very idea of a collective and common understanding of the fundamental rights. This, in turn, could initiate a process leading to the current European architecture of fundamental rights protection being unravelled altogether. Human rights standards should not be seen as obstacles to upholding EU legal doctrines such as interstate trust and primacy of EU law as Opinion 2/13 seemed to suggest. Legal doctrines should be considered instrumental. Instrumental to achieving a Union of shared values. Respect the fundamental rights is considered as a top value.

Keywords: European Convention for the Protection of Human Rights (ECHR), Charter of Fundamental Rights of the EU, European Court of Human Rights (ECtHR), Court of Justice of the European Union (ECJ), European Union (EU), Draft Agreement on the Accession, ECJ Opinion 2/13

I. THE EU ACCESSION TO THE ECHR – CHRONOLOGY FACTS AND MAIN CHALLENGES

The need for EU accession to the ECHR, for the first time, was suggested by the European Commission in 1979, as the main factor of contribution to the coherence of the human rights protection in Europe, and more specifically in the EU.[2]
In this sense, it must be pointed out that the initial opinion of the European Commission in its 1976 report, considering accession as "not necessary" since fundamental rights laid down in the ECHR "are recognized as generally binding in the context of (EU) law".
In the years that followed, a number of positive, as well as negative opinions, were presented.
In 1996 for example, in Opinion 2/94[3], the ECJ ruled that as European Community law (as it then was) stood at that time, the EC could not accede to the ECHR. Only a Treaty

[1] The reactions of many university scholars and human rights experts on this negative opinion of the ECJ were 'a combination of shock, disbelief and protest" This opinion was described by many as "a legal bombshell". Member States and institutions both within the EU and the Council of Europe were more reserved, but it is hardly a secret that the reaction in most capitals was equally disapproving.

[2] Since the European Communities did not have their own catalogue of human rights, the Court of Justice was compelled to seek inspiration elsewhere. The Luxemburg Court identified two sources-"the constitutional traditions common to the Member States" and "international treaties for the protection of human rights", on which the Member States have collaborated or of which they are signatories. See also: Case 36/75, *Rutili* [1975] ECR 1219; Case 149/77, *Defrenne v Sabena* [1978] ECR 1365; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 and Case 155/79, *A.M. & S.* [1982] ECR 1575.

amendment could overturn this judgment, **and in 2009, the Treaty of Lisbon did just that, inserting a new provision in the Treaties that required the EU to accede to the ECHR (Article 6(2) TEU).**[4]

Namely, with Article 6(2) of the Treaty for the Functioning of the EU, the Union secured the legal grounds for the EU accession to the ECHR, highlighting not only the commitment of the member states to allow this process within the EU legal system but also within their membership in the Council of Europe as co-signatories of the ECHR and the Protocol 14.

The Lisbon Treaty also added a Protocol 8 to the Treaties, regulating aspects of the accession, as well as a Declaration requiring that accession to the ECHR must comply with the "specific characteristics" of EU law. However, these new Treaty provisions could not by themselves make the EU a contracting party to the ECHR. To obtain that outcome, the EU needed to negotiate a specific accession treaty with the Council of Europe institutions.[5]

In addition, let us see a brief chronology of this process.

On 26 May 2010, the Committee of Ministers of the Council of Europe gave an *ad hoc* mandate to its Committee for Human Rights to talk with the EU about the legal instrument that ought to be used for the EU accession to the ECHR. From the EU side, the EU justice ministers gave on 4 June 2010 a mandate to the European Commission to lead the talks on the EU's behalf and on its account.

The official talks for the EU accession to the ECHR started on 7 July 2010 between **Thorbjørn Jagland,** Secretary-General of the Council of Europe and **Viviane Reding**, then vice-president of the EC. The Human Rights Committee assigned the first task to an informal group composed of 14 members (seven from the EU members states and seven from the non-member states) to elaborate the accession instrument. These members were elected based on their expertise.

In the period from June 2010 to July 2011, this informal group had eight meetings with the EC, constantly reporting on the progress in their activities and the achieved results. In the context of the held meetings, the informal group also had two meetings with the representatives of the civil society who continuously submitted remarks to the working documents of the group.

In June 2011, the working group completed its work and submitted a draft accession agreement together with the report which contained the explanations. In January of 2011, delegations from both European courts discussed the EU accession to the ECHR, emphasizing

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[3] In paragraphs 34 and 35 of its Opinion 2/94 (EU: C:1996:140) the EU Court of Justice considered that, as Community law stood at the time, the European Community had no competence to accede to the ECHR. Such accession would have entailed a substantial change in the existing Community system for the protection of human rights. It would have entailed the entry of the Community into a distinct international institutional system as well as integration of all the provisions of that Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would have been of constitutional significance and would therefore have been such as to go beyond the scope of Article 235 of the EC Treaty (which became Article 308 EC), a provision now contained in Article 352(1) TFEU, which could have been brought about only by way of amendment of that Treaty. See more details: http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN.

[4] See more details in: https://eur-lex.europa.eu/resource.html?uri=cellar:3645916a-61ba-4ad5-84e1-57767433f326.0002.02/DOC_1&format=PDF

[5] See: Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13", Verfassungsblog, 23 December 2014, available at (all websites last visited 13 November 2020), Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: A Christmas bombshell from the European Court of Justice", UK Constitutional Law Blog, 24 December 2014.

the future connection between the two courts in the context of specific cases launched against the EU and within the ECHR system.
In October 2011, the Human Rights Committee discussed with the Committee of Ministers the draft instruments and the transmission treaties for the report and the draft instruments aimed at their consolidation and future guidance. On 13 June 2012, the Committee of Ministers, in accordance with its instructions, allowed the Human Rights Committee to continue with the talks with the EU within the ad-hoc group "47+1" in order to finalize the accession instruments without delay.

This ad-hoc group held four meetings in Strasbourg. On 5 April 2013, the negotiators from the 47 member states of the Council of Europe and the EU finalized the draft treaty for the EU accession to the ECHR. After a long negotiation process, the accession treaty in 2013 was agreed in principle.
On 18 December 2014, the ECJ delivered a negative opinion of the EU accession to the ECHR, insisting that "accession must take into account the particular characteristic of the EU". It stated that the EU accession to the ECHR under the provisions of the current draft agreement would undermine the autonomy and primacy of EU law.
The Court notably expressed concerns about the affect of the accession on internal relations between member states and the EU, given that "as regards the matters covered by the transfer of power to the EU, the member states have accepted that their relations are governed by EU law to the exclusion of any other law", and that "EU law imposes an obligation of mutual trust between those member states".
The Court has also pointed out that under the current draft agreement the ECtHR would be able to adjudicate disputes on the interpretation of EU law, undermining the primacy of the ECJ in this regard. **The Court also rejected the co-respondent mechanism, considering that "the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its member states",** and that it "could adopt a final decision in that respect which would be binding both on the member states and on the EU".[6]
To permit the ECtHR to adopt such a decision would risk adversely affecting the division of powers between the EU and its member states. The Court also expresses its view on the procedure for the prior involvement of the Court. The question of whether the Court has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR can be resolved only by the competent EU institution, that institution's decision having to bind the ECtHR.
The ECJ observes that the draft agreement excludes the possibility of bringing a matter before the Court in order for it to rule on a question of interpretation of secondary law by means of that procedure. Limiting the scope of that procedure solely to questions of validity adversely affects the competencies of the EU and the powers of the Court. In the light of the problems identified, **the Court concludes that the draft agreement on the accession of the EU to the ECHR is not compatible with the EU law.**
On 12 February 2019, the European Parliament adopted Resolution[7] on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework reiterates the importance of the EU acceding to the ECHR.

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[6] Full text of the draft agreement for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, see:
http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN
[7] The full text of the European Parliament Resolution: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0079_EN.html?redirect.

On 31 October 2019, the then President and the then First Vice-President of the European Commission co-signed a letter to the Secretary-General of the Council of Europe in which they declared that the EU was ready to resume negotiations.[8]
The Council of Europe and the EU have been working on the preparations and finalization of the negotiations. The joint meeting was held on the 24th of March 2020 but was postponed due to the Covid-19 crisis. The negotiations formally continued in Strasbourg in the period from 29 September to 2 October 2020. The last negotiation meeting took place on 24-26 November 2020 and the following meeting is scheduled for 2-4 February 2021.
As a general remark, it should be concluded that today the EU cannot be a party to any proceedings before the ECtHR and cannot be represented in front of the Court. This means that it cannot be bound to participate in any Court proceedings, it cannot be held accountable under the Convention for its own actions and it cannot be legally bound to execute a judgment of the ECtHR.
Instead, the burden of the Strasbourg proceedings and their consequences rests entirely on the Member States. Regardless of whether they can live with that or not, it remains highly unsatisfactory that where EU law is at issue, representation and liability under the ECHR should not reflect the distribution of powers provided for by the Treaties.[9]
The current situation is even worse, with the EU remaining totally absent from the procedure and escaping all Convention responsibility until further notice, while at the same time the number of applications before the ECtHR involving EU law is on the rise. The absence of accession will give rise to a double standard between the European States that are or are not members of the EU and the EU itself.

II. FOUR KEY REASONS WHY THE EU NEEDS TO JOIN THE ECHR

Pointing out the legal grounds for the official EU accession to the ECHR, and having in mind the compulsory application of the EU Charter for Fundamental Rights[10], two legal regimes are undoubtedly created in the context of the protection of the rights and freedoms in the Union, **manifested through two different legal institutions: the European Court on Human Rights in Strasbourg and the EU Court of Justice in Luxemburg.**
It is well known that the first court is a court of the Council of Europe, whose main authority is to protect the human rights and freedoms in Europe, as well as to monitor the protection of the rights in the CoE member states, in capacity which primarily involves the issues that concern the quality of the realization and the protection of the national rights in these countries.
Unlike this court, the EU Court of Justice (also known as ECJ) is not considered a guardian of human rights *per se*, but an EU legal institution whose main task, first and foremost, is to support the process of economic integration among the different member

[8] https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.
[9] In this context, see **Art. 1(b) of Protocol No. 8** relating to Art. 6(2) TEU which requires the accession agreement to put in place "the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to the Member States and/or the Union as appropriate".
[10] The Charter is often explained by scholars as a "state of the art" human rights document. It includes rights and freedoms which were not yet acknowledged in the 1950 ECHR, such as the right to good administration (article 41 of the Charter) or the right of access to documents (article 42 of the Charter). At the same time, however, certain rights were worded differently, for some inexplicable reason, from comparable rights in the ECHR and other human rights instruments. See: **G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *Maastricht Journal of European and Comparative Law* 20 (2013), p. 168.**

states, so then it can expand its mandate on issues related with the understanding and the application of the EU law, or the national law deriving from it or which is in accordance with the EU Law. This authority certainly includes the fundamental freedoms and rights within the EU law.

There are at least four main reasons why the EU accession to the ECHR is considered a necessity. Let see them in the following order.

The **first reason** for accession lies in the fact that individuals, in the present situation, can not file a complaint directly against the EU before the ECtHR in case of violation of one of the rights contained in the ECHR. **As the EU is not a party to the Convention, complaints directed against the EU are considered today as inadmissible *ratione personae* by the ECtHR**.[11] In practice, the individuals could only challenge EU decisions or legislation under very limited circumstances.

The **second reason** justifying the need for accession relates to the responsibility potentially endorsed by member states for violations of the ECHR having their origin in EU law. The member states are responsible by the ECtHR for infringements of the Convention coming from the EU law. **This principle is actually established by the European Commission of Human Rights in the *X v Germany decision* from 1958**: "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligation under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty". This statement combines with the generally accepted international law principle of the relativity of treaties.

The **third reason** in favour of accession relates to the current lack of external review of the EU law with respect to human rights standards, in particular with ECHR standards, although in a certain way, the EU law is already subject to external review by the ECtHR. **The EU law can be indirectly examined by the Strasbourg Court through its implementation by the Member States.** The EU is the only "legal space" in Europe which is not subject to the external scrutiny of the ECtHR, and this situation does not mean that the efficiency of the internal human rights protection as provided by the EU institutions is put into question. There is undoubtedly an added value to the external review of the EU law by a specialized human rights court, such as the ECtHR.

The **fourth reason** that supports the EU accession is that this could globally contribute to a higher degree of consistency in the human rights protection framework in Europe.[12] The accession would lead to the suppression of the "schizophrenic situation" between the EU and its member states concerning the attribution of responsibility before the ECtHR, whereby a member state is potentially held responsible for a violation of the ECHR rooted in EU law. It is a well-known fact that the ECJ interprets fundamental rights in isolation from the jurisprudence emerging from other human rights instruments, including the ECHR. The

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[11] https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

As a result of acceding to the ECHR, the EU will be integrated into the fundamental rights protection system of the ECHR. In addition to the internal protection of these rights by the EU law and the Court of Justice, the EU will be bound to respect the ECHR and will be placed under the external control of the European Court of Human Rights. This will enhance consistency between the Strasbourg and the Luxembourg Courts and will afford citizens protection against the action of the EU, similar to that which they already enjoy against the action of Council of Europe member states. The accession will also enhance the credibility of the EU in the eyes of third countries, which the EU regularly calls upon, in its bilateral relations, to respect the ECHR. https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.

[12] It could be expected that the ECJ would primarily draw on its "own human rights catalogue", which is not conducive for the two main European legal systems developing in harmony. See: Rick Lawson, 'Case C-17/98, Emesa Sugar (Free Zone) NV v. Aruba, Order of the Court of Justice of 4 February 2000, NY. Full Court', *Common Market Law Review* 37, no. 4 (2000), p. 983–90.

interpretation of certain fundamental rights by the ECJ within a specific context of the EU legal order may lead to different results and different outcomes.[13]

III. PLURALITY IN THE STANDARDS FOR THE PROTECTION OF HUMAN RIGHTS – POSITIVE AND NEGATIVE EFFECTS

Although there is no formal connection between the two courts, it is still worthwhile noting a certain degree of overlapping in the part where the EU member states are also members of the Council of Europe.

With the entry into force of the EU Charter, the EU member states undoubtedly became subject **to three different systems for the protection of human rights**: 1. The system set by the Charter within the Union; 2. The system set by the European Court on Human Rights in Strasbourg with the direct application of the European Convention on Human Rights; and 3. The national legal system of the EU member states[14].

It is believed that this plurality of standards on human rights and mechanisms that interlink and even, in certain cases, overlap, can have certain positive effects.

First, from an aspect of their content, these three systems are basically complementary, they can provide vast protection of the human rights in Europe, **and second, from an aspect of standard implementation, the joint work of the European Court on Human Rights and the EU Court of Justice can serve as a double "watchdog" for the human rights**, not only at national but also at the supra-institutional level.

On the other hand, this plurality can serve as a ground for increased insecurity about the European human rights standards. For example, the two institutions can have different positions and opinions on the application of certain rights and can view these rights from a different perspective and in a different manner, which can lead, in certain cases, to contradictory messages to the member states.

This is a very real and possible threat because, unfortunately, there is no legal connection or hierarchy between the two institutions. A case which involves the right to private and family life, and in which Luxemburg Court decided that this right does not refer to the companies (***Hoechst AG v. Commission***)[15], while the Strasbourg Court case later decided that it can be applied (***Niemietz v. Germany)***[16] is a direct example of the possibility of this difference in

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[13] In ***Soukupova case*** the ECJ had to examine the Czech law on pension insurance that determines the retirement age in the context of granting support for early retirement from a farming based on an EU regulation. This Czech pension legislation determined a retirement age varying depending on the applicant's sex and, for women, on the number of children raised. The ECJ ruled that in the context of the EU's support for early retirement it was incompatible with the Union's general principle of non-discrimination that the "normal retirement age" was determined differently depending on the gender of the applicant and, in the case of female applicants, on the number of children raised by the applicant. In an earlier case, the Strasbourg court had ruled that the Czech old-age pension law was compatible with Article 14 in combination with the right to property of Article 1, Protocol 1 of the ECHR. This case shows that it is possible for a national law to be compatible with the guarantee of non-discrimination in the enjoyment of the rights of the ECHR (Article 14 combined with Article 1, Protocol 1 of the ECHR) and yet to be compatible with the principle of equality and non-discrimination as guaranteed in the EU legal order within specific circumstances. For more details for the case see in: http://curia.europa.eu/juris/documents.jsf?num=C-401/11.

[14] That is, in the instance of a claim commenced in the national courts, in which a reference is made to the CJEU in Luxembourg for a preliminary ruling, and then completed in the national courts.
https://www.corteidh.or.cr/tablas/r27635.pdf.

[15] http://www.hrcr.org/safrica/privacy/Hoechst.html.

[16] https://www.refworld.org/cases,ECHR,3f32560b4.html.

opinions. Although this case is an exception and not a general rule, its existence does demonstrate the possibility for similar cases in the future.

The different standards in the protection of human rights definitely impact the work of both courts. Therefore, the need for further respect of the boundaries in their work and different functions is constantly highlighted. On the other hand, there is the need for mutual monitoring of activities so that balance can be achieved in the different standards for the protection of human rights among the member states, and in the context of avoiding possible conflicts through their interpretation.

For the sake of the truth, the two institutions, faced with real problems in the practising of the law, have made several attempts to deal with these challenges through so-called forms of informal cooperation in legal cases.

The Strasbourg Court and its precedent law are already mentioned in the decisions of the ECJ as a "source of inspiration" for its decisions. The same practice is also applied by the Strasbourg Court. This simple coordination of the ECJ's and ECtHR's respective case law on human rights could be a satisfactory solution to EU's shortages with respect to human rights. But it would not tackle the issue of the limited *locus standi* of individuals before the ECJ, and would not include the domains over which the ECJ has no jurisdiction under EU law.

This form of compromise can partially fill up the legal gap that exists in reality in the context of the relations between the two courts, but it cannot serve as a solution for the problem, which is the lack of external forms of control over the work of both courts, aimed to secure harmonized and complementary application of the law. Without clearly set boundaries in the relations between the ECHR and the ECJ, there will always be a possibility for conflicts in their work. EU Court has become more oriented to the Charter at the expense of the ECHR and the case law of the Strasbourg Court.

Understandably, the EU Court would primarily draw on its "own" human rights catalogue, on one side, but still, on the other side, it is conducive that two main European legal systems will develop in harmony[17]. **The reasonable question after all will be is harmony possible in the face of existing legal plurality? Creating legal harmony is a very hard issue especially because of the differences between the main missions of the two Courts**. The Strasbourg Court gives a concrete response to a precise case whereas the Luxembourg Court gives an abstract response to an issue of interpretation during a case dealt with by a national judge.

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[17] The Luxembourg Court has developed an impressive body of fundamental rights case law. The most important judgments are the judgments on data protection (***Google case*** and "Safe harbour" (***Schrems case***). https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62012CJ0131.

The Schrems case started with the complaint against Facebook brought to the Irish Data Protection Commissioner by an Austrian privacy advocate named Max Schrems. In the complaint, Mr. Schrems challenged the transfer of his data (and the data of EU citizens' generally) to the United States by Facebook, which is incorporated in Ireland. The case ("Schrems I") led the Court of Justice of the European Union on October 6, 2015, to invalidate the Safe Harbor arrangement, which governed data transfers between the EU and the US.

See more details: https://epic.org/privacy/intl/schrems/, https://epic.org/privacy/intl/dpc-v-facebook/cjeu/

The Luxembourg Court has consistently emphasized the autonomy and primacy of the EU's legal system of human rights protection. The Luxembourg Court in specific cases treats the EU Charter as the only source on fundamental rights within the EU's legal order. The Court interprets fundamental rights in isolation from the jurisprudence emerging from other human rights instruments, including the ECHR. Where the Charter includes rights inspired by international instruments or ECHR it sometimes broadens these rights. For examples, Article 6 of the ECHR guarantees access to a court and the right of defence only for civil claims and in the context of criminal prosecution. In Article 47 of the Charter, it is guaranteed the right to an effective remedy and fair trial in all domains, including in administrative procedures such as migration cases and taxation law.

IV. DRAFT AGREEMENT FOR THE EU ACCESSION TO THE ECHR AND THE AUTONOMY OF THE EU LEGAL ORDER

The issue of compatibility between the draft agreement for the EU accession to the ECHR and the autonomy of the EU legal order is of crucial importance, having in mind the autonomous position of the institutions in the system and the EU law within this legal order. The main dilemma, as well as the main challenges that the EU is facing, are related to **the future relation between the ECJ and ECtHR after the EU accession to the ECHR, and, on the other hand, on the impact of the decisions of the two courts.**

Although the European Commission has said on several occasions that it sees no major difficulties about the EU accession to the ECHR, the fact that the European Court on Human Rights can be opposed as a major, superior court over the ECJ, which would work in a limited capacity when it comes to the human rights, points to possible future problems.

According to the experts, the European Court on Human Rights will not be able to read the EU law in a way that is compulsory to the ECJ. This position, coming from the German experts, but also accepted by a number of EU member states, is that with the EU accession to the ECHR, the European Court on Human Rights will remain in charge for the protection of the fundamental rights and freedoms. And, as some legal experts from the UK pointed out, this is already happening in reality.

Namely, according to Article 52(3) from the Charter on Fundamental Rights and Article 6(3) of the EU Treaty, the ECJ is obliged to apply the court practice of the European Court on Human Rights when reading the provisions on the fundamental rights from the EU Law.

This is in fact only the procedural side of the European Court on Human Rights cases in which the EU law is challenged. The European Court on Human Rights will maintain the possibility to work as an external mechanism *vis-à-vis* the Union in the segment of the human rights and freedoms.

This situation, according to the EU Council and the Commission, corresponds with the position of the EU member states that regardless of the legal implications in the relations between the two courts; it will not have an impact on the EU legal autonomy. In the same direction points the Protocol 8 of the EU Treaty, where it is stipulated the obligation for the accession agreement to respect the autonomy of the EU legal order[18].

In this context, it is interesting to see the comments made by the ECJ judges. According to one judge, Article 6(2) of the EU Treaty can be read-only as an article that allows the EU accession to the European Convention on Human Rights, underlining that this can certainly challenge the EU legal autonomy. The Commission immediately replied to this position, saying that according to Protocol 8 of the EU Treaty, the accession must take place after successful negotiations and after an agreement is reached among all signatories of the European Convention on Human Rights. Consequently, the ECJ ought to be prepared, to a certain degree that the Union will not be able to win absolutely everything it asks for.

In this context, Germany submitted additional clarifications regarding the effects that the ECJ will face with after the implementation of the so-called "margins of discretion" that would be implemented in the decisions of the European Court on Human Rights. But, it seems that these additional clarifications have omitted the fact that the principle of **self-sustainability of**

[18] The Charter rights may generate a horizontal effect, that is, obligations between private parties. This situation is in line with the autonomy of the EU legal order. The cases that illustrate the existence of the horizontal direct effect of the Union's fundamental rights are ***Mangold*** and ***Kücükdeveci.*** See: https://www.researchgate.net/publication/228150877_Criticizing_the_Horizontal_Direct_Effect_of_the_EU_General_Principle_of_Equality.

the international law is automatically part of the EU legal order and that this principle has a direct effect.

In the context of this conclusion speaks the fact that several signatories of the European Convention on Human Rights have constitutions that are open to international law in a manner very similar to the one of the Union. Still, even in this constellation, the national courts of these states sometimes have their own judicial assessment of the ECHR decisions.

It is well known that the international law and the law of the European Court on Human Rights do not use the **doctrine *stare decisis,* i.e. their rivalry is not put in context with the principle of automatic and self-sustainable transponing of the European Convention on Human Rights.** Therefore, Germany seems to be right when concluding that the Union should approach the European Convention of Human Rights on "equal merits", as did the other signatories of the Convention. It is a fact that this principle is not recognized in the draft-accession agreement.

On the other hand, we should pointed out that the ECJ practice regarding the autonomy of the EU legal order is not fully acceptable, because the EU concept for legal autonomy gives a significant level of discretion to the ECJ.[19]

And it seems that the Court uses this discretion when it rejects every agreement that it finds unacceptable to a certain degree, without having to list the reasons for this rejection first. The assumptions are that this attitude of the ECJ comes as a result of the provided "watchdogs" incorporated in the negotiating process, as early as in the time of writing the so-called "discussion document."

The results from this "discussion document" are that the European Court on Human Rights will probably not be in a position to read the EU law independently, without having in mind the previous decisions of the ECJ. And if the European Court on Human Rights, in certain cases, still decides to read the EU law without the knowledge of the ECJ, this decision will not be compulsory for the Union. These conclusions are in fact leading to the conclusion that the draft-accession agreement is compatible with the EU legal autonomy.

The EU accession to the ECHR is no different than, for example, the agreement for the EU accession to the World Trade Organization, which also puts the Union under supervision of an external judicial body that is entitled to read the law and to pass decisions that are legally compulsory for the Union.

In this context goes the EU Opinion No. 1/09, which explicitly determines that **the legal autonomy of the EU cannot be put in context with the accession to "an international agreement that determines a Court that is responsible to read its provisions."** If the ECJ decides differently, it will be considered as a decision that is inconsistent with the obligations that the EU has taken over in the part of the human rights and freedoms, as well as to the obligation to initiate amendments to the Article 6(2) of the EU Treaty.

V. THE EU ACCESSION TO THE ECHR AND THE ECHR PROTOCOL 16

On October 2, 2013, the Committee of Ministers of the Council of Europe opened for signing the Protocol 16 of the European Convention on Human Rights. This new protocol, titled as "Protocol of dialogue" by the President of the ECHR **Dan Spillman**, opened a possibility for

[19] In this sense, I would like to highlight the official "Explanations" to the Charter where the scope of some articles is wider than the Charter itself which will create overlapping legal space among both Courts. Concerns have also been raised with regard to the ECJ's insufficient openness towards ECtHR case law. The Luxembourg Court is criticized for developing its own fundamental rights standards paying less attention to the ECHR. With regard to EU legal acts, member states could find themselves in a difficult situation in case of discrepancy between ECJ and ECtHR case law which can be prevented by EU accession to the ECHR.

the supreme courts of the ECHR signatories to ask on certain "principle issues related with the understanding or with the application of the rights and freedoms defined in the convention and its protocols."

Although the material range of the Protocol 16 is clearly defined with the Convention and its protocols, there are still some obvious dilemmas and subjects of concern that the use of this new consultative instrument for the courts of the EU member states can be problematic from the EU law point of view.

More precisely speaking, the issue that caused most concerns is whether **Protocol 16 will undermine the autonomy of the EU law and the monopoly of the ECJ over the EU law**, by allowing the supreme courts of the member states to get engaged in a **so-called "forum-shopping" between the courts in Luxemburg and in Strasbourg[20].**

The recently passed ECHR Protocol 16, with its non-compulsory nature and signed by just a few ECHR signatories, none of whom has ratified it yet, has for its goal to enable every domestic court to seek an early opinion from the ECtHR on the provisions from the European Convention on Human Rights. Several member states rightfully pointed out that the Union will probably not join Protocol 16 through the draft-accession agreement which will mean that the Union will remain outside the scope of this Protocol.

The ECJ President **Mr Scouris** disagrees with this position, and engaged in an open debate with **Hans Cramer Ph.D., Commission's agent**, at the end of the hearing in the Court **on the risks the Protocol 16 opposes to the EU legal autonomy.**

According to President Scouris, if one bare in mind the EC position that the ECHR can identically occupy the EU law as any other international treaty, according to Article 216 of the EU Treaty, it will mean that the ECJ doctrine "Haegeman jurisprudence" will also be applied concerning the ECHR.

According to this doctrine, the ECHR provisions can be directly applicable also by the domestic courts within the scope of the EU Law. President Scouris also presented a hypothetical situation in a form of a question, asking what if the issue of ECHR application is put before a national court of EU member states, can this be subject to a prior procedure by the ECJ?

According to Mr Scouris, if the member state supports Protocol 16, there is a possibility for so-called "forum shopping" also with the domestic courts. He pointed a hypothetical case: "**Let us assume that the ECJ has already given an opinion on a case presented by a national court in the first instance. Does this mean that according to the *Cilfit* doctrine[21], the same court should also consult the ECHR for a second prior opinion*?" Cilfit case-law*** (judgment of 6 October 1982, Cilfit and Others, 283/81, EU: C:1982:335) is applied by national courts or tribunals against whose decisions there is no judicial remedy under national law and, in particular, how they interpret the concept of 'any reasonable doubt'.

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[20] Protocol 16 enables the highest national courts and tribunals to ask the ECtHR for advisory opinions. Although modelled after the preliminary reference procedure to the ECJ, Protocol No 16 advisory opinion is quite distinct from its EU law archetype: **it is exclusively open to the highest courts**, it is completely voluntary, and the ECtHR's advisory opinion is not binding. Whether Protocol No 16 will help to decrease the ECtHR's workload by diminishing the number of applications or whether the opposite will hold, is open to debate. In any event, there will be a new option for dialogue between national high courts and the ECtHR. Protocol 16 is entered into force in 15 states of the Council of Europe by now. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=zG2t20eU.
See: http://intr2dok.vifa-recht.de/servlets/MCRFileNodeServlet/mir_derivate_00001173/verfassungsblog.de-Forum%20Shopping%20between%20Luxembourg%20and%20Strasbourg.pdf.

[21] See details: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/ndr-cilfit_synthese_en.pdf.

The answer to this question given by the Commission was pretty dissatisfactory and vague. On the other hand, the EU Council has said that any threat to the EU legal autonomy that would come from Protocol 16 ought to be eliminated with the internal EU rules, i.e. in the draft-accession agreement itself.

VI. THE SCOPE OF THE PROBLEM

According to the opinion of numerous legal experts, there is a need for an urgent position on several problematic questions.

Firstly, whether the advisory opinions foreseen with Protocol 16 can overshadow the previous procedure, but also the opinions of the ECJ, according to Article 267 of the EU Treaty? With regard to this dilemma, numerous opinions are pointing in several directions.

Some of them say that "the highest courts and tribunals of the high party in the agreement" will be able to submit a request for opinion from the ECJ that will have a non-compulsory character, same as the advisory opinions given by the ECHR.

On the other hand, this problem will not come up when the national Supreme Court is obliged according to Article 267 of the EU Treaty, to submit a request for a prior procedure in front of the ECJ. In the context of Article 4(3) of the EU Treaty and Article 344 of the Treaty for the Functioning of the EU, this provision will stand in the path of the so-called "forum shopping" by the domestic courts.

The present concern is more focused on the cases where, because of the prior opinion of the of the ECJ asked by a lower court and **in accordance with the *Cilfit doctrine*, the Supreme Court of a certain member state will no longer be obliged with the Article 67 of the TFEU, when it can address the ECHR for a "second" prior opinion? What happens in these cases?**

Several experts gave an answer to this question, particularly **Johansen and Streinz**, who say that the application of the Protocol 16 by the Supreme Courts of the EU member states ought to be subject to condition by numerous legally compulsory restrictions that will protect the autonomy of the EU Law.

According to their opinion, these restrictions should be practised by the ECJ, possibly through the incorporation of certain internal rules that will have a goal to supplement the draft agreement. Still, other legal experts believe that these suggestions can neither be proportional nor justified, i.e. **the restrictions in the use of Protocol 16 are disproportional.**

It is believed that with the fact alone that the Protocol 16 is not limited only to the EU and its member states, but it also covers the other signatories of the Convention, the application of the Protocol will have to be put in the context of all "situations" that fall under the "competence" of these countries, in accordance with the Article 1 of the Convention. The legal expert **Johansen** believes that the EU member states ought to be legally free from signing and ratification of Protocol 16, which is completely disproportionate, as are the situations that take place in the EU member states that are not governed by the EU law.

In this context, there are only two options in the relations between the Strasbourg and Luxemburg courts. The first option is that the special issues are addressed to the ECJ by the national Supreme Courts, asking for an advisory opinion and these cases to remain with the ECJ in a prior procedure. In this case, the ECJ decisions in prior procedure will basically be compulsory for the national Supreme Courts.

The second option is if the national Supreme Courts do not decide to address the ECJ, in accordance with Article 267 of the TFEU, and decide to address the ECHR for an advisory opinion, then it is clear that the validity of this request can only be put in the context of the

Convention, but not also with the EU law, because the ECHR is not competent to read the EU Law.[22]
Which are the alternatives for the ECHR in this case?
To answer this question, we have to keep in mind that the ECHR has always been quite nervous, especially when it comes to the autonomy of the EU law. This nervousness is evident not only through the ECHR precedent law but also through its efforts to secure participation in the EU institutions, predominantly in the European Commission, as a third party when the application of the EU law is decided. Having in mind that the protection of the autonomy of the EU law is one of the key principles on which the draft-accession treaty is based, and in the context of the Protocol 8 and the Lisbon Treaty, this principle is explicitly supported by all negotiating parties of the Council of Europe and the ECHR, who manifested that the ECHR has no interest to get involved in the autonomy of the EU law.
It is not its competence, it's its husk.
Under these circumstances, the question is how realistically can we expect the panel of the ECHR, which is in charge of making the selection between the demands for advisory opinions, to accept the so-called "forum shopping court", having in mind the fact that this institute is the one that raises the question for the EU law.

VII. HOW MUCH AUTONOMY IS NEEDED IN THE FIELD OF FUNDAMENTAL RIGHTS?

One needs to make a general division between the fundamental rights on one hand, and all other rights on the other, and to answer the question of whether all fundamental rights can be subject of analysis?
It is a fact that there is only one area, more specifically Article 52 and Article 53 of the EU Charter on Fundamental rights through which the EU law limits its autonomy, having in mind the fact that these rights are directly "borrowed" from the ECHR.
The provision reads: "When the Charter contains rights that correspond directly with the ECHR, the meaning and the scope of these rights remain the same as those determined in the ECHR. This provision does not obstruct the EU law to provide more extensive protection." According to this provision, the Charter calls on the Convention when determining the minimum level of protection of the determined rights, whereas the EU law agrees that it should not read this right completely autonomously and should indirectly rely on the ECHR.
In this limited space, the issues under the scope of the EU law can at the same time be issues under the Convention and vice-versa. There are two possible scenarios also for this situation. The first scenario is that in all cases where Article 267 of the TFEU is applied there is no direct threat for the autonomy of the EU law, having in mind the fact that this provision protects the ECJ monopoly vis-à-vis the EU law, including the protection of the fundamental rights with the EU law.
On the other hand, in exceptional cases when this provision is not applied and when the ECHR is called to give an advisory opinion, and if the ECHR accepts to give this opinion, this

[22] In practice, there is a high degree of consensus among European and highest national constitutional and supreme courts. On 19 February 2013, the ECtHR and the German Federal Constitutional Court recognized the adoption rights of same-sex couples. The Strasbourg Court judgment in ***X and Others v. Austria*** concerned the right of unmarried same sex-couples to second-parent adoption, while the Constitutional Court's judgment concerned the bar on successive adoption by registered civil (same-sex) partners. The Constitutional Court went further than the ECtHR holding in a position that the bar on successive adoption by registered civil partners violated the general principle of equality before Article 3 (1) of the German *Grundgesetz.*

by definition will be taken as "a principle issue related with the reading and the application of the rights and freedoms defined with the Convention and its protocols."

As a result of the above said, it is quite logical for the national courts of the EU member states to be appropriately reminded of their obligations coming from Article 267 of the TFEU when they apply the Protocol 16, but also of the supreme autonomy of the ECJ when it comes to the reading of the EU law. Still, should this happen, the compulsory legal restrictions for the use of this Protocol will be considered disproportionate and unjustified. They can be a threat to the future development of the system of the Convention as a whole, much more than the Protocol can serve as a threat for the autonomy of the EU Law. This is considered the opposite of what is expected, that this is a purely internal issue for the EU Law.

There is hesitation among the ECJ judges on the aggressive line of asking questions about Protocol 16, which is in fact an alibi that should be used when explicitly saying that the draft-accession agreement is incompatible with the EU legal autonomy. This situation, according to many experts, is used as an exit strategy, as an argument for the ECJ to reject the draft-accession agreement.

On the other hand, there are still plenty of reasons why the ECJ should support the draft agreement. In this sense, it is unclear whether the correspondent procedure, as an early mechanism, cannot be applied when it is asked from the ECHR to give a preliminary opinion on a specific case. Article 3 (2) of the draft agreement reads:

"Where an application is directed against one or more member states of the European Union, the European Union may become co-respondent to the proceedings in respect of an alleged violation notified by the [ECtHR] if it appears that such allegation calls into question the compatibility with the [ECHR] rights at the issue of a provision of European Union law […]"

This provision can also be applied to the requests for advisory opinions for the Protocol 16 of the ECHR. The only possible obstacle in this regard seems to be the term "application" in the introduction of the paragraph. However, it could be expected broad interpretation of this term by the ECtHR, and also covering requests for advisory opinions. Especially considering that the context and purpose of DAA Article 3 is to enable the Union to become co-respondent in all cases where the compatibility of Union law is at stake. Consequently, the Union will be allowed to become co-respondent in such cases, which entails both the right to participate in the procedure before the ECtHR and the right to make use of the "prior involvement" procedure under DAA Article 3(6).

Secondly, President Skouris' hypothetical is not terribly different from what would be the case if Protocol 16 is out of the picture. If the domestic highest court does not ask the ECtHR for a second preliminary opinion, an individual losing party may apply to the ECtHR. Before the ECtHR, the Union would certainly be allowed to act as co-respondent, but the ECJ would not have a right to prior involvement. This is because in President Skouris' (modified) example the ECJ has already ruled on the interpretation and validity of the Union act in the preliminary reference to it by the domestic court of the first instance.

Third and finally, in its judgment concerning the compatibility of the DAA with the constituent treaties, the ECJ should be able to conclude – either in the operative paragraph, in its *dicta*, or *obiter dictum* – that the EU member states have an obligation not to accede to Protocol 16. Such an obligation could be based on the duty of sincere cooperation under TEU Article 4(3). This would merely mean finding that the EU member states have a duty to refrain from entering into an international agreement that could endanger the autonomy of the Union's legal order.

Those EU member states that have already signed Protocol 16 would then have to withdraw their signatures. This would be allowed under treaty law, as none of the member states has yet ratified Protocol 16. A statement by the ECJ to this effect would also protect the Union's legal

autonomy from any future ECHR Protocol that could potentially threaten this concept of autonomy. If an EU member state nevertheless took steps toward joining an infringing Protocol, the Commission could launch infringement proceedings.

VIII. OVERLAPPING THE COURTS *RATIONE MATERIAE*: THE COMBINED EFFECT OF THE MELLONI AND ÅKERBERG CASE-LAW VS. *BOSPHORUS DOCTRINE*

The Bosphorus doctrine (presumption) is also contained in the case law of the ECtHR since 2005 in the context of the decision in the case *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland.*[23]
In this decision, the ECtHR, in accordance with the established case law, mentions for the first time that the member states of an international organization (such as the EU) are still responsible and obliged to respect the ECHR in "all acts and actions of their bodies, whether those acts or actions were a consequence ”of the need to comply with international legal obligations “ (*Bosphorus* para 153).
The decision also recognizes "the growing importance of international co-operation in the context of the consequent need to ensure the proper functioning of international organizations". (*Bosphorus* para. 150).
With this decision, the ECtHR practically imposed as mandatory the Bosphorus Doctrine or the presumption of equivalent protection of ECHR rights by the EU, although the EU is not yet officially a signatory to the ECHR.
In the Court's view, any action taken by a certain country must comply with its legal obligations and is justified if the country or a relevant organization seeks to protect its fundamental rights, both in relation to the content guarantees offered and in relation to the mechanisms for controlling their protection in a way that can be considered equivalent to that of the Convention.
However, this equivalence does not have to be final and could be considered in the context of the protection of fundamental rights. If this protection is provided through an organization, then the presumption is that the state does not depart from the obligation to respect the Convention in the implementation of the legal obligations that follow from its membership in the organization.
Many believe that the ECtHR can modify the Bosphorus Doctrine after the rejection of the EU to join to the ECHR, in the context of the negative opinion 2/13 adopted by the EU Court of Justice. In this sense was the statement of the President of the ECtHR Guido Raimondi in 2015, within the Annual Report of the Court, who stated that the negative opinion of the Court in Luxembourg was a great disappointment. However, we must not forget that the main victims of this opinion will be the citizens, whose rights would be violated by the EU acts. The responsibility for this situation would be for the Strasbourg Court to do what it can in cases where the rights of citizens must be protected from the negative effects of opinion.
In the decision of the Grand Chamber of the ECtHR concerning the ***case of Avotiņš v. Latvia***, one can clearly see that the Bosphorus assumption is still alive. The ECtHR applied it for the first time in a case concerning the mutual recognition of obligations under EU law.[24] This is evident given the fact that one of the main arguments of the EU Court of Justice was that the

[23] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69564%22]}.
[24] This situation qualified this case law as the 'professional courtesy' approach of the Strasbourg Court. See more details: Martin Kuijer, “The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession”, https://www.tandfonline.com/doi/full/10.1080/13642987.2018.1535433.

negative Opinion 2/13 that the EU accession to the ECHR could pose "a great danger to the principle of mutual trust which will disrupt the balance in the EU and will undermine the autonomy of EU law " (Opinion 2/13, paragraph 194).
On the other side, according to article 51(1), the Charter applies to Member States "only when they are implementing Union law". The Official Explanations annexed to the Charter give a slightly confusing explanation-"the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law". This explanation is much broader than the text of the underlying provision seems to suggest (*"implement Union law"*).
In the case of Avotiņš v. Latvia, the ECtHR found that the system of mutual observance of the Brussels 1 Regulation was generally compatible with the Article 6 of the ECHR (paragraphs 117-119), however, the ECtHR was sceptical about the interpretation and application of this Regulation by the Latvian Supreme Court.
Namely, the ECtHR found that the Latvian Supreme Court "reflects a literal and automatic application of Article 34 (2) of the Brussels 1 Regulation, which in theory is interpreted as "manifestly deficient" protection equivalent to the protection of the right to defense guaranteed by Article 6 став 1. by the ECHR". This judgment is specific due to three main reasons. The first reason was that for the first time since the adoption of Negative Opinion 2/13 by the Luxembourg Court, the Grand Chamber of the Strasbourg Court applied the Bosphorus Doctrine. The verdict confirms that the doctrine is still alive despite the open protests by the then President of the ECtHR.
Second, it is noteworthy that this is the first case where the ECtHR has found a "manifest deficit" in the protection of fundamental rights, although it must be said that the Court's reasoning was rather vague.
Third, given that the burden of proof was the key instrument for the Latvian Supreme Court's ruling, a matter that is not governed by EU law, this court appears to have used the "margin of manoeuvring".
In May 2013, the CJEU provided (more) clarity in the ***Åkerberg-Melloni*** **case**[25] advocating a very broad application of the Charter whereby the level of human rights protection is attributed to the Charter. In this case, ECJ made a perfect highlight to the importance of the basic principles coming from the EU law-primacy of EU law and principle of interstate trust but did not demonstrate the same "professional courtesy" approach as the ECtHR had adopted in the Bosphorus ruling.
These two different approaches of application the ECHR, on one side, and the Charter, on the other side, is not a good signal for the harmonious cooperation between both European courts in the future. The negative opinion of the ECJ created the impression that ECJ will follow the Charter when protection of fundamental rights is on a board, and the ECtHR will continue to follow the Convention as its main instrument.
There is also another very important issue regarding the relation between the Charter and ECHR in a national context. For instance, in 2015 the German Constitutional Court said that they would review the application of the primacy of the EU law and the (quasi)automatic application of the doctrine of mutual trust if this is indispensable to protect German constitutional identity guaranteed by the German Constitution. The Court also emphasized that the Charter will not be applied in case when it provides lesser protection of fundamental rights than the Convention.

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[25] C-617/10, 7 May 2013, *Åklagaren v Hans Åkerberg Fransson*.
See also: E. Hancox, 'The Meaning of "Implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson', *Common Market Law Review* 50, no. 5 (2013), p. 1411–31.

XI. CONCLUSION

The ECJ has decided that the EU accession to the ECHR is not in accordance with the EU law. The decision was published on 18 December 2014 in Luxemburg. In this decision, the Court, despite the conclusion that the problem with the lack of legal grounds for the EU accession to the ECHR has been overcome with the Lisbon Treaty, says that the EU cannot be considered as a state, which means that this accession should take into consideration the specifics of the Union, which is strictly demanded from the conditions under which the accession is subject of negotiations.

By explaining this situation, the Court, in fact, says that as a result of the accession, the ECHR, as any other international agreement signed by the EU, will become compulsory for the EU institutions, as well as for its member states, and therefore it will be an integral part of the EU law. Under these circumstances, the EU, like any other agreed party, will become subject to external control aimed at securing the rights and freedoms foreseen with the ECHR. Therefore, the EU and its institutions will be subject to the control mechanisms foreseen in the ECHR, and particularly of the decisions of the ECtHR. The Court further underlines that it is necessary for the concept of external control to define that, on one hand, the decisions of the ECtHR based on the ECHR will be compulsory for the EU, and its institutions, and, on the other hand, to determine that the decisions of the EU Court of Justice related with the rights recognized with the ECHR will not be compulsory for the ECtHR.

However, as the Court says in addition, this will not be the case when it comes to the decisions related to the EU Law, including the Charter, by the Court itself. The Court believes that even though the ECHR gives the power to the agreed parties to determine higher standards for the protection of the rights guaranteed by the ECHR, the ECHR ought to be coordinated with the Charter.

It is necessary when the rights recognized by the Charter correspond with those guaranteed in the ECHR the limited power of the EU member states to be recognized, coming from the ECHR, so that the necessary level of protection guaranteed by the Charter to be secured, same as the provisions for primary effect, unity and efficiency of the EU Law.

The Court believes that there is no provision in the draft agreement that will provide this coordination. On the contrary, the Court believes that the approach used in the draft agreement underestimates the legal nature of the EU. Particularly, the approach does not take into consideration the fact that with regard to the issues that cover the transfer of power of the EU, the member states have already accepted that their relations are regulated with the EU law, excluding any other law.

So, for the EU and its members to be viewed as agreed parties not only in the relations with the non-EU states but also in the relations among themselves, the ECtHR will be allowed to demand every member state to check whether the other members respect the fundamental rights, although the EU law determines the obligation for mutual trust among the member states. In this situation, the Court believes, the accession can seriously obstruct the balance within the EU and can undermine the autonomy of the EU law.

The draft agreement does not contain a provision that would appropriately answer this situation. With regard to the Protocol 16 of the ECHR, signed on 2 October 2013, which allows the highest national courts and tribunals of the member states to seek advisory opinions from the ECtHR on matters related with the application and understanding of the rights and freedoms guaranteed with the ECHR and its protocols, in case of accession, the Court believes that thus the ECHR will become an integral part of the EU Law. With this, the mechanism determined with the Protocol can influence on the autonomy and the efficiency of the early procedure determined with the TFEU. We need to remind that the agreement does stipulate that the rights guaranteed with the Charter correspond with the rights secured with

Protocol 16, but also that this protocol can discourage the "early procedure" of the Court, causing direct damage to the procedure.
The Court further on concluded that the draft agreement does not contain provisions that will regulate the relations between these two mechanisms. Therefore, as a logical outcome of this hypothetical situation, the EU Court of Justice will have exclusive authority in overcoming disputes among the EU member states, but also in disputes involving EU member states when it comes to their coordination with the ECHR. Although the draft agreement does not consider the case-law of the Court as an instrument that would be used for overcoming the disputes between the agreed parties in accordance with the ECHR, still this is not enough to protect the exclusive competence of the EU Court of Justice. The draft agreement still leaves a possibility for the EU or its members to be able to file an application to the ECtHR when it comes to the violation of certain provisions from the ECHR by a given member state, or by the EU when it comes to the EU law.
The existence of this possibility underestimates the conditions determined in the TFEU. Under these circumstances, the Court believes, the draft agreement can be in accordance with the TFEU only if the disputes among the EU member states or the disputes between the EU members with regard to the application of the ECHR in the context of the EU law are excluded from the authority of the European Court on Human Rights. **Also, the correspondent mechanism contained in the draft agreement has its goal to provide guarantees that the proceedings led in the ECtHR by the non-EU countries and individual applicants are specifically addressed to the EU member states and/or to the EU**. The draft agreement stipulates that the agreed party will become a correspondent either by accepting the invitation from the ECtHR or with the decision passed by this Court, based on its request. If the request from the EU or its member state leaves space for intervention as correspondents in a case before the European Court on Human Rights, they must confirm that the conditions for their participation have been met.
The ECtHR can pass a final decision that would be compulsory for the member states, but not also for the EU. This poses a risk of disturbing the division of power between the EU and its members.
With regard to the procedure for early involvement, the Court has taken a position that the issue whether the Court has given an opinion or whether it has decided on a specific issue in a procedure led before the ECtHR, can be decided only by a competent EU institution which, as part of its decisions, should authorize the ECtHR judges. The Court has also said that the draft agreement excludes the possibility of passing the case before the Court in the context of deciding on issues related to the secondary EU law. Limiting the scope of the procedure only on issues related to their validity will seriously influence the competences of the EU and on the power of the Court.
The Court has also analyzed the specific characteristics of the EU law when it comes to the prior procedure on issues related to the common foreign and security policy. The Court has noted that as the things are set at the present with the EU Law, the specific adopted acts do not fall under the scope of the prior procedure by the Court. This is important for the judicial power determined in the treaties, and as such, it can only be explained through EU law.
However, with the EU accession to the ECHR, the European Court on Human Rights will have the competence to assess the compatibility of these acts, actions and activities with the ECHR. This will cause a lack of trust not only in the part of the rights guaranteed with the ECHR but also in the part of the exclusive prior procedure on these acts and their coordination with the EU law to be entrusted to a non-EU body.
Therefore, the Court says that the draft agreement has failed to take into consideration the specific characteristics of the EU Law vis-à-vis the early procedure on the acts, actions and activities and their coordination with the EU Law, in the part of the common foreign and

security policy. Also in the part on the other indicated problems, the Court has concluded that the draft agreement for the EU accession to the ECHR is not in accordance with the EU law.
The dialogue between the two Courts should continue and the Charter encourages constructive talks. The talks are particularly important for the process of creating a common European area of human rights and freedoms. However, the fact remains that the mere existence of two different fundamental rights catalogues, to be interpreted by two distinct courts operating in very different contexts, risks undermining legal certainty. Undermining legal certainty lead to the existence of two sets of human rights standards in Europe where membership in the EU and the Council of Europe increasingly overlaps.

"The duplication of protection systems runs the risk of weakening the overall protection offered and undermining legal certainty in this filed"- ex-President of the ECtHR, Luzius Wildhaber.

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